INDIANA FIRE AND BUILDING SERVICES DEPARTMENT

Title:	**Enforcement date of the 2003 Fire Code**
Identification Number:	**DFBS 01-2003**
Date Originally Adopted:	
Dates Revised:	**NA**
Other Policies Repealed or Amended:	**NA**
Brief Description of Subject Matter:	Policy on enforcement of effective date of 2003 Indiana Fire Code
Citations Affected:	**675 IAC 22-2.2, 675 IAC 22-2.3**

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

I. BACKGROUND

The 2003 Indiana Fire Code is based on the 2000 International Fire Code, a model code document. The 2000 International Fire Code was written to be adopted and enforced in conjunction with the 2000 International Building Code, the 2000 International Mechanical Code and the 2000 International Fuel Gas Code. In the code adoption process, the Fire Prevention and Building Safety Commission, the state entity that has the authority to adopt fire safety and building laws in Indiana, simultaneously adopted all four model codes, with amendments, so as to preserve the intended inter-relationship among them. Pursuant to Indiana law, rules adopted by the Commission become effective thirty (30) days after filing with the office of the Secretary of State. During the filing process for the 2003 Indiana Fire Code, 2003 Indiana Building Code, 2003 Indiana Mechanical Code and 2003 Indiana Fuel Gas Code, the 2003 Indiana Fire Code was filed with the office of the Secretary of State on April 17, 2003, and the 2003 Indiana Building Code, 2003 Indiana Mechanical Code and 2003 Indiana Fuel Gas Code were filed with the office of the Secretary of State on April 21, 2003. The filing process resulted in the 2003 Indiana Fire Code achieving an effective date of May 17, 2003, and the other 3 codes achieving an effective date of May 21, 2003.

II. POLICY

In order to maintain the necessary inter-relationship among the four codes, the Office of the State Fire Marshal and the Office of the State Building Commissioner have determined that they will adopt a policy of enforcing the 2003 Indiana Fire Code as though it achieved an effective date of May 21, 2003. The purpose of this policy is to ensure that the innumerable provisions of the 2003 Indiana Fire Code that are parallel or complementary to the provisions of the 2003 Indiana Building Code, the 2003 Indiana Mechanical Code and the 2003 Indiana Fuel Gas Code are appropriately enforced.

DEPARTMENT OF STATE REVENUE
Departmental Notice #2
June 1, 2003
Prepayment of Sales Tax on Gasoline

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

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

1) the statewide average retail price per gallon of gasoline (excluding the Indiana gasoline tax, the federal gasoline tax, and the Indiana gross retail tax); multiplied by
2) the state gross retail tax rate [6%]; multiplied by
3) ninety percent (90%); and then
4) rounded to the nearest one-tenth of one cent ($0.001)

The prepayment rate of sales tax on gasoline for the six – (6) month period beginning July 1, 2003, is six and six-tenths cents ($.066) per gallon.

Using the most recent retail price of gasoline available (as required by IC 6-2.5-7-14(b)), the Department has determined the statewide average retail price per gallon of gasoline to be one dollar and twenty-two and three tenths cents ($1.223). The most recent retail price of gasoline available was based on data contained in the May 2003 Petroleum Marketing Monthly as published by the Energy Information Agency.

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

Period			Rate Per Gallon
July 1, 1994	to	December 31, 1994	2.9 cents
January 1, 1995	to	June 30, 1995	3.7 cents
July 1, 1995	to	December 31, 1995	3.3 cents
January 1, 1996	to	June 30, 1996	3.3 cents
July 1, 1996	to	December 31, 1996	3.4 cents
January 1, 1997	to	June 30, 1997	4.0 cents
July 1, 1997	to	December 31, 1997	3.9 cents
January 1, 1998	to	June 30, 1998	4.0 cents
July 1, 1998	to	December 31, 1998	2.9 cents
January 1, 1999	to	June 30, 1999	3.0 cents
July 1, 1999	to	December 31, 1999	2.4 cents
January 1, 2000	to	June 30, 2000	3.6 cents
July 1, 2000	to	December 31, 2000	4.6 cents
January 1, 2001	to	June 30, 2001	4.9 cents
July 1, 2001	to	December 31, 2001	4.9 cents
January 1, 2002	to	June 30, 2002	4.9 cents
July 1, 2002	to	December 31, 2002	3.2 cents
January 1, 2003	to	June 30, 2003	5.3 cents
July 1, 2003	to	December 31, 2003	6.6 cents

Indiana Department of State Revenue
Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

02970284.LOF

LETTER OF FINDINGS NUMBER: 97-0284
Adjusted Gross Income Tax
For Tax Years 1992 through 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

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

Authority: *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223 (1980); *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207, 100 S.Ct. 2109 (1980); *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 102 S.Ct. 3103 (1982); *F.W. Woolworth v. Taxation and Revenue Department of New Mexico*, 458 U.S. 354, 102 S.Ct. 3128 (1982); *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 112 S.Ct. 2251 (1992); 45 IAC 3.1-1-153(b), (c)

Taxpayer protests the Department's determination that taxpayer's subsidiary's distributive partnership share should have been classified as non-business income because the subsidiary did not enjoy a unitary relationship with a certain partnership in which it held a fifty percent (50%) partnership interest.

II. Adjusted Gross Income Tax – Net Operating Loss Deductions

Authority: Ind. Code § 6-3-2-2.6; 26 USCA § 172; Treasury Regulation Section 1.172-4(a)(3)

Taxpayer protests the Department's application of taxpayer's net operating losses for the tax year ending 1993.

STATEMENT OF FACTS

At the time of the audit, taxpayer was an out-of-state corporation principally engaged in the exploration for, and the production, transportation, and sale of crude oil and natural gas in the United States and foreign countries; and, the manufacture, purchase, transportation and marketing of petroleum and selected chemical products. For federal income tax purposes, taxpayer filed consolidated tax returns with its Parent and all of its wholly owned subsidiaries. Taxpayer's Parent acted as a holding company, and taxpayer acted as the operating parent.

For Indiana gross income and adjusted gross income tax purposes, taxpayer filed separate tax returns through tax year ending 1992. Beginning in tax year 1993, taxpayer began to file on a consolidated basis with its subsidiary (hereinafter, the "Subsidiary"). The Subsidiary was formed in 1989 for the purpose of holding a fifty percent (50%) interest in a partnership. The partnership was a refining and marketing joint-venture located in the Middle-West United States, which owned a refinery, product terminals, lubricant terminals, and a lube oil blending and packaging plant (hereinafter, the "Partnership"). The Subsidiary had no other sources of income other than its distributive share from its partnership interest.

The Department of Revenue conducted an audit for the years in question and determined that the Subsidiary did not enjoy a unitary relationship with the Partnership. As such, the Department determined that the Subsidiary's distributive share of partnership income should have been excluded from taxpayer's consolidated income and apportionment calculations and allocated to Indiana pursuant to 45 IAC 3.1-1-153(c).

Taxpayer declined to schedule an administrative hearing with the Department or send additional documentation in support of its argument. Therefore, the Department issues this Letter of Findings based on its best understanding of the facts as provided by the auditor and the taxpayer's original protest letter.

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

DISCUSSION

Taxpayer argues that the Department erred in finding that taxpayer's Subsidiary did not enjoy a unitary relationship with the Partnership. The Department determined that the Subsidiary's corporate activities and the Partnership's activities did not constitute a unitary business under established standards because the Subsidiary was a holding company whose sole corporate activity was to hold a fifty percent (50%) interest in the Partnership.

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

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

(Alternatively, 45 IAC 3.1-1-153(c) sets forth the means by which one attributes partnership income in those situations where the corporate partner's activities and the partnership's activities *do not* demonstrate a unitary business relationship.) This section further indicates that to establish the existence of a unitary operation, the taxpayer must demonstrate that the relationship itself and the partnership meet the established characteristics of a unitary relationship.

The Supreme Court over the years has developed a three-part test in determining whether a unitary relationship exists: common ownership, common management, and common use or operation. *See, e.g., Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 100 S.Ct. 1223 (1980); *Exxon Corp. v. Department of Revenue of Wisconsin*, 447 U.S. 207, 100 S.Ct. 2109 (1980); *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 102 S.Ct. 3103 (1982); *F.W. Woolworth v. Taxation and Revenue Department of New Mexico*, 458 U.S. 354, 102 S.Ct. 3128 (1982); *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 112 S.Ct. 2251 (1992). To establish a unitary relationship, taxpayer must demonstrate at the very least that a corporate partner has operational control of the partnership or that management of the partnership is centralized with management of the corporation.

Here, the information in taxpayer's file shows that during the audit period, the Subsidiary held a fifty percent (50%) interest in the Partnership. The Subsidiary's only corporate activity was holding the interest in the Partnership. The Subsidiary performed no administrative or management functions for the Partnership. Given the appearance of the Subsidiary's limited role in the operations of the Partnership, taxpayer would have to show that the Subsidiary was given an unusual amount of control from the other partners to prove that the Subsidiary and the Partnership enjoyed a unitary relationship. Taxpayer submitted no evidence evincing that such control was given to taxpayer by the other partners. As taxpayer has failed to meet the first prong of the three-part test, taxpayer has failed to establish that it enjoyed a unitary relationship with the Partnership.

FINDING

Taxpayer's protest is denied.

II. Adjusted Gross Income Tax – Net Operating Loss Deductions

DISCUSSION

During the audit period, taxpayer carried forward certain net operating losses (NOLs) to reduce (or eliminate) its reportable Indiana adjusted gross income. The auditor determined that taxpayer had misapplied its NOL deduction for tax year ending 1993.

The auditor further determined that the correct way to apply the NOL was to apply it first to taxpayer's positive Indiana allocated income for the tax year ending 1993, and then apply any residual amounts to the tax year ending 1994. Taxpayer protests the auditor's application.

Indiana treatment of net operating losses is governed by the provisions of the federal law concerning corporate net operating losses. IC 6-3-2-2.6. Pursuant to IC 6-3-2-2.6, Indiana allows a corporation or nonresident person to reduce their adjusted gross income tax with a deduction as allowed under the Internal Revenue Code (IRC) Section 172. Section 172 of the IRC states in part:

(a) Deduction Allowed **--** There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

(b) Net Operating Loss Carrybacks and Carryovers—

(1) Years to Which Loss May Be Carried **--**

(A) General Rule **-** Except as otherwise provided in this paragraph, a net operating loss for any taxable year **--**

(i) shall be net operating loss carryback to each of the 3 taxable years preceding the taxable year of such loss, and

(ii) shall be net operating loss carryover to each of the 15 taxable years following the taxable year of the loss.

Treasury Regulation Section 1.172-4(a)(3) states that the loss carrybacks and carryovers "are considered to be applied in reduction of the taxable (or net) income in the order of the taxable years from which such losses are carried over or carried back, beginning with the loss for the earliest taxable year." In the instant case, the NOL should be carried back or forward to the applicable year and not applied to current income.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

01980415.LOF

LETTER OF FINDINGS NUMBER: 98-0415
Individual Income Tax
For the Tax Period: 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

I. Individual Income Tax – Farm Rental Income/Documentation

Authority: IC 6-3-1-3.5, IC 6-8.1-5-4, IC 6-8.1-5-1, I.R.C. §62

The Taxpayer protests the Department's disallowance of certain expenses pertaining to its farm rental income.

II. Individual Income Tax – Dividend Income/Documentation

Authority: IC 6-3-1-3.5, IC 6-8.1-5-4, IC 6-8.1-5-1, I.R.C. §61, I.R.C. §62

The Taxpayer protests the Department's inclusion of dividend income.

STATEMENT OF FACTS

An investigation was conducted by the Audit Division of the Indiana Department of Revenue. Taxpayer was assessed as a shareholder for adjustments made to two companies, which are wholly owned by Taxpayer. The investigation also found that Taxpayer's Farm Rental Income was underreported on his federal Schedule E (Supplemental Income or Loss) when certain expenses were disallowed on his federal Form 4835 (Farm Rental Income). More facts supplied as necessary.

I. Individual Income Tax – Farm Rental Income/Documentation

DISCUSSION

Taxpayer was assessed income tax on adjustments made to his Farm Rental Income. The assessment was based on Taxpayer's federal Schedule E (Supplemental Income and Loss) which included net farm rental income as computed on federal Form 4835. The Department disallowed certain expenses reported by Taxpayer on Form 4835 in computing the income.

The computation of Indiana Adjusted Gross Income for individuals begins with the definition provided in Section 62 of the Internal Revenue Code. IC 6-3-1-3.5. I.R.C. § 62 defines adjusted gross income to include gross income minus certain deductions, including "Deductions Attributable to Rents and Royalties", which are the only deductions relevant in this matter. I.R.C. § 62(a)(4) states:

Deductions Attributable to Rents and Royalties – The deductions allowed by part VI (sec. 161 and following), by section 212 (relating to expenses for production of income), and by section 611 (relating to depletion) which are attributable to property held for the production of rents and royalties.

The auditor disallowed various expenses because Taxpayer failed to demonstrate they were attributable to the farm rental income. IC 6-8.1-5-4 states

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

Taxpayer claims that the auditor disallowed the expenses in error but does not provide any documentation to show otherwise. Pursuant to IC 6-8.1-5-1(b): "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposes assessment is wrong rests with the person against whom the proposes assessment is made." Thus, Taxpayer's argument that the expenses were disallowed in error fails.

Taxpayer also claims that the expenses were disallowed during the investigation but were subsequently allowed in an audit for a different period. Taxpayer's argument is without merit. The facts and circumstances relating to each audit period are unique and viewed independently. Taxpayer has the burden of providing the documentation necessary to verify the expenses pursuant to IC 6-8.1-5-4.

FINDING

The Taxpayer's protest is respectfully denied.

II. Individual Income Tax – Dividend Income/Documentation

Taxpayer claims that certain dividend income which was added during the investigation is not income above that previously reported. Taxpayer was assessed Indiana Adjusted Gross Income Tax on underreported shareholder income received by Taxpayer. The underreported income was found when the Department audited two companies wholly owned by Taxpayer.

The computation of Indiana Adjusted Gross Income for individuals begins with the definition provided in Section 62 of the Internal Revenue Code. IC 6-3-1-3.5.. I.R.C. § 62 defines adjusted gross income to include gross income minus certain deductions, none of which are relevant in this matter. The definition of gross income includes dividends. I.R.C.§ 61.

IC 6-8.1-5-4 states

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

Also, "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposes assessment is wrong rests with the person against whom the proposes assessment is made." IC 6-8.1-5-1(b). Taxpayer provides no evidence whatsoever to show that assessment is in error.

FINDING

The Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01990320.LOF

LETTER OF FINDINGS NUMBER: 99-0320
Adjusted Gross Income Tax
For Years 1996 and 1997

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. Adjusted Gross Income Tax – Adequate Documentation

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

Taxpayer protests the proposed assessments of Indiana's adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer is an employee in a beauty salon. In the course of taxpayer's employment taxpayer received unreported tip income for the tax years at issue. A departmental audit assessed the taxpayer eight percent (8%) tip income subject to adjusted gross income tax that should have been reported by taxpayer. The taxpayer did not produce documents, only arguments. Taxpayer and her representative filed a protest, claiming the documents and/or taxpayer's position would be presented at the hearing. Taxpayer did not provide documentation after several written requests and after returning the file to the auditor.

I. Adjusted Gross Income Tax – Adequate Documentation

DISCUSSION

At hearing, taxpayer's representative protests the increase in income from services and the tips, arguing that the taxpayer's employer operates on a different model than the typical hair styling salon resulting in limited tip income. Taxpayer's representative states he has available for inspection, documents supporting his contention that the taxpayer did not earn tip income in the amount of eight percent (8%). Taxpayer's representative further states that the assessment is in error because the auditor treated each employee of the business exactly the same. Said records were not provided within the time period, nor has taxpayer provided any indications that said records will be produced.

This issue for decision is whether the taxpayer received unreported tip income during 1996 and 1997 in the amounts determined by the department. Tips are includable in gross income as compensation for services rendered under IRS Code Section 6053.

Taxpayer receives fifty percent (50%) of service receipts as wage income. The auditor doubled the wage income to arrive at service income and computed eight percent (8%) of the service income as tip income. In her 1996 and 1997 Federal and State income tax returns, taxpayer reported no tip income:

Taxpayer maintained no records from which her tip income could be determined. In the notice of deficiency, the auditor reconstructed the taxpayer's tip income by multiplying her gross sales by 8%, the percentage of tip income shown in Federal Code Sec.6053 (c)(3)(A)(i). The 8% rate is available only for the audit period.

Because the Taxpayer did not maintain any records of her tip income, the Department is authorized to compute taxpayer's tip income in accordance with a method that, in the auditor's opinion, clearly reflects such income. Taxpayer bears the burden of proving that the auditor's determination is erroneous. Taxpayer presented absolutely no evidence to refute the department's determination of her tip income.

To support its belief that the notice of deficiency is arbitrary, taxpayer has not provided additional evidence to refute the assessment. The department finds that the department's determination must be sustained.

Taxpayer was negligent in failing to maintain accurate records of her tip income as required by section 6001of the Internal Revenue Code, and she presented no evidence to justify her conduct.

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept taxpayer's assertions as to the nature of the transactions without any supporting documentation. Nor has taxpayer asserted any argument as to why the Department's assessment should be reduced or abated. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has failed to establish a basis for reversal of this assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01990321.LOF

LETTER OF FINDINGS NUMBER: 99-0321
Adjusted Gross Income Tax
For Years 1996 and 1997

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. Adjusted Gross Income Tax – Adequate Documentation

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

Taxpayer protests the proposed assessments of Indiana's adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer is an employee in a beauty salon. In the course of taxpayer's employment taxpayer received unreported tip income for the tax years at issue. A departmental audit assessed the taxpayer eight percent (8%) tip income subject to adjusted gross income tax that should have been reported by taxpayer. The taxpayer did not produce documents, only arguments. Taxpayer and her representative filed protest, claiming the documents and/or taxpayer's position would be presented at the hearing. Taxpayer did not provide documentation after several written requests and after returning the file to the auditor.

I. Adjusted Gross Income Tax – Adequate Documentation

DISCUSSION

At hearing, taxpayer's representative protests the increase in income from services and the tips, arguing that the taxpayer's employer operates on a different model than the typical hair styling salon resulting in limited tip income. Taxpayer's representative states he has available for inspection, documents supporting his contention that the taxpayer did not earn tip income in the amount of eight percent (8%). Taxpayer's representative further states that the assessment is in error because the auditor treated each employee of the business exactly the same. Said records were not provided within the time period, nor has taxpayer provided any indications that said records will be produced.

This issue for decision is whether the taxpayer received unreported tip income during 1996 and 1997 in the amounts determined by the department. Tips are includable in gross income as compensation for services rendered under IRS Code Section 6053.

Taxpayer receives fifty percent (50%) of service receipts as wage income. The auditor doubled the wage income to arrive at service income and computed eight percent (8%) of the service income as tip income. In her 1996 and 1997 Federal and State income tax returns, taxpayer reported no tip income:

Taxpayer maintained no records from which her tip income could be determined. In the notice of deficiency, the auditor reconstructed the taxpayer's tip income by multiplying her gross sales by 8%, the percentage of tip income shown in Federal Code Sec.6053 (c)(3)(A)(i). The 8% rate is available only for the audit period.

Because the Taxpayer did not maintain any records of her tip income, the Department is authorized to compute taxpayer's tip income in accordance with a method that, in the auditor's opinion, clearly reflects such income. Taxpayer bears the burden of proving that the auditor's determination is erroneous. Taxpayer presented absolutely no evidence to refute the department's determination of her tip income.

To support its belief that the notice of deficiency is arbitrary, taxpayer has not provided additional evidence to refute the assessment. The department finds that the department's determination must be sustained.

Taxpayer was negligent in failing to maintain accurate records of her tip income as required by section 6001of the Internal Revenue Code, and she presented no evidence to justify her conduct.

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept taxpayer's assertions as to the nature of the transactions without any supporting documentation. Nor has taxpayer asserted any argument as to why the Department's assessment should be reduced or abated. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has failed to establish a basis for reversal of this assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01990322.LOF

LETTER OF FINDINGS NUMBER: 99-0322
Adjusted Gross Income Tax
For Years 1996 and 1997

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. Adjusted Gross Income Tax – Adequate Documentation

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

Taxpayer protests the proposed assessments of Indiana's adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer is an employee in a beauty salon. In the course of taxpayer's employment taxpayer received unreported tip income for the tax years at issue. A departmental audit assessed the taxpayer eight percent (8%) tip income subject to adjusted gross income tax that should have been reported by taxpayer. The taxpayer did not produce documents, only arguments. Taxpayer and her representative filed protest, claiming the documents and/or taxpayer's position would be presented at the hearing. Taxpayer did not provide documentation after several written requests and after returning the file to the auditor.

I. Adjusted Gross Income Tax – Adequate Documentation

DISCUSSION

At hearing, taxpayer's representative protests the increase in income from services and the tips, arguing that the taxpayer's employer operates on a different model than the typical hair styling salon resulting in limited tip income. Taxpayer's representative states he has available for inspection, documents supporting his contention that the taxpayer did not earn tip income in the amount of eight percent (8%). Taxpayer's representative further states that the assessment is in error because the auditor treated each employee of the business exactly the same. Said records were not provided within the time period, nor has taxpayer provided any indications that said records will be produced.

This issue for decision is whether the taxpayer received unreported tip income during 1996 and 1997 in the amounts determined by the department. Tips are includable in gross income as compensation for services rendered under IRS Code Section 6053.

Taxpayer receives fifty percent (50%) of service receipts as wage income. The auditor doubled the wage income to arrive at service income and computed eight percent (8%) of the service income as tip income. In her 1996 and 1997 Federal and State income tax returns, taxpayer reported no tip income:

Taxpayer maintained no records from which her tip income could be determined. In the notice of deficiency, the auditor reconstructed the taxpayer's tip income by multiplying her gross sales by 8%, the percentage of tip income shown in Federal Code Sec.6053 (c)(3)(A)(i). The 8% rate is available only for the audit period.

Because the Taxpayer did not maintain any records of her tip income, the Department is authorized to compute taxpayer's tip income in accordance with a method that, in the auditor's opinion, clearly reflects such income. Taxpayer bears the burden of proving that the auditor's determination is erroneous. Taxpayer presented absolutely no evidence to refute the department's determination of her tip income.

To support its belief that the notice of deficiency is arbitrary, taxpayer has not provided additional evidence to refute the assessment. The department finds that the department's determination must be sustained.

Taxpayer was negligent in failing to maintain accurate records of her tip income as required by section 6001of the Internal Revenue Code, and she presented no evidence to justify her conduct.

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept taxpayer's assertions as to the nature of the transactions without any supporting documentation. Nor has taxpayer asserted any argument as to why the Department's assessment should be reduced or abated. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has failed to establish a basis for reversal of this assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01990323.LOF

LETTER OF FINDINGS NUMBER: 99-0323
Adjusted Gross Income Tax
For Years 1996 and 1997

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. Adjusted Gross Income Tax – Adequate Documentation

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

Taxpayer protests the proposed assessments of Indiana's adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer is an employee in a beauty salon. In the course of taxpayer's employment taxpayer received unreported tip income for the tax years at issue. A departmental audit assessed the taxpayer eight percent (8%) tip income subject to adjusted gross income tax that should have been reported by taxpayer. The taxpayer did not produce documents, only arguments. Taxpayer and her representative filed protest, claiming the documents and/or taxpayer's position would be presented at the hearing. Taxpayer did not provide documentation after several written requests and after returning the file to the auditor.

I. Adjusted Gross Income Tax – Adequate Documentation

DISCUSSION

At hearing, taxpayer's representative protests the increase in income from services and the tips, arguing that the taxpayer's employer operates on a different model than the typical hair styling salon resulting in limited tip income. Taxpayer's representative states he has available for inspection, documents supporting his contention that the taxpayer did not earn tip income in the amount of eight percent (8%). Taxpayer's representative further states that the assessment is in error because the auditor treated each employee of the business exactly the same. Said records were not provided within the time period, nor has taxpayer provided any indications that said records will be produced.

This issue for decision is whether the taxpayer received unreported tip income during 1996 and 1997 in the amounts determined by the department. Tips are includable in gross income as compensation for services rendered under IRS Code Section 6053.

Taxpayer receives fifty percent (50%) of service receipts as wage income. The auditor doubled the wage income to arrive at service income and computed eight percent (8%) of the service income as tip income. In her 1996 and 1997 Federal and State income tax returns, taxpayer reported no tip income:

Taxpayer maintained no records from which her tip income could be determined. In the notice of deficiency, the auditor reconstructed the taxpayer's tip income by multiplying her gross sales by 8%, the percentage of tip income shown in Federal Code Sec.6053 (c)(3)(A)(i). The 8% rate is available only for the audit period.

Because the Taxpayer did not maintain any records of her tip income, the Department is authorized to compute taxpayer's tip income in accordance with a method that, in the auditor's opinion, clearly reflects such income. Taxpayer bears the burden of proving that the auditor's determination is erroneous. Taxpayer presented absolutely no evidence to refute the department's determination of her tip income.

To support its belief that the notice of deficiency is arbitrary, taxpayer has not provided additional evidence to refute the assessment. The department finds that the department's determination must be sustained.

Taxpayer was negligent in failing to maintain accurate records of her tip income as required by section 6001of the Internal Revenue Code, and she presented no evidence to justify her conduct.

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept taxpayer's assertions as to the nature of the transactions without any supporting documentation. Nor has taxpayer asserted any argument as to why the Department's assessment should be reduced or abated. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has failed to establish a basis for reversal of this assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01990324.LOF

LETTER OF FINDINGS NUMBER: 99-0324
Adjusted Gross Income Tax
For Years 1996 and 1997

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. Adjusted Gross Income Tax – Adequate Documentation

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

Taxpayer protests the proposed assessments of Indiana's 0adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer is an employed owner of a beauty salon. In the course of taxpayer's employment taxpayer received unreported tip income for the tax years at issue. A departmental audit assessed the taxpayer eight percent (8%) tip income subject to adjusted gross income tax that should have been reported by taxpayer because the taxpayer had no tip diaries, no appointment books, computer lists, or other information to document tips. Taxpayer and her representatives filed protest, claiming the documents and/or taxpayer's position would be presented at the hearing. Taxpayer did not provide documentation after several written requests and after returning the file to the auditor.

I. Adjusted Gross Income Tax – Adequate Documentation

DISCUSSION

At hearing, taxpayer's representative protests the increase in income from services and the tips, arguing that the taxpayer operates on a different model than the typical hair styling salon resulting in limited tip income. Taxpayer's representative states he has available for inspection, documents supporting his contention that the taxpayer did not earn tip income in the amount of eight percent (8%). Taxpayer's representative further states that the assessment is in error because the auditor treated each employee of the business exactly the same. Said records were not provided within the time period, nor has taxpayer provided any indications that said records will be produced.

This issue for decision is whether the taxpayer received unreported tip income during 1996 and 1997 in the amounts determined by the department. Tips are includable in gross income as compensation for services rendered under IRS Code Section 6053.

Taxpayer receives fifty percent (50%) of service receipts as wage income. The auditor doubled the wage income to arrive at service income and computed eight percent (8%) of the service income as tip income. In her 1996 and 1997 Federal and State income tax returns, taxpayer reported no tip income.

Taxpayer maintained no records from which her tip income could be determined. In the notice of deficiency, the auditor reconstructed the taxpayer's tip income by multiplying her gross sales by 8%, the percentage of tip income shown in Federal Code Sec.6053 (c)(3)(A)(i). The 8% rate is available only for the audit period.

Because the Taxpayer did not maintain any records of her tip income, the Department is authorized to compute taxpayer's tip income in accordance with a method that, in the auditor's opinion, clearly reflects such income. Taxpayer bears the burden of proving that the auditor's determination is erroneous. Taxpayer presented absolutely no evidence to refute the department's determination of her tip income.

To support its belief that the notice of deficiency is arbitrary, taxpayer has not provided additional evidence to refute the assessment. The department finds that the department's determination must be sustained.

Taxpayer was negligent in failing to maintain accurate records of her tip income as required by section 6001of the Internal Revenue Code, and she presented no evidence to justify her conduct.

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept taxpayer's assertions as to the nature of the transactions without any supporting documentation. Nor has taxpayer asserted any argument as to why the Department's assessment should be reduced or abated. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has failed to establish a basis for reversal of this assessment.

However, the Hearing Officer found that the auditor also assessed tax on 8% tip income from unreported services that was generated from services performed by other hair stylists in the amount of $16,756.91 and $16,842.81 in 1996 and 1997 respectively. The service income, however, had already been included and taxed for each individual. The tips on the amount listed above are to be removed from the assessment.

FINDING

Taxpayer's protest is partially sustained and partially denied.

DEPARTMENT OF STATE REVENUE

01990325.LOF

LETTER OF FINDINGS NUMBER: 99-0325
Adjusted Gross Income Tax
For Years 1996 and 1997

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. Adjusted Gross Income Tax – Adequate Documentation

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

Taxpayer protests the proposed assessments of Indiana's adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer is an employee in a beauty salon. In the course of taxpayer's employment taxpayer received unreported tip income for the tax years at issue. A departmental audit assessed the taxpayer eight percent (8%) tip income subject to adjusted gross income tax that should have been reported by taxpayer. The taxpayer did not produce documents, only arguments. Taxpayer and his representative filed a protest, claiming the documents and/or taxpayer's position would be presented at the hearing. Taxpayer did not provide documentation after several written requests and after returning the file to the auditor.

I. Adjusted Gross Income Tax – Adequate Documentation

DISCUSSION

At hearing, taxpayer's representative protests the increase in income from services and the tips, arguing that the taxpayer's employer operates on a different model than the typical hair styling salon resulting in limited tip income. Taxpayer states he has available for inspection, documents supporting his contention that the taxpayer did not earn tip income in the amount of eight percent (8%). Taxpayer's representative further states that the assessment is in error because the auditor treated each employee of the business exactly the same. Said records were not provided within the time period, nor has taxpayer provided any indications that said records will be produced.

This issue for decision is whether the taxpayer received unreported tip income during 1996 and 1997 in the amounts determined by the department. Tips are includable in gross income as compensation for services rendered under IRS Code Section 6053.

Taxpayer maintained no records from which her tip income could be determined. In the notice of deficiency, the auditor reconstructed the taxpayer's tip income by multiplying her gross sales by 8%, the percentage of tip income shown in Federal Code Sec.6053 (c)(3)(A)(i). The 8% rate is available only for the audit period.

Because the Taxpayer did not maintain any records of her tip income, the Department is authorized to compute taxpayer's tip income in accordance with a method that, in the auditor's opinion, clearly reflects such income. Taxpayer bears the burden of proving that the auditor's determination is erroneous. Taxpayer presented a copy of the Federal Tax Returns indicating the taxpayer reported $1,473 and $1,109 in tips in 1996 and 1997 respectively. No other evidence to refute the department's determination of her tip income was provided.

The department finds that the department's determination must be sustained for the balance of tips not reported.

Taxpayer was negligent in failing to maintain accurate records of her tip income as required by section 6001of the Internal Revenue Code, and she presented no evidence to justify her conduct.

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept taxpayer's assertions as to the nature of the transactions without any supporting documentation. Taxpayer has, however, produced into evidence the filing of the Federal Income Tax Returns that indicate a partial filing of tip income. The Department will adjust the tip income by $1,473 and $1,109 for 1996 and 1997 respectively. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has failed to establish a basis for reversal of the balance of the assessment.

FINDING

Taxpayer's protest is partially denied.

DEPARTMENT OF STATE REVENUE

01990332.LOF

LETTER OF FINDINGS NUMBER: 99-0332
Adjusted Gross Income Tax
For Years 1996 and 1997

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. Adjusted Gross Income Tax – Adequate Documentation

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

Taxpayer protests the proposed assessments of Indiana's adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer is an employee in a beauty salon. In the course of taxpayer's employment taxpayer received unreported tip income for the tax years at issue. A departmental audit assessed the taxpayer eight percent (8%) tip income subject to adjusted gross income tax that should have been reported by taxpayer. The taxpayer did not produce documents, only arguments. Taxpayer and her representative filed protest, claiming the documents and/or taxpayer's position would be presented at the hearing. Taxpayer did not provide documentation after several written requests and after returning the file to the auditor.

I. Adjusted Gross Income Tax – Adequate Documentation

DISCUSSION

At hearing, taxpayer's representative protests the increase in income from services and the tips, arguing that the taxpayer's employer operates on a different model than the typical hair styling salon resulting in limited tip income. Taxpayer's representative states he has available for inspection, documents supporting his contention that the taxpayer did not earn tip income in the amount of eight percent (8%). Taxpayer's representative further states that the assessment is in error because the auditor treated each employee of the business exactly the same. Said records were not provided within the time period, nor has taxpayer provided any indications that said records will be produced.

This issue for decision is whether the taxpayer received unreported tip income during 1996 and 1997 in the amounts determined by the department. Tips are includable in gross income as compensation for services rendered under IRS Code Section 6053.

Taxpayer receives fifty percent (50%) of service receipts as wage income. The auditor doubled the wage income to arrive at service income and computed eight percent (8%) of the service income as tip income. In her 1996 and 1997 Federal and State income tax returns, taxpayer reported no tip income:

Taxpayer maintained no records from which her tip income could be determined. In the notice of deficiency, the auditor reconstructed the taxpayer's tip income by multiplying her gross sales by 8%, the percentage of tip income shown in Federal Code Sec.6053 (c)(3)(A)(i). The 8% rate is available only for the audit period.

Because the Taxpayer did not maintain any records of her tip income, the Department is authorized to compute taxpayer's tip income in accordance with a method that, in the auditor's opinion, clearly reflects such income. Taxpayer bears the burden of

proving that the auditor's determination is erroneous. Taxpayer presented absolutely no evidence to refute the department's determination of her tip income.

To support its belief that the notice of deficiency is arbitrary, taxpayer has not provided additional evidence to refute the assessment. The department finds that the department's determination must be sustained.

Taxpayer was negligent in failing to maintain accurate records of her tip income as required by section 6001of the Internal Revenue Code, and she presented no evidence to justify her conduct.

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept taxpayer's assertions as to the nature of the transactions without any supporting documentation. Nor has taxpayer asserted any argument as to why the Department's assessment should be reduced or abated. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has failed to establish a basis for reversal of this assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01990348.LOF

LETTER OF FINDINGS NUMBER: 99-0348
Adjusted Gross Income Tax
For Years 1996 and 1997

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. Adjusted Gross Income Tax – Adequate Documentation

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

Taxpayer protests the proposed assessments of Indiana's adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer is an employee in a beauty salon. In the course of taxpayer's employment taxpayer received unreported tip income for the tax years at issue. A departmental audit assessed the taxpayer eight percent (8%) tip income subject to adjusted gross income tax that should have been reported by taxpayer. The taxpayer did not produce documents, only arguments. Taxpayer and her representative filed protest, claiming the documents and/or taxpayer's position would be presented at the hearing. Taxpayer did not provide documentation after several written requests and after returning the file to the auditor.

I. Adjusted Gross Income Tax – Adequate Documentation

DISCUSSION

At hearing, taxpayer's representative protests the increase in income from services and the tips, arguing that the taxpayer's employer operates on a different model than the typical hair styling salon resulting in limited tip income. Taxpayer's representative states he has available for inspection, documents supporting his contention that the taxpayer did not earn tip income in the amount of eight percent (8%). Taxpayer's representative further states that the assessment is in error because the auditor treated each employee of the business exactly the same. Said records were not provided within the time period, nor has taxpayer provided any indications that said records will be produced.

This issue for decision is whether the taxpayer received unreported tip income during 1996 and 1997 in the amounts determined by the department. Tips are includable in gross income as compensation for services rendered under IRS Code Section 6053.

Taxpayer receives fifty percent (50%) of service receipts as wage income. The auditor doubled the wage income to arrive at service income and computed eight percent (8%) of the service income as tip income. In her 1996 and 1997 Federal and State income tax returns, taxpayer reported no tip income:

Taxpayer maintained no records from which her tip income could be determined. In the notice of deficiency, the auditor reconstructed the taxpayer's tip income by multiplying her gross sales by 8%, the percentage of tip income shown in Federal Code Sec.6053 (c)(3)(A)(i). The 8% rate is available only for the audit period.

Because the Taxpayer did not maintain any records of her tip income, the Department is authorized to compute taxpayer's tip income in accordance with a method that, in the auditor's opinion, clearly reflects such income. Taxpayer bears the burden of proving that the auditor's determination is erroneous. Taxpayer presented absolutely no evidence to refute the department's determination of her tip income.

To support its belief that the notice of deficiency is arbitrary, taxpayer has not provided additional evidence to refute the assessment. The department finds that the department's determination must be sustained.

Taxpayer was negligent in failing to maintain accurate records of her tip income as required by section 6001of the Internal Revenue Code, and she presented no evidence to justify her conduct.

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept taxpayer's assertions as to the nature of the transactions without any supporting documentation. Nor has taxpayer asserted any argument as to why the Department's assessment should be reduced or abated. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has failed to establish a basis for reversal of this assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01990349.LOF

LETTER OF FINDINGS NUMBER: 99-0349
Adjusted Gross Income Tax
For Years 1996 and 1997

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. Adjusted Gross Income Tax – Adequate Documentation

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

Taxpayer protests the proposed assessments of Indiana's adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer is an employee in a beauty salon. In the course of taxpayer's employment taxpayer received unreported tip income for the tax years at issue. A departmental audit assessed the taxpayer eight percent (8%) tip income subject to adjusted gross income tax that should have been reported by taxpayer. The taxpayer did not produce documents, only arguments. Taxpayer and her representative filed protest, claiming the documents and/or taxpayer's position would be presented at the hearing. Taxpayer did not provide documentation after several written requests and after returning the file to the auditor.

I. Adjusted Gross Income Tax – Adequate Documentation

DISCUSSION

At hearing, taxpayer's representative protests the increase in income from services and the tips, arguing that the taxpayer's employer operates on a different model than the typical hair styling salon resulting in limited tip income. Taxpayer's representative states he has available for inspection, documents supporting his contention that the taxpayer did not earn tip income in the amount of eight percent (8%). Taxpayer's representative further states that the assessment is in error because the auditor treated each employee of the business exactly the same. Said records were not provided within the time period, nor has taxpayer provided any indications that said records will be produced.

This issue for decision is whether the taxpayer received unreported tip income during 1996 and 1997 in the amounts determined by the department. Tips are includable in gross income as compensation for services rendered under IRS Code Section 6053.

Taxpayer receives fifty percent (50%) of service receipts as wage income. The auditor doubled the wage income to arrive at service income and computed eight percent (8%) of the service income as tip income. In her 1996 and 1997 Federal and State income tax returns, taxpayer reported no tip income:

Taxpayer maintained no records from which her tip income could be determined. In the notice of deficiency, the auditor reconstructed the taxpayer's tip income by multiplying her gross sales by 8%, the percentage of tip income shown in Federal Code Sec.6053 (c)(3)(A)(i). The 8% rate is available only for the audit period.

Because the Taxpayer did not maintain any records of her tip income, the Department is authorized to compute taxpayer's tip income in accordance with a method that, in the auditor's opinion, clearly reflects such income. Taxpayer bears the burden of proving that the auditor's determination is erroneous. Taxpayer presented absolutely no evidence to refute the department's determination of her tip income.

To support its belief that the notice of deficiency is arbitrary, taxpayer has not provided additional evidence to refute the assessment. The department finds that the department's determination must be sustained.

Taxpayer was negligent in failing to maintain accurate records of her tip income as required by section 6001of the Internal Revenue Code, and she presented no evidence to justify her conduct.

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept taxpayer's assertions as to the nature of the transactions without any supporting documentation. Nor has taxpayer asserted any argument as to why the Department's assessment should be reduced or abated. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has failed to establish a basis for reversal of this assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01990353.LOF

LETTER OF FINDINGS NUMBER: 99-0353
Adjusted Gross Income Tax
For Years 1996 and 1997

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. Adjusted Gross Income Tax – Adequate Documentation

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

Taxpayer protests the proposed assessments of Indiana's adjusted gross income tax.

STATEMENT OF FACTS

Taxpayer is an employee in a beauty salon. In the course of taxpayer's employment taxpayer received unreported tip income for the tax years at issue. A departmental audit assessed the taxpayer eight percent (8%) tip income subject to adjusted gross income tax that should have been reported by taxpayer. The taxpayer did not produce documents, only arguments. Taxpayer and her representative filed protest, claiming the documents and/or taxpayer's position would be presented at the hearing. Taxpayer did not provide documentation after several written requests and after returning the file to the auditor.

I. Adjusted Gross Income Tax – Adequate Documentation

DISCUSSION

At hearing, taxpayer's representative protests the increase in income from services and the tips, arguing that the taxpayer's employer operates on a different model than the typical hair styling salon resulting in limited tip income. Taxpayer's representative states he has available for inspection, documents supporting his contention that the taxpayer did not earn tip income in the amount of eight percent (8%). Taxpayer's representative further states that the assessment is in error because the auditor treated each employee of the business exactly the same. Said records were not provided within the time period, nor has taxpayer provided any indications that said records will be produced.

This issue for decision is whether the taxpayer received unreported tip income during 1996 and 1997 in the amounts determined by the department. Tips are includable in gross income as compensation for services rendered under IRS Code Section 6053.

Taxpayer receives fifty percent (50%) of service receipts as wage income. The auditor doubled the wage income to arrive at service income and computed eight percent (8%) of the service income as tip income. In her 1996 and 1997 Federal and State income tax returns, taxpayer reported no tip income:

Taxpayer maintained no records from which her tip income could be determined. In the notice of deficiency, the auditor reconstructed the taxpayer's tip income by multiplying her gross sales by 8%, the percentage of tip income shown in Federal Code Sec.6053 (c)(3)(A)(i). The 8% rate is available only for the audit period.

Because the Taxpayer did not maintain any records of her tip income, the Department is authorized to compute taxpayer's tip income in accordance with a method that, in the auditor's opinion, clearly reflects such income. Taxpayer bears the burden of proving that the auditor's determination is erroneous. Taxpayer presented absolutely no evidence to refute the department's determination of her tip income.

To support its belief that the notice of deficiency is arbitrary, taxpayer has not provided additional evidence to refute the assessment. The department finds that the department's determination must be sustained.

Taxpayer was negligent in failing to maintain accurate records of her tip income as required by section 6001of the Internal Revenue Code, and she presented no evidence to justify her conduct.

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept taxpayer's assertions as to the nature of the transactions without any supporting documentation. Nor has taxpayer asserted any argument as to why the Department's assessment should be reduced or abated. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has failed to establish a basis for reversal of this assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01990596.LOF

LETTER OF FINDINGS NUMBER: 99-0596
Adjusted Gross Income Tax
For the Tax Periods: 1995, 1996

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

ISSUE

I. Adjusted Gross Income Tax – Distributive Shares

Authority: IC 6-3-2-1, IC 6-3-2-2, 45 IAC 3.1-1-62

The Taxpayer protests the assessment of adjusted gross income tax on distributive shares.

STATEMENT OF FACTS

Taxpayer was assessed Indiana adjusted gross income tax on distributive shares from a Subchapter-S corporation after the company failed to file Indiana IT-20S returns or Withholding Forms WH-18 for the years of 1994 through 1996. The corporation processed ferrous metals primarily for use in the steel and automotive industries. Taxpayer's Indiana operation broke up iron runoff scrap from steel mills. More facts will be supplied as necessary.

I. Adjusted Gross Income Tax – Distributive Shares

DISCUSSION

Taxpayer was assessed Indiana adjusted gross income tax on distributive shares from a Subchapter-S corporation. Taxpayer does not agree with the apportionment of income calculations using the three-factor formula. Taxpayer states that the corporation uses separate accounting for each operating location and maintains separate books.

A tax is imposed on the adjusted gross income of corporations which is derived from sources within Indiana. IC 6-3-2-1. Also, IC 6-3-2-2(b) states in relevant part:

Except as provided in subsection (*l*), if business income of a corporation or nonresident person is derived from sources within the state of Indiana and from sources without the state of Indiana, then the 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).

Taxpayer argues that the three-factor apportionment does not fairly represent Taxpayer's income from Indiana sources. Taxpayer states that separate books of accounting were kept for all of their business locations. Taxpayer provided a review of the separate accounting of the Indiana operations showing a loss for 1994. Taxpayer states that IC 6-3-2-2(l) provides for such a situation. IC 6-3-2-2(l) states:

If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(1) separate accounting;

(2) the exclusion of any one (1) or more of the factors'

(3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources with the state of Indiana; or

(4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

However, 45 IAC 3.1-1-62 clarifies IC 6-3-2-2(l), it states:

Special Formulas for Division of Income. All corporations doing business in more than one state shall use the allocation and apportionment provisions described in Regulations 6-3-2-2(b)-(k) *[45 IAC 3.1-1-37- 45 IAC 3.1-1-61]* unless such provisions do not result in a division of income which fairly represents the taxpayer's income for Indiana sources. In such case the taxpayer must request in writing or the Department may require the use of a more equitable formula for determining Indiana income. (*Emphasis added).* However, the Department will depart from use of the standard formula only if the use of such formula works a hardship or injustice upon the taxpayer, which results in an arbitrary division of income, or in other respects does not fairly attribute income to this state or other states. It is anticipated that these situations will arise only in limited and unusual circumstances (which ordinarily will be unique and nonrecurring) when the standard apportionment provisions produce incongruous results.

Taxpayer states that 45 IAC 3.1-1-62 provides an opportunity for Taxpayer to present an alternative to the apportionment method if the apportionment method does not fairly represent Taxpayer's Indiana operations. They state the use of a more equitable formula is appropriate since the imposition of a tax upon Taxpayer who incurs a loss from Indiana operations before applying any selling and administrative expenses creates a hardship upon Taxpayer by assessing an income tax on operations that generated no economic benefit. Taxpayer states that the three-factor apportionment does result in an arbitrary division of income when the Department ignores the true results of the Indiana operations represented by separate accounting records.

Nevertheless, both IC 6-3-2-2 and 45 IAC 3.1-1-62 make clear that Taxpayer must request in writing for a different apportionment method and, it will be allowed ordinarily only in unique and nonrecurring circumstances. Taxpayer has not provided any documentation demonstrating that the Department approved any deviation from the standard formula of apportionment. Furthermore, Taxpayer has not provided a compelling reason to deviate from the apportionment formula. Taxpayer only requested the special apportionment method after he was assessed as a result of not filing tax returns. Consequently, Taxpayer was properly assessed for the periods in question.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

01990606.LOF

LETTER OF FINDINGS NUMBER: 99-0606
Adjusted Gross Income Tax
For the Tax Periods: 1995, 1996

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

ISSUE

I. Adjusted Gross Income Tax – Distributive Shares

Authority: IC 6-3-2-1, IC 6-3-2-2, 45 IAC 3.1-1-62

The Taxpayer protests the assessment of adjusted gross income tax on distributive shares.

STATEMENT OF FACTS

Taxpayer was assessed Indiana adjusted gross income tax on distributive shares from a Subchapter-S corporation after the company failed to file Indiana IT-20S returns or Withholding Forms WH-18 for the years of 1994 through 1996. The corporation processed ferrous metals primarily for use in the steel and automotive industries. Taxpayer's Indiana operation broke up iron runoff scrap from steel mills. More facts will be supplied as necessary.

I. Adjusted Gross Income Tax – Distributive Shares

DISCUSSION

Taxpayer was assessed Indiana adjusted gross income tax on distributive shares from a Subchapter-S corporation. Taxpayer does not agree with the apportionment of income calculations using the three-factor formula. Taxpayer states that the corporation uses separate accounting for each operating location and maintains separate books.

A tax is imposed on the adjusted gross income of corporations which is derived from sources within Indiana. IC 6-3-2-1. Also, IC 6-3-2-2(b) states in relevant part:

> Except as provided in subsection (*l*), if business income of a corporation or nonresident person is derived from sources within the state of Indiana and from sources without the state of Indiana, then the 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).

Taxpayer argues that the three-factor apportionment does not fairly represent Taxpayer's income from Indiana sources. Taxpayer states that separate books of accounting were kept for all of their business locations. Taxpayer provided a review of the separate accounting of the Indiana operations showing a loss for 1994. Taxpayer states that IC 6-3-2-2(l) provides for such a situation. IC 6-3-2-2(l) states:

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

However, 45 IAC 3.1-1-62 clarifies IC 6-3-2-2(l), it states:

Special Formulas for Division of Income. All corporations doing business in more than one state shall use the allocation and apportionment provisions described in Regulations 6-3-2-2(b)-(k) *[45 IAC 3.1-1-37- 45 IAC 3.1-1-61]* unless such provisions do not result in a division of income which fairly represents the taxpayer's income for Indiana sources. In such case the taxpayer must request in writing or the Department may require the use of a more equitable formula for determining Indiana income. (*Emphasis added).* However, the Department will depart from use of the standard formula only if the use of such formula works a hardship or injustice upon the taxpayer, which results in an arbitrary division of income, or in other respects does not fairly attribute income to this state or other states. It is anticipated that these situations will arise only in limited and unusual circumstances (which ordinarily will be unique and nonrecurring) when the standard apportionment provisions produce incongruous results.

Taxpayer states that 45 IAC 3.1-1-62 provides an opportunity for Taxpayer to present an alternative to the apportionment method if the apportionment method does not fairly represent Taxpayer's Indiana operations. They state the use of a more equitable formula is appropriate since the imposition of a tax upon Taxpayer who incurs a loss from Indiana operations before applying any selling and administrative expenses creates a hardship upon Taxpayer by assessing an income tax on operations that generated no economic benefit. Taxpayer states that the three-factor apportionment does result in an arbitrary division of income when the Department ignores the true results of the Indiana operations represented by separate accounting records.

Nevertheless, both IC 6-3-2-2 and 45 IAC 3.1-1-62 make clear that Taxpayer must request in writing for a different apportionment method and, it will be allowed ordinarily only in unique and nonrecurring circumstances. Taxpayer has not provided any documentation demonstrating that the Department approved any deviation from the standard formula of apportionment. Furthermore, Taxpayer has not provided a compelling reason to deviate from the apportionment formula. Taxpayer only requested the special apportionment method after he was assessed as a result of not filing tax returns. Consequently, Taxpayer was properly assessed for the periods in question.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0120000066.LOF

LETTER OF FINDINGS NUMBER: 00-0066
Adjusted Gross Income Tax
For the Tax Periods: 1995, 1996

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

ISSUE

I. Adjusted Gross Income Tax – Distributive Shares

Authority: IC 6-3-2-1, IC 6-3-2-2, 45 IAC 3.1-1-62

The Taxpayer protests the assessment of adjusted gross income tax on distributive shares.

STATEMENT OF FACTS

Taxpayer was assessed Indiana adjusted gross income tax on distributive shares from a Subchapter-S corporation after the company failed to file Indiana IT-20S returns or Withholding Forms WH-18 for the years of 1994 through 1996. The corporation processed ferrous metals primarily for use in the steel and automotive industries. Taxpayer's Indiana operation broke up iron runoff scrap from steel mills. More facts will be supplied as necessary.

I. Adjusted Gross Income Tax – Distributive Shares

DISCUSSION

Taxpayer was assessed Indiana adjusted gross income tax on distributive shares from a Subchapter-S corporation. Taxpayer does not agree with the apportionment of income calculations using the three-factor formula. Taxpayer states that the corporation uses separate accounting for each operating location and maintains separate books.

A tax is imposed on the adjusted gross income of corporations which is derived from sources within Indiana. IC 6-3-2-1. Also, IC 6-3-2-2(b) states in relevant part:

Except as provided in subsection (*l*), if business income of a corporation or nonresident person is derived from sources within the state of Indiana and from sources without the state of Indiana, then the 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).

Taxpayer argues that the three-factor apportionment does not fairly represent Taxpayer's income from Indiana sources. Taxpayer states that separate books of accounting were kept for all of their business locations. Taxpayer provided a review of the separate accounting of the Indiana operations showing a loss for 1994. Taxpayer states that IC 6-3-2-2(l) provides for such a situation. IC 6-3-2-2(l) states:

If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(1) separate accounting;

(2) the exclusion of any one (1) or more of the factors'

(3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources with the state of Indiana; or

(4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

However, 45 IAC 3.1-1-62 clarifies IC 6-3-2-2(l), it states:

Special Formulas for Division of Income. All corporations doing business in more than one state shall use the allocation and apportionment provisions described in Regulations 6-3-2-2(b)-(k) *[45 IAC 3.1-1-37- 45 IAC 3.1-1-61]* unless such provisions do not result in a division of income which fairly represents the taxpayer's income for Indiana sources. In such case the taxpayer must request in writing or the Department may require the use of a more equitable formula for determining Indiana income. (*Emphasis added).* However, the Department will depart from use of the standard formula only if the use of such formula works a hardship or injustice upon the taxpayer, which results in an arbitrary division of income, or in other respects does not fairly attribute income to this state or other states. It is anticipated that these situations will arise only in limited and unusual circumstances (which ordinarily will be unique and nonrecurring) when the standard apportionment provisions produce incongruous results.

Taxpayer states that 45 IAC 3.1-1-62 provides an opportunity for Taxpayer to present an alternative to the apportionment method if the apportionment method does not fairly represent Taxpayer's Indiana operations. They state the use of a more equitable formula is appropriate since the imposition of a tax upon Taxpayer who incurs a loss from Indiana operations before applying any selling and administrative expenses creates a hardship upon Taxpayer by assessing an income tax on operations that generated no economic benefit. Taxpayer states that the three-factor apportionment does result in an arbitrary division of income when the Department ignores the true results of the Indiana operations represented by separate accounting records.

Nevertheless, both IC 6-3-2-2 and 45 IAC 3.1-1-62 make clear that Taxpayer must request in writing for a different apportionment method and, it will be allowed ordinarily only in unique and nonrecurring circumstances. Taxpayer has not provided any documentation demonstrating that the Department approved any deviation from the standard formula of apportionment. Furthermore, Taxpayer has not provided a compelling reason to deviate from the apportionment formula. Taxpayer only requested the special apportionment method after he was assessed as a result of not filing tax returns. Consequently, Taxpayer was properly assessed for the periods in question.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0120000067.LOF

LETTER OF FINDINGS NUMBER: 00-0067
Adjusted Gross Income Tax
For the Tax Periods: 1995, 1996

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

ISSUES

I. Adjusted Gross Income Tax – Distributive Shares

Authority: IC 6-3-2-1, IC 6-3-2-2, 45 IAC 3.1-1-62

The Taxpayer protests the assessment of adjusted gross income tax on distributive shares.

STATEMENT OF FACTS

Taxpayer was assessed Indiana adjusted gross income tax on distributive shares from a Subchapter-S corporation after the company failed to file Indiana IT-20S returns or Withholding Forms WH-18 for the years of 1994 through 1996. The corporation processed ferrous metals primarily for use in the steel and automotive industries. Taxpayer's Indiana operation broke up iron runoff scrap from steel mills. More facts will be supplied as necessary.

I. Adjusted Gross Income Tax – Distributive Shares

DISCUSSION

Taxpayer was assessed Indiana adjusted gross income tax on distributive shares from a Subchapter-S corporation. Taxpayer does not agree with the apportionment of income calculations using the three-factor formula. Taxpayer states that the corporation uses separate accounting for each operating location and maintains separate books.

A tax is imposed on the adjusted gross income of corporations which is derived from sources within Indiana. IC 6-3-2-1. Also, IC 6-3-2-2(b) states in relevant part:

> Except as provided in subsection (*l*), if business income of a corporation or nonresident person is derived from sources within the state of Indiana and from sources without the state of Indiana, then the 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).

Taxpayer argues that the three-factor apportionment does not fairly represent Taxpayer's income from Indiana sources. Taxpayer states that separate books of accounting were kept for all of their business locations. Taxpayer provided a review of the separate accounting of the Indiana operations showing a loss for 1994. Taxpayer states that IC 6-3-2-2(l) provides for such a situation. IC 6-3-2-2(l) states:

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

However, 45 IAC 3.1-1-62 clarifies IC 6-3-2-2(l), it states:

> Special Formulas for Division of Income. All corporations doing business in more than one state shall use the allocation and apportionment provisions described in Regulations 6-3-2-2(b)-(k) *[45 IAC 3.1-1-37- 45 IAC 3.1-1-61]* unless such provisions do not result in a division of income which fairly represents the taxpayer's income for Indiana sources. In such case the taxpayer must request in writing or the Department may require the use of a more equitable formula for determining Indiana income. (*Emphasis added).* However, the Department will depart from use of the standard formula only if the use of such formula works a hardship or injustice upon the taxpayer, which results in an arbitrary division of income, or in other respects does not fairly attribute income to this state or other states. It is anticipated that these situations will arise only in limited and unusual circumstances (which ordinarily will be unique and nonrecurring) when the standard apportionment provisions produce incongruous results.

Taxpayer states that 45 IAC 3.1-1-62 provides an opportunity for Taxpayer to present an alternative to the apportionment method if the apportionment method does not fairly represent Taxpayer's Indiana operations. They state the use of a more equitable formula is appropriate since the imposition of a tax upon Taxpayer who incurs a loss from Indiana operations before applying any selling and administrative expenses creates a hardship upon Taxpayer by assessing an income tax on operations that generated no economic benefit. Taxpayer states that the three-factor apportionment does result in an arbitrary division of income when the Department ignores the true results of the Indiana operations represented by separate accounting records.

Nevertheless, both IC 6-3-2-2 and 45 IAC 3.1-1-62 make clear that Taxpayer must request in writing for a different apportionment method and, it will be allowed ordinarily only in unique and nonrecurring circumstances. Taxpayer has not provided any documentation demonstrating that the Department approved any deviation from the standard formula of apportionment. Furthermore, Taxpayer has not provided a compelling reason to deviate from the apportionment formula. Taxpayer only requested the special apportionment method after he was assessed as a result of not filing tax returns. Consequently, Taxpayer was properly assessed for the periods in question.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420000462.LOF

LETTER OF FINDINGS NUMBER: 00-0462
Gross Retail Tax
For Tax 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

I. Gross Retail Tax – Credit

Authority: IC 6-2.5-3-4

Taxpayer protests the Department denying credit for sales tax paid.

II. Gross Retail Tax – Use Tax Paid to Another State

Authority: *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365 (1983); *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 107 S.Ct. 2810 (1987); *Allied Steel Company v. Larey*, 246 Ark. 1009, 440 S.W.2d 567 (1969); *Weeks Dredging & Contracting, Inc. v. Mississippi State Tax Commission*, 521 So.2d 884 (Miss. 1988); *Terrebonne Parish Sales and Use Tax Department v. Callais Cablevision, Inc.*, 433 So.2d 820 (La.App. 1st Cir. 1983); IC 6-2.5-3-2; IC 6-2.5-3-5; 45 IAC 2.2-3-16; 68 Am.Jur. 2d, *Sales and Use Tax* § 188 (1993); OAC § 5739.02

Taxpayer protests the assessment of tax on several purchases on which taxpayer contends it paid tax to other taxing jurisdictions.

III. Gross Retail Tax – Lump Sum Contract

Authority: IC 6-2.5-1-1; 45 IAC 2.2-1-1; 45 IAC 2.2-3-9(d)(1); 45 IAC 2.2-4-22(e); 45 IAC 2.2-4-26(a); 50 IAC 4.2.4.10

Taxpayer protests the imposition of tax on materials used in improvements to taxpayer's real property.

IV. Gross Retail Tax – Duplicates

Authority: None

Taxpayer protests duplicate assessments of Indiana use tax on taxpayer's construction in progress account.

V. Gross Retail Tax – Duplicates

Authority: None

Taxpayer protests duplicate assessments of Indiana use tax on certain capital purchases.

VI. Gross Retail Tax – Credit for Overpayment of Use Tax

Authority: None

Taxpayer protests overpayment credits not given by the Audit Division.

VII. Gross Retail Tax – Software Licensing Agreements

Authority: IC 6-2.5-3-2(a); *Sales Tax Information Bulletin #8* (May 1983); *Sales Tax Information Bulletin #8* (February 1990)

Taxpayer protests the imposition of use tax on its software licensing agreements.

VIII. Gross Retail Tax – Sample Projection Methodology

Authority: *Floral Trade Council of Davis, California v. United States*, 16 CIT 1014; (CIT 1992); IC 6-2.5-3-2; IC 6-2.5-4-6; IC 6-2.5-4-10(a); IC 6-2.5-4-11; 45 IAC 2.2-3-27

Taxpayer protests the sample projection methodology used in the audit report.

STATEMENT OF FACTS

Taxpayer operates a riverboat casino in Indiana. The casino has offered daily gaming sessions to patrons since opening. The pavilion area where the patrons board the riverboat includes a gift shop, a bar, and several restaurants. Taxpayer later opened a hotel and an auditorium.

The Indiana Department of Revenue ("Department") conducted an audit for the tax year in question, and assessed additional use tax. The taxpayer filed a timely protest and a hearing was held. Additional facts will be supplied as necessary.

I. Gross Retail Tax – Credit

DISCUSSION

Taxpayer protests assessment of use tax on items contained in four invoices on which taxpayer claims sales tax has already been paid. Taxpayer argues credit should be given for the amount of sales tax paid on the invoices. Taxpayer has submitted further information as part of this protest. If this new information shows that sales tax has already been paid on this item, the same tax should not be paid again. IC 6-2.5-3-4. The Audit Division will need to review this information.

FINDING

Taxpayer's protest is sustained pending verification by the Audit Division.

II. Gross Retail Tax – Use Tax Paid to Another State

DISCUSSION

Taxpayer also protests the assessment of use tax on several purchases for which no credit was given for taxes paid to other states. IC 6-2.5-3-2 provides for the imposition of use tax on the [s]torage, use, or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction...” Indiana allows a credit for payment of taxes paid to other taxing jurisdictions at the time of purchase. This credit is found in IC 6-2.5-3-5(a), which provides in pertinent part: “A person is entitled to a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state, territory, or possession of the United States for the acquisition of that property.” *See also* 45 IAC 2.2-3-16.

A use tax ordinarily serves to complement the sales tax of a state by eliminating the incentive to make major purchases in states with lower sales taxes; it requires the resident who shops out-of-state to pay a use tax equal to the sales tax he saved by buying out-of-state. *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581-582, 103 S.Ct. 1365, 1370 (1983); 68 Am.Jur. 2d, *Sales and Use Tax* § 188 (1993). However, to alleviate or eliminate the potential multiple taxation that results when two or more states have jurisdiction to tax parts of the same chain of commercial events, most states which impose sales and use taxes provide a credit against their own sales or use taxes for sales or use taxes paid to another state. *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 245 n. 13, 107 S.Ct. 2810, 2819 n. 13 (1987).

Taxpayer argues that it is entitled to a credit against Indiana’s use tax because it paid sales tax on its purchases to Ohio. The Audit Division argues that taxpayer is not entitled to the use tax credit in Indiana because the sales tax paid by taxpayer to Ohio was not owed to Ohio. Referencing an Ohio statute which exempts Ohio purchases from sales tax when they are shipped outside of Ohio, the Audit Division argues that, because the tangible personal property at issue was shipped to Indiana, the purchases were exempted from Ohio sales tax. Therefore, because the sales taxes at issue were exempted by Ohio, the sales taxes paid by taxpayer to Ohio were not owed there, and do not constitute a tax for which Indiana is bound to give a use tax credit. In other words, according to Audit, a taxpayer’s erroneous payment of sales taxes to one taxing authority negates its entitlement to a credit for use taxes from another taxing authority.

There is ample authority from other states to support the Audit Division’s interpretation of IC 6-2.5-3-5. *See, e.g., Allied Steel Company v. Larey*, 246 Ark. 1009, 440 S.W.2d 567 (1969), where the Arkansas Department of Revenue denied the use tax credit claimed for the Oklahoma use tax because the Oklahoma tax was paid before taxpayer became liable for it; *Weeks Dredging & Contracting, Inc. v. Mississippi State Tax Commission*, 521 So.2d 884 (Miss. 1988), where the Mississippi court concluded that a plain reading of the Mississippi use tax credit statute implied a requirement that the tax paid in another state be properly imposed before credit was due to prevent a taxpayer from paying even the most patently improper tax assessments in another state, gain an exemption in Mississippi, then gain a refund in the taxing state*; Terrebonne Parish Sales and Use Tax Department v. Callais Cablevision, Inc.*, 433 So.2d 820 (La.App. 1st Cir. 1983), where use tax credit was denied to taxpayer because the taxes for which a credit was sought were not legally owed to the other taxing authorities.

According to the Ohio Administrative Code, when tangible personal property is sold within the state of Ohio and the vendor is obligated to deliver the property to a point outside of the state, or to deliver the property to the mails for transportation to a point outside of the state, the Ohio sales tax does not apply. In the instant case, taxpayer made numerous purchases from an Ohio vendor. As part of the contract, the Ohio vendor shipped the purchases, which consisted mainly of computer equipment and supplies, to taxpayer via carrier, *i.e.*, UPS, and charged taxpayer for the costs thereof. The copies of invoices that taxpayer submitted as part of its protest show that taxpayer and the Ohio vendor agreed to the shipping term of F.O.B. Cincinnati. However, the fact that the parties designated Cincinnati as the F.O.B. point is irrelevant in this analysis because according to Ohio law, the taxable event occurs at the location at which a taxpayer exercises rights of ownership and control over the property. *See, Central Transport, Inc. et al., v. Tracy*, 649 N.E.2d 1210, 1212 (1995)

In the instant case, the evidence on files establishes that taxpayer exercised its rights of ownership over the computer equipment in Indiana. Accordingly, taxpayer’s purchases of the equipment, designated for delivery and ultimate consumption within the state of Indiana, was not subject to Ohio sales tax. Because, Ohio sales tax was not due and payable on taxpayer’s purchases, taxpayer is not entitled to an Indiana credit under 45 IAC 2.2-3-16. Instead, taxpayer’s purchases are subject to Indiana use tax under IC 6-2.5-3-2 because the purchases constitute tangible personal property used or consumed in Indiana.

FINDING

The taxpayer’s protest is denied.

III. Gross Retail Tax – Lump Sum Contract

DISCUSSION

Taxpayer entered into contracts with several vendors for the installation of a brick structured sign located at the entryway to taxpayer’s property, the installation of a clock and a sauna, and the seal coating and asphalt repair of its parking lot. Taxpayer argues that these were lump sum contracts for the improvement of real property. The Department, however, maintains (1) that the contracts for the installation of the sign and the clock constitute unitary transactions, and (2) the contract for the installation of the sauna constitutes a time and material contract.

A taxpayer is not subject to use tax liability for those transactions for which taxpayer either issued a purchase order or contracted for an improvement to taxpayer's realty on the basis of lump sum contracts. Under 45 IAC 2.2-4-22(e):

> ... With respect to construction material a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:
>
> (1) He converts the construction material into realty on land he owns and then sells the improved real estate;
>
> (2) He utilizes the construction material for his own benefit; or
>
> (3) Lump sum contract. *He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.*

(Emphasis added).

Accordingly, the contractor will either pay the gross retail tax "up-front" when he initially purchases the construction materials or he will pay the gross retail tax in the form of use taxes when the materials are incorporated into the construction project. Either up-front or at the point where the materials are incorporated into the taxpayer's realty, in lump sum contracts between the taxpayer and its contractors, it is the contractors who are ultimately responsible for paying the tax on the construction materials. *See, e.g.*, 45 IAC 2.2-4-26(a) which provides that "[a] person [(*i.e.*, the contractor)] making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchase price of all material so used."

45 IAC 2.2-3-9(d)(1) provides that a contractor-retail merchant must collect gross state retail tax whenever he disposes of construction material by way of a time and material contract. A time and material contract is a contract in which a contractor "converts the construction material into realty on land he does not own and states separately the cost for the construction material and the cost for the labor and other charges..." *Id*.

Taxpayer has provided documentation to support its contention that the seal coating and asphalt repair of its parking lot was provided for under a lump sum contract for making improvements to taxpayer's realty. However, taxpayer's invoice for the sauna was billed as a time and material contract, and not a lump sum contract. As such, the materials required to complete the sauna are subject to gross state retail tax. *See* 45 IAC 2.2-3-9(d)(1).

We also consider taxpayer's clock to be tangible personal property rather than an improvement to realty. Because taxpayer's purchases are for tangible property and not improvements to realty, the sales and use tax regulations governing lump sum contracts are not applicable. Moreover, because the invoices for the sign and the clock provide no breakdown of material and installation charges, the transactions are deemed unitary transactions and the entire charge on the invoice of both the sign and the clock is subject to gross state retail tax. (*See* IC 6-2.5-1-1 and 45 IAC 2.2-1-1 which provide that a transaction involving a retail sale of property in conjunction with a service can be classified as a unitary transaction. That transaction is subject to Indiana sales tax on the entire charge.)

FINDING

Taxpayer's protest is sustained with regard to the contract governing the seal coating and asphalt repair; however, taxpayer's protest is denied with regard to the contracts for the installation of the sauna, the sign and the clock.

IV. Gross Retail Tax – Duplicates

DISCUSSION

Taxpayer protests the assessment of use tax on its construction in progress ("CIP") account. The CIP account was originally held out of state because taxpayer's development company, which coordinates the construction of the casinos, is located there. The account was later transferred to Indiana. During the audit, the detailed invoices for the transactions occurring on the CIP account were available only at the out of state. As such, an Indiana-based auditor traveled to that location to review the asset purchases. However, because a different auditor reviewed the same asset purchases at taxpayer's Indiana property, taxpayer believes that the asset purchases for the CIP account were assessed use tax twice - once by the auditor working at the out of state location, and once by the auditor working in Indiana.

In support of its argument, taxpayer submitted a copy of its capital purchase exception schedule listing the CIP account purchases that were reviewed by the Indiana-based auditor at taxpayer's development company's out of state office. *See* Taxpayer's Exhibit I. If this exhibit shows that use tax was assessed on taxpayer's CIP account, the same tax should not be assessed again. The Audit Division will need to review this information.

FINDING

Taxpayer's protest is sustained pursuant to audit verification as to whether or not the asset purchases on the CIP account were subjected to double taxation.

V. Gross Retail Tax – Duplicates

DISCUSSION

Taxpayer protests the assessment of tax on several capital purchases for which taxpayer claims that use tax accrued and was remitted to the Department. Taxpayer has provided documentation evincing that use tax was indeed paid on the purchases in question.

FINDING

Taxpayer's protest is sustained subject to verification by the Audit Division.

VI. Gross Retail Tax – Credit for Overpayment of Use Tax

DISCUSSION

Taxpayer claims that in the months of November and December of 1997, estimated use tax payments were made. The amounts paid were over and above the actual amount of use tax that was due on taxpayer's purchases. Taxpayer claims a credit should be given for these overpayments. Taxpayer has provided invoice documentation of the overpayments, as well as the actual use tax due on the transactions, in Exhibits T and U of its supplemental documentation.

FINDING

Taxpayer's protest is sustained subject to the Audit Division's verification.

VII. Gross Retail Tax – Software Licensing Agreements

DISCUSSION

Taxpayer protests the imposition of use tax on its purchases of software and software licensing agreements. Examples of the software and licensing agreements purchased and used include application manager, query, general ledger, payables ledger, income reporting, fixed assets purchase management, inventory control, journal processor, cross applications, purchasing/payables exchange, security access, and human resources/payroll, as well as a third party software system. The use tax was imposed pursuant to IC 6-2.5-3-2(a) which provides that "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..."

Taxpayer contends that the software and software licensing agreements are not subject to use tax because according to *Information Bulletin #8* (05/23/1983), *Sales Tax*, "a licensing arrangement whereby a licensee is entitled to limited use of a computer program for copying or other programming purposes is not subject to tax regardless whether the program is a custom program or pre-written program." However, the May 1983 Information Bulletin was revised in February of 1990. Within the February 1990, Sales Tax Information Bulletin #8, we find the following more relevant to the instant case:

> As a general rule, transactions involving computer software are not subject to Indiana Sales or Use Tax provided the software is in the form of a custom program *specifically designed* for the purchaser.
>
> Pre-written programs, not specifically designed for one purchaser, developed by the seller for sale or lease on the general market... are subject to tax irrespective of the fact that the program may require some modification for a purchaser's particular computer.

(Emphasis Added).

We wish to point out that Information Bulletin No. 8, dated May 23, 1983, also clarified the Department's position on software and software licensing systems. Page 2 of that Information Bulletin read in pertinent part as follows:

> Pre-written programs, not specifically designed for one purchaser, developed by the seller for sale or lease on the general market in the form of tangible personal property and sold or leased in the form of tangible personal property are subject to tax irrespective of the fact that the program may require some modification for a purchaser's particular computer.

The nature of the licensed software, as well as the terms of the agreements, strongly suggests taxpayer licensed a *standard* business application software package. The Department finds that the programs and licensing agreements at issue in this audit are the type of canned, pre-written business application software which is available to all—even though the software might have been "modified" subsequently to meet taxpayer's specific needs. But even "modified," in this context, is not synonymous with "customized." Software can be "modified" in many ways; however, only the "writing" and "rewriting" of source code represents the creation of "custom" software.

FINDING

Taxpayer's protest is denied.

VIII. Gross Retail Tax – Sample Projection Methodology

DISCUSSION

Taxpayer protests the methodology of the sample projection used by the auditor to arrive at use tax owed for the audit period. The auditor used a block sampling method for the period January 1, 1997 through December 31, 1997. After an analysis of the taxable expenses for 1997 was conducted by taxpayer, it was agreed that the sample period of June, 1997 would be used for a projection of the expense accounts for the entire year. The expense records for purchases from the check register of payables from June 1 through June 30, 1997 were examined at one hundred percent (100%) to determine sales and use tax liability. A percentage error was calculated as follows:

> The amount found as taxable from chosen accounts in the sample was used as the numerator. The denominator was the total amount of the sample less the amount of invoices that were not posted to accounts that were chosen to be examined by the audit. To arrive at an amount for a proposed assessment of sales and use tax, the determined percentage was applied to the total amount of the account balances chosen for the sample.
>
> *See* Audit Summary-Explanation of Adjustments, pg. 3.

Taxpayer protests the inclusion of six specific items in the use tax sample. These items will be addressed individually. Taxpayer also objects to the manner in which the error rate was calculated.

A. Extraordinary Items

In June 1997, taxpayer rented a large screen television as part of taxpayer's promotion for a major heavyweight title boxing match. According to taxpayer, because this item was a one-time rental, the expense should be removed from the calculation of the error rate and assessed separately as an extraordinary item. "Extraordinary expenses" generally will be excluded from sample populations to ensure the validity of the calculated error percentages.

The term "extraordinary expense" is not defined by our statutes or regulations. However, the Court of International Trade defines "extraordinary expense" as "unusual in nature and infrequent in occurrence." *Floral Trade Council of Davis, California v. United States*, 16 CIT 1014, 1016-17 (CIT 1992). Using the CIT's definition of the term as a guide, we first note that it is not far reaching that a casino would provide its patrons with the opportunity to view a boxing match. Casinos are popular venues for hosting prize fights. As such, it does not seem that a casino's providing pay-for-view boxing entertainment would be highly abnormal, unrelated or incidentally related to the casino's operations.

B. Use Tax Paid to Another State

Taxpayer revisits its earlier protest regarding the assessment of use tax on several purchases for which no credit was given for taxes paid to another state, *i.e.*, Ohio. According to taxpayer, the Audit Division erred in including in the calculation of error rate the transactions on which sales tax was paid to Ohio.

We have concluded already that because the transactions took place in interstate commerce and that taxpayer has not demonstrated that Ohio law required the payment of these taxes, the Ohio sales tax was not properly paid. As such, said transactions should be included in the calculation of error rate.

C. Royalties

Taxpayer protests the inclusion of the use tax assessed on what taxpayer characterizes as a license royalty paid to another entity for a specialty stud poker game. Under IC 6-2.5-3-2, use tax is imposed on the "[s]torage, use, or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction…", unless an exemption is granted. Taxpayer asserts that it paid "royalty fees" to use the poker game, but does not owe use tax on the tangible personal property because the "royalty fees" are intangibles. Thus, taxpayer believes there is no basis for imposing use tax; and, as such, said transaction should be removed from the calculation of the error rate.

Taxpayer attempts to characterize its payments for the poker game as royalties; however, these payments are a clear example of licensing fees. IC 6-2.5-4-10(a) states in relevant part that a person is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person. In the instant case, paying licensing fees for the privilege of using a casino game is tantamount to the renting or leasing of tangible personal property. Although taxpayer is not acquiring ownership rights to the poker game, it is purchasing the right to use the game for a period of time. The Audit Division rightfully imposed use tax on the fees paid for the use of the poker game. No error occurred here.

D. Satellite Television Programming

Taxpayer was assessed use tax on its purchase of a live television programming feed of a major heavyweight boxing match transmitted by satellite from an out-of-state source. Taxpayer claims that because the satellite service originated from outside of Indiana, the transmission did not meet the definition of telecommunication services. Taxpayer further claims that the transaction was not subject to use tax, and therefore should not have been included in the error rate, because the satellite programming did not constitute tangible personal property.

However, IC 6-2.5-4-6 states that certain types of "telecommunication services" are taxable. For the purpose of IC 6-2.5-4-6, satellite transmissions are considered "telecommunication services". IC 6-2.5-4-6(a) states:

> As used in this section, 'telecommunication services' means the transmission of messages or information by or using wire, cable, fiber optics, laser, microwave, radio, satellite, or similar facilities. The term does not include value added services in which computer processing applications are used to act on the form, content, code, or protocol of the information for purposes other than transmission.

In the instant case, taxpayer presented evidence at hearing establishing that it purchased the satellite feed for the boxing match directly from an out-of-state provider. Pursuant to the contract, the out-of-state provider was responsible for the delivery of the video and audio signal to taxpayer's communications satellite.

IC 6-2.5-4-11, which authorizes the taxation of certain cable television services, states in pertinent part: "A person is a retail merchant making a retail transaction when he furnishes local cable television service or intrastate cable television service." The Department considers cable television services and satellite broadcast services to be similar. While the amount of property and facilities located within the state necessary to ensure cable program differs from that necessary to ensure satellite program, this difference does not affect the taxable consequences of sales of the respective programming services. The Department finds, therefore, that the provision of television programming services via satellite – from standard fare to pay-per-view programming – represents a taxable sales transaction under IC 6-2.5-4-6. While the transaction is, and should have been, subject to sales tax as an enumerated service, the effect to taxpayer is as use tax and it is appropriate to consider it in the error rate.

E. Missing Invoice

Audit included one expense item in the sample period for which no invoice could be located. Since no invoice was available for examination, Audit assessed use tax on the purchase. Audit cites 45 IAC 2.2-3-27, which discusses documentation requirements:

> The person who stores, uses or consumes tangible personal property in Indiana may avoid paying the use tax to the Department if such person retains for inspection by the Indiana Department of Revenue a receipt evidencing payment of the tax.

Taxpayer identified the contested expense as one purchase (for $324.48) from a particular vendor (Wal-Mart). Taxpayer contends that based upon a purchase spreadsheet that taxpayer attached as an exhibit to its protest letter, "it is reasonable to say that we did in fact pay the sales tax to Wal-Mart at the time of purchase." Taxpayer further contends that it must have paid sales tax on the Wal-Mart purchases because as an in-state vendor that is registered to do business in Indiana, Wal-Mart must have charged sales tax on the purchases. However, it is well-settled that the burden of proof is on the taxpayer. Absent additional evidence presented by taxpayer that taxpayer actually paid the sales tax, the Department cannot rule in its favor.

F. Duplicate Invoices

Taxpayer claims the auditor included duplicate invoices in the calculation of the error rate. Taxpayer has provided a list of these duplicated invoices. Subject to verification by the Audit Division, these invoices should be removed from the error rate calculation.

G. Method of Assessment

(a) Taxpayer first disagrees with the manner in which the use tax error rate was applied against the expense accounts. According to taxpayer, if an expense account was found to have no errors, that account should not have been used to assess additional use tax liability on other expense purchases. However, taxpayer is mistaken. If the Audit Division found no error in a particular account, the calculation for the account equaled "zero". Therefore, it makes no difference whether the Audit Division removes the account from the error rate or includes the account with a "zero" calculation. The result is the same.

(b) Taxpayer next disagrees with the manner in which the use tax error rate against the expense accounts was determined. Taxpayer points to its Exhibit W as proof that the Audit Division erred in determining the error rate. Taxpayer's Exhibit W is the Form AD-20-4 Workpaper that was created by the auditor. The exhibit shows that in calculating the error rate, the auditor used taxpayer's check register totals as the denominator in the formula for calculating the percentage rate of error. Taxpayer argues that the auditor should have used the monthly general ledger account balance totals as the denominator in the formula. We agree. However, the denominator should include the general ledger account balances for all of the examined expense accounts, whether or not a particular expense account was found to have use tax errors.

FINDING

Taxpayer's protest is denied on issues A, B, C, D, E, and G(a). Taxpayer's protest is sustained pending Audit Division verification on issue F. Taxpayer's protest is sustained on issue G(b) subject to taxpayer's ability to supply the Audit Division with the necessary documentation to correct the use tax error rate.

DEPARTMENT OF STATE REVENUE

04-20000468.LOF

LETTER OF FINDINGS NUMBER: 00-0468
Sales and Use Tax
For the Years 1997-1999

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

ISSUES

I. Sales and Use Tax – Prepaid Telephone Calling Cards

Authority: IC 6-2.5-4-13; IC 6-2.5-2-1.

Taxpayer protests the Department's assessment of tax on prepaid telephone calling cards.

STATEMENT OF FACTS

The taxpayer operates two service stations in Indiana. In addition to gasoline and diesel fuel, the service stations also sell convenience store type items (e.g., cigarettes, grocery items, lottery tickets, etc.). The taxpayer's protest involves one of the items that it sells—namely, prepaid telephone cards.

I. Sales and Use Tax – Prepaid Telephone Calling Cards

DISCUSSION

Prepaid telephone cards are taxed as a retail sale in Indiana, as IC 6-2.5-4-13 makes clear:

A person is a retail merchant making a retail transaction when a person sells:
(1) a prepaid telephone calling card at retail;
(2) a prepaid telephone authorization number at retail;
(3) the reauthorization of a prepaid telephone calling card; or
(4) the reauthorization of a prepaid telephone authorization number.

The taxpayer, which began selling prepaid telephone calling cards in 1998, stated in its protest letter to the Department that

> [t]he taxpayer was not aware of the tax law requiring the sales of prepaid phone cards to be taxable, and were under the impression the tax was paid by the company when they purchased it and therefore not subject to sales tax.

In other words, the taxpayer's argument is that since it was unaware of the law that it therefore should not have to pay the tax that is due from its failure to properly collect and remit.

The taxpayer, as a retail merchant, has a *duty* to collect and remit sales tax to the State of Indiana:

> (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*)
> IC 6-2.5-2-1.

In summary: (1) the taxpayer is a retail merchant; (2) the taxpayer made retail sales of taxable items (prepaid telephone calling cards); and (3) the taxpayer failed to collect and remit the tax as required. Finally, the taxpayer's argument is that it was ignorant of the appropriate law.

Ignorance of Indiana's law is not a valid defense (45 IAC 15-11-2(b) echoes this principle when it notes, with regards to tax penalties, "[I]gnorance of the listed tax laws, rules and/or regulations is treated as negligence." And as quoted above, IC 6-2.5-2-1 states the taxpayer *shall* collect the tax for the state). Taxpayer cited no law that would excuse it from its duty to collect and remit the tax.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010170.LOF

LETTER OF FINDINGS NUMBER: 01-0170
Gross Income Tax
For the Years 1994 through 1998

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

ISSUES

I. Service-Related Income Received from the Sale and Installation of Industrial Equipment – Gross Income Tax

Authority: U.S. Const. art. I, § 8; IC 6-2.1-3-3; IC 6-8.1-5-1(b); Indiana Dept. of Revenue v. Brown Boveri Corp., 439 N.E.2d 561 (Ind. 1982); Indiana Dept. of Revenue v. Surface Combustion Corp., 111 N.E.2d 50 (Ind. 1953); 45 IAC 1-1-100; 45 IAC 1-1-120; 45 IAC 1-1-120(1)(c); 45 IAC 1-1-120(d); 45 IAC 1-1-121(d)

Taxpayer argues that the audit erroneously subjected service-related income to Gross Income Tax.

II. Audit's Assessment Calculation – Gross Income Tax

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

Taxpayer challenges the audit's method of calculating its tax liability arguing that the audit's methodology was inconsistent and unfair.

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 it exercised the required business care and prudence in filing its tax returns. As a result, taxpayer argues that it is entitled to abatement of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer was an out-of-state entity engaged in the business of designing, manufacturing, and installing industrial air pollution equipment. That equipment included cooling towers, electrostatic precipitators, and industrial chimneys. Over a period of time, taxpayer was acquired by parent company and became a wholly-owned subsidiary of that parent company. In 1997, parent company decided to discontinue taxpayer's business. A second parent company subsidiary was assigned to oversee the taxpayer's final affairs.

It was in that context that the Department conducted an audit of taxpayer's business records for 1994 through 1998. The Department's audit was completed in 2001 and resulted in an assessment of additional tax liability for those years. Taxpayer submitted a protest, an administrative hearing was held, and this Letter of Findings results.

DISCUSSION

I. Service-Related Income Received from the Sale and Installation of Industrial Equipment – Gross Income Tax

Taxpayer was paid to design, construct, and install certain types of industrial equipment. The equipment was installed at locations nationwide including locations within the state. The size and complexity of that equipment varied. For example, taxpayer constructed precipitators ranging from the size of a five-story building to the size of a large van. Taxpayer built 500 foot high natural draft cooling towers and also built much smaller mechanical cooling units. Taxpayer was paid for the materials used in construction of the equipment and for services related to the design, construction, installation, and testing of the equipment.

In addition, the audit determined that taxpayer received service-related income. According to the audit, the taxpayer received money for engineering, asbestos removal, water management, and other services.

However, taxpayer raises the issue of whether service related income attributable to its construction and installation activities is subject to the state's Gross Income Tax. In particular, taxpayer argues that the Interstate Commerce Clause, U.S. Const. art. I, § 8, precludes Indiana from taxing this income. The crux of taxpayer's argument is that the service-related income stemmed from the construction of equipment outside of Indiana and that the services rendered in conjunction with the construction of the equipment were integrally related to the out-of-state transaction. Any services taxpayer performed inside Indiana were so integrally related to the underlying interstate sales transaction, that the service income came within the protection provided by the Commerce Clause.

Taxpayer is correct in its assertion that Indiana is precluded from assessing the un-apportioned Gross Income Tax on income derived from out-of-state transactions. The constitutional protection is incorporated into IC 6-2.1-3-3 which states as follows:

> Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution.

Taxpayer cites to Indiana Dept. of Revenue v. Brown Boveri Corp., 439 N.E.2d 561 (Ind. 1982) in support of the proposition that Indiana sales of its equipment were not subject to the Gross Income Tax. In Brown Boveri, plaintiff taxpayer was an out-of-state company which had entered into a contract with an Indiana manufacturer for the sale of an induction melting system. The parties' sales agreement was for the "turn-key" delivery of a system that would produce molten iron. "The system was pre-fabricated at [plaintiff taxpayer's] plant, broken down for shipment and reassembled at the [Indiana customer's] plant." Id. at 563. Plaintiff taxpayer conducted certain activities at the Indiana site because it "was necessary for [plaintiff taxpayer] to engage in various activities to guarantee proper planning and coordination of the project." Id.

The court disagreed with the Department's argument that plaintiff taxpayer's performance of activities within Indiana removed the transaction from the protection afforded interstate commerce. Id. at 564. The court found that the transaction between plaintiff taxpayer and the Indiana customer was "indeed interstate commerce such that taxation of gross income resulting therefrom [was] prohibited." Id. The transaction was for the "sale of a functioning system for a lump sum," in which "all of the component parts were pre-fabricated outside Indiana, disassembled for shipment, and then reassembled on the job site." Id. Plaintiff taxpayer's local activities did not take the sale of the melting system outside interstate commerce protection because "the local activities of [plaintiff taxpayer] were intrinsically related to and inherently part of the sale in interstate commerce." Id.

In addition, taxpayer cites to Indiana Dept. of Revenue v. Surface Combustion Corp., 111 N.E.2d 50 (Ind. 1953) for support of its contention that the sale of the industrial equipment to its Indiana customers took place within interstate commerce and the service-related proceeds were exempt from Gross Income Tax. In Surface Combustion, appellee taxpayer was an Ohio based furnace manufacturer. It sold furnaces to an Indiana customer, was assessed Gross Income Tax on the income derived from the sales, and brought an action seeking a refund of those taxes. The court determined that appellee taxpayer had constructed the furnaces at its Ohio facility. Thereafter, appellee taxpayer transported the smaller furnaces to the Indiana customer's site. The larger furnaces were assembled at the Ohio facility, disassembled, and shipped to the Indiana site; alternatively, the larger furnaces were only partially assembled at the Ohio facility before being "knocked down," transported and reassembled at the Indiana customer's site. In each case, the court found that the "parties contemplated and intended that the furnace... should be shipped and transported from appellee's plant at Toledo, Ohio to the customer's plant in Indiana...." Id. 53.

The court rejected the Department's contention that it was entitled to levy the Gross Income Tax against appellee taxpayer's income derived from the sale of the furnaces. The court found that, "the tax sought to be recovered was levied upon the gross receipts of appellee from interstate commerce transactions within and without the State of Indiana." Id. at 69. The court concluded that imposition of the tax "directly burdens, and interferes with, the free flow of such commerce between the State of Ohio and the State of Indiana and is invalid as being in conflict with Article I, of § 8 of the Constitution of the United States." Id.

The court found that the "thing" which the Indiana customer purchased from appellee in Ohio, was a "heat treating furnace complete in one functional unit." Id. at 62. In support of that conclusion, the court noted that, "There is no evidence that the furnaces were made, built, fabricated, created or brought into existence in Indiana." Id. The Indiana installation work performed by appellee taxpayer consisted "only in the reassembling and installing the furnaces which had been purchased in the State of Ohio and taken apart for the convenience of shipment." Id. Appellee taxpayer's in-state services were "intrinsically related to and inherently a part of the sale; and because of their complexity their installation and testing was essential to the making of the sale." Id. The sales of the furnaces were "clearly sales of personal chattels in interstate commerce and the installation and reassembling where required, were inherently a part of, and a necessary incident to, the sale." Id.

Taxpayer maintains that the Department should follow the Indiana Supreme Court's precedent in Brown Boveri and Surface Combustion and conclude that its service income was so intrinsically related to the transfer of the industrial equipment from outside Indiana as to constitute a continuous interstate transaction entirely removed from the state's Gross Income Tax pursuant to IC 6-2.1-3-3.

Taxpayer is correct in its assertion that income derived from provision of in-state services may be beyond the reach of the Gross Income Tax. In regard to "Nontaxable in-shipments," the regulation states that, "As a general rule, income derived from sales made by nonresident sellers to Indiana buyers is not subject to gross income tax unless the seller was engaged in business activity within the state and such activity was connected with or facilitated the sales." 45 IAC 1-1-120. Specifically, the regulation exempts those sales "made by a nonresident where the product sold is, because of its size or weight, shipped in parts; and the seller, because of his special skill or expertise, assembles or installs the product at the buyer's place of business with no additional services rendered." 45 IAC 1-1-120(1)(c). Accordingly, when a vendor builds a piece of equipment out-of-state, ships the equipment into the state – either as a single unit or disassembled for ease of transport – and thereafter performs certain limited on-site services to install the equipment at the Indiana location, the state may not subject the transaction's service related proceeds to the unapportioned Gross Income Tax.

However, the regulation also recognizes that "Gross receipts from contracts entered into by nonresidents to furnish and install tangible personal property in Indiana are subject to gross income tax." 45 IAC 1-1-121(d).

Taxpayer argues that its income is derived from exempt in-shipments. The audit determined that the income was derived from essentially in-state transactions. 45 IAC 1-1-121(d) sets out the rule:

> The problem... is deciding if the contract is simply one of sale with incidental services taking place within the State, which may be tax exempt as a transaction in interstate commerce, or one of service which is taxable if it takes place in Indiana. The Department interprets the relevant court decisions to mean that whenever a product is shipped in parts as a convenience to transportation and the seller then assembles it or supervises assembly on the customer's premises, the transaction is a sale if the following conditions are met:
>
> > installation consists of no more than setting the product on bases or connecting it to pipes, wires, supports, etc., provided by the customer;
> > the product remains personal property after installation;
> > the property is suitable for sale to other customers in the regular course of the seller's business;
> > and the service necessary to installation is of such a technical nature that only the seller is capable of providing the necessary skilled workmen.
>
> If these conditions are not met or if, in addition to assembly, the seller performs additional services, such as installation, testing, construction, etc., the transaction will not be considered a sale but will be treated as a construction project.

Therefore, if a hypothetical out-of-state vendor of air conditioning equipment contracted to provide a compressor to an Indiana customer, shipped the compressor into the state, and had its trained technicians connect the device to the Indiana customer's pipes and wires, the transaction would be a "sale" and the proceeds would not be subject to the Gross Income Tax. With perhaps the minor exception of certain loose parts, the compressor was shipped as a single unit, the compressor remained "personal property" after it was installed, and the compressor could have been sold to a different customer if the Indiana customer reneged on the deal. In addition, the out-of-state vendor performed no elaborate "installation, testing, construction" services within Indiana.

Taxpayer argues that it is in the same position as the hypothetical air conditioning vendor. In particular, taxpayer argues that its transfers of "lower-gas-flow precipitators and mechanical draft cooling towers" fall within the definition of "sales" set out in 45 IAC 1-1-121(d). Taxpayer cites to several Revenue Rulings which found variously that the provision of a "piece of equipment" the "sale and installation of pollution control equipment" were not subject to the state's Gross Income Tax. However, the cited Revenue Rulings are of little assistance because the Rulings are brief, conclusory statements that do not provide the guidance or analysis necessary to resolve the particular issue raised by taxpayer.

It is apparent that taxpayer's installation of large scale cooling towers, electrostatic precipitators, and various items of pollution control equipment qualifies it as a "contractor" under 45 IAC 1-1-100 and that its own activities are not analogous to the limited in-state service activities described in Brown Boveri and Surface Combustion. The installation of the large scale precipitators, cooling towers, and other pollution control equipment, were lengthy, complex projects in which the devices were first brought into being at the Indiana location. Unlike the out-of-state manufacturers in Brown Boveri and Surface Combustion, taxpayer did not simply construct this equipment outside the state, disassemble the devices for ease of transport, and then reassemble the equipment at the Indiana location. The sheer scale of taxpayer's projects – some of which took years to complete – belie the contention that this equipment was constructed outside Indiana, disassembled, transported, and then simply reassembled at the Indiana location. In addition, it would seem apparent – given the complexity, scale, and specialization of these devices – that the taxpayer "perform[ed] additional services, such as installation, testing, construction" (45 IAC 1-1-121(d)) once the component parts were brought to the Indiana site.

It is possible that taxpayer entered into transactions for the provision and installation of certain equipment and that those transactions fell within the definition of a "sale" as set out in 45 IAC 1-1-121(d). A contract for taxpayer to supply an Indiana customer with a precipitator "the size of a large van" conceivably could have been a transaction similar to that of the hypothetical air conditioning manufacturer noted above. However, there are simply no conceivable circumstances under which the delivery of "500 foot high natural draft cooling towers" would have constituted the kind of "sale" envisioned under 45 IAC 1-1-121(d). Taxpayer has done nothing to identify a specific, potentially exempt "sale" and then to "tie" that particular transaction to the findings contained within the audit report. Taxpayer has provided no support for the proposition that the audit assessment should be rejected in toto because of the possibility that certain undefined 1994 through 1998 Indiana transactions may have fallen within the definition of an exempt "sale." Because taxpayer has not met its "burden of proving that the proposed assessment is wrong," (IC 6-8.1-5-1(b)), the Department is unable to grant the requested relief.

FINDING

Taxpayer's protest is respectfully denied.

II. Audit's Assessment Calculation – Gross Income Tax

Taxpayer argues that the audit's assessment of additional Gross Income Tax was fundamentally flawed because the audit "utilized an inconsistent methodology in ascertaining [taxpayer's] liability." According to taxpayer, the audit determined the amount of liability by reviewing sales and use tax reports and then comparing those reports to information listed on the taxpayer's tax returns. Thereafter – again, according to taxpayer – when information contained on the returns revealed a greater number than indicated on the sales and use tax reports, the audit adopted the number indicated on the returns. Conversely, when the information contained on the sales and use tax reports indicated a greater amount than that reported on the returns, the audit adopted the number indicated on the sales and use tax reports. In effect, the audit purportedly utilized whichever number resulted in the greater tax assessment. In addition, taxpayer argues that the audit's reliance on the sales and use tax reports is – in itself – problematic. Taxpayer explains that, "Sales tax is collected by the seller and then paid to the State of Indiana on a cash basis [while] Gross receipts are reported on an accrual basis when the sale is made."

The taxpayer offers no alternative assessment of its tax liability. Instead, the taxpayer asks the Department to reject the audit results because the results are "patently unfair to the taxpayer."

At the time of the audit, taxpayer's representatives – acting on behalf of the expired entity – were unable to provide the audit with complete financial records for the years at issue. From the information provided, it is evident that the audit had access to a limited number of sales and use tax records and that not all federal and state returns "were available or could be located." Accordingly, the audit indicated that the report was completed based upon "the best information available."

As noted in the audit report, the Department is entitled to make an assessment of taxes based upon "the best information available." IC 6-8.1-5-1(a) states that, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department." In addition, the statute places the burden of refuting such a proposed assessment on the taxpayer. "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC 6-8.1-5-1(b).

Taxpayer argues that the audit report "mix and match[ed]" the available information to produce the results that best suited the Department. However, taxpayer's bare assertion – that it is aggrieved by the audit methodology – is insufficient to establish that "the proposed assessment is wrong...." Taxpayer's representatives may be in the awkward position of having to establish the precise obligations of an entity which has undergone successive changes of ownership; however, taxpayer's representatives have offered no substantive, verifiable, superior, or reliable substitute for the audit's own conclusions.

The audit – faced with the responsibility of arriving at a determination of tax liabilities for a period spanning five years and six tax-reporting periods – arrived at a conclusion in spite of the fact that the audit had access to few existing records and in spite of the fact that taxpayer's own personnel, at the time of the audit, had very little understanding of taxpayer's past business or financial activities. There is simply no evidence that the audit's additional assessments were capricious, whimsical, or arbitrary. The Department must conclude that there is plainly no justification for setting aside the audit's conclusions because taxpayer has been unable to demonstrate that the assessments are quantifiably wrong, and because taxpayer has not been able to offer an alternative assessment which is demonstrably more reliable.

FINDING

Taxpayer's protest is respectfully denied.

III. Abatement of the Ten Percent Negligence Penalty

The audit concluded with the recommendation that a ten percent negligence penalty be assessed. Taxpayer argues that the

Department should exercise its discretion to abate the penalty because it "acted reasonably and with the requisite business care and prudence in filing its tax returns."

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 Department is unable to agree with taxpayer's argument that its original returns represented a reasonable interpretation of the law and that, in preparing those original returns, it "exercised ordinary business care." Taxpayer raised the substantially identical issues with the Department following an earlier audit report. Although the taxpayer may have disagreed with the results of the earlier Letter of Findings which addressed those issues, taxpayer is not now entitled to assert that the issues were not addressed within the Letter of Findings or that it is unaware of the conclusions contained in that Letter of Findings. In addition, taxpayer is not now entitled to assert that the Letter of Finding's conclusions – sustaining taxpayer's protest in part and denying the protest in part – did not provide taxpayer with the specific guidance necessary for it to prepare its Indiana tax returns in a manner and to a degree which comported with the Indiana's Gross Income Tax law.

Further, the Department finds that the absence of adequate financial records can be interpreted as the lack of the "requisite business care and prudence" which would otherwise permit the Department to abate the penalty. Taxpayer's representative may be handicapped by the fact that taxpayer is not now a functioning business entity. Nonetheless, taxpayer was not a marginal "mom-and-pop" operation which unexpectedly vanished from the face of the earth. Taxpayer's substantial operations were absorbed by the parent company and a related entity was charged with the specific responsibility of winding down taxpayer's remaining business obligations including its outstanding tax liabilities. In its time, taxpayer was a substantial and sophisticated business operation having income, obligations, and contracts measured in the many-millions of dollars. The fact that the audit report had to be pieced together based upon vague, incomplete, and missing information is not evidence of the sort of "ordinary business care and prudence" expected of an "ordinary reasonable taxpayer" that would warrant abatement of the ten percent negligence penalty.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420010193P.LOF

LETTER OF FINDINGS NUMBER: 01-0193P
Use Tax
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 6-8.1-10.2

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer, in a letter dated April 25, 2001, requested an abatement of the penalty and interest assessed on an aircraft.

Taxpayer is a resident of Indiana who purchased an aircraft from a manufacturer in southern Florida on June 5, 1998. The Compliance Division – Aeronautics issued its Proposed Assessment on April 5, 2001 for the use tax, excise tax, registration fee, penalties, and interest. The taxpayer paid the assessment sans penalty and interest.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer asks that the Department waive the penalty because he did not purposely avoid his obligation to the state of Indiana.

Taxpayer states he relied on the counsel of his CPA and the aircraft manufacturer to see that all fees and registrations were in place.

Taxpayer failed to register his aircraft with the State although he was a resident. Taxpayer should have made himself aware of State requirements to register his plane at the time of purchase.

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 asked the Department to waive the interest because he relied on the counsel of his CPA.

The Department has no authority to waive interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020034.LOF

LETTER OF FINDINGS NUMBER: 02-0034
Sales Tax
Calendar Years 1998 & 1999

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

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

The taxpayer is a fast food purveyor. The taxpayer's commercial domicile is located out-of-state. The taxpayer has 26 locations in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty assessment be waived based on the fact the taxpayer's error was unintentional. The error in the audit consisted of mislocated records needed to prove tax was paid.

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

The Department finds the taxpayer did not act with reasonable care in that the taxpayer was inattentive to tax duties. Inattention is negligence and negligence is subject to penalty. As such, the taxpayer's penalty protest is denied.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

4220020109.LOF

LETTER OF FINDINGS NUMBER: 02-0109
Motor Carrier/IFTA
For Tax Years 1998 through 2000

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

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

ISSUE

I. Motor Carrier/IFTA – Audited Mileage and Fuel Calculations

Authority: IC 6-6-4.1-4; IC 6-8.1-5-1; IC 6-8.1-5-4; IFTA P510; IFTA R1210.100; IFTA R1210.200

Taxpayer protests the method used to calculate mileage and fuel tax.

STATEMENT OF FACTS

Taxpayer operated a hauling business. The business is no longer in operation. As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments for tax years 1999 and 2000. Due to the unavailability of sufficient records, the Department estimated mileage and fuel consumption. Taxpayer protests that the estimations were too high. Taxpayer did not attend the scheduled administrative hearing. Further facts will be provided as required.

I. Motor Carrier/IFTA – Audited Mileage and Fuel Calculations

DISCUSSION

Taxpayer operated a hauling business, which hauled a variety of loads for a variety of customers. The Department conducted a Motor Carrier and IFTA (International Fuel Tax Agreement) audit for the tax years 1998 through 2000. The Department found insufficient records to determine the amount of tax which should have been paid under IC 6-6-4.1-4 and IFTA. IC 6-6-4.1-4(a) states in part:

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

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

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

Also, IFTA P510 states:

Every licensee shall preserve the records for a period of four years from the due date of the return or the date filed, whichever is later. Such records shall be made available upon request by any member jurisdiction.

In its protest, taxpayer explains that some of its documentation was destroyed in a fire. The Department reviewed the available information to determine the amount, if any, of taxpayer's liability.

The Department refers to IC 6-8.1-5-1(a), which states in relevant part:

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

IFTA R1210.100 states in relevant part:

In the event that any licensee…

.015 fails to maintain records from which the licensee's true liability may be determined, the base jurisdiction shall, on the basis of the best information available to it, determine tax liability of the licensee for each jurisdiction. The base jurisdiction shall, after adding the appropriate penalties and interest, serve the assessment upon the licensee in the same manner as an audit assessment or in accordance with the laws of the base jurisdiction.

The Department determined that taxpayer had not reported the proper amount of tax due under IC 6-6-4.1-4. The Department then issued a proposed assessment of the unpaid tax on the basis of the best information available to the Department, as provided in IC 6-8.1-5-1(a) and IFTA R1210.100.

Taxpayer states in its protest that it disagrees with the Department's assessment and provided some documentation to support its position. Taxpayer also states in its protest that, "The State may have circumstantial evidence, but you have not proven we bought the fuel nor where we did such." The Department refers to IC 6-8.1-5-1(b), which states in relevant part:

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

IFTA R1210.200 states in relevant part:

The assessment made by a jurisdiction pursuant to this procedure shall be presumed to be correct and, in any case where the validity of the assessment is questioned, the burden shall be on the licensee to establish a fair preponderance of evidence that the assessment is erroneous or excessive.

Prior to an administrative hearing being scheduled, the Department informed taxpayer that the submitted documentation was insufficient to prove the proposed assessment wrong. Taxpayer did not submit any further information and did not attend the scheduled administrative hearing. Taxpayer has not met its burden under IC 6-8.1-5-1(b) and IFTA R1210.200.

Therefore, taxpayer did not report the proper amount of tax due under IC 6-6-4.1-4 and did not have sufficient records available to determine the proper amount due as required under IC 6-8.1-5-4(a) and IFTA P510. The Department issued the proposed assessment using the best information available, under IC 6-8.1-5-1(a) and IFTA R1210.100. Taxpayer has not met its burden of proving the proposed assessment wrong, as required under IC 6-8.1-5-1(b) and IFTA R1210.200.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020240. LOF

LETTER OF FINDINGS NUMBER: 02-0240
Sales and Use Taxes
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. Sales Tax – Sales Tax Collected on Sales of Autos

Authority: 45 IAC 2.2-6-8; 45 IAC 6-8.1-5-1(a)

Taxpayer protests the sales tax on auto sales it did not make.

STATEMENT OF FACTS

Taxpayer was audited for calendar years 1999 and 2000. Upon audit it was discovered that the taxpayer failed to remit all of the sales tax collected. The audit was based upon the Bureau of Motor Vehicle's "Summary by Short Dealer" that lists the titles and the sales tax collected. Because the BMV sales tax did not agree with the sales tax remitted to the Indiana Department of Revenue, the difference was assessed in the audit. It is noted that specific car transactions were identified after the auditor presented his initial findings that limited the variance from year-end totals to specific transactions. The taxpayer's research also reduced the potential assessment.

A hearing was scheduled for June 3, 2002, which the taxpayer cancelled. Taxpayer had approximately fifty titles that it believes were assessed tax in error. A hearing was rescheduled for October 29, 2002. At hearing, the taxpayer was given additional time to review thirty-one titles it believed were not his.

On January 28, 2003, Taxpayers met with the hearing officer. Taxpayer states that $2,850.75 in tax was for sales it did not make. Taxpayer further states it called everyone possible and had written letters and can find no one who owns up to these sales.

The hearing officer has reviewed the contested titles and found that each listed the dealer's number, some appeared to have the same handwriting as those not contested, the certificates of title showed that title transferred to the taxpayer. Taxpayer and the hearing officer have not been able to verify that the sales were not made.

Based upon the letter of protest, the hearing officer tried to resolve the matter but was unable to determine from the information given that the assessments are in error. The burden of proof is upon the taxpayer and not the Department.

I. Sales Tax – Sales Tax Collected on Auto Sales

DISCUSSION

Taxpayer's audit was based upon information from the BMV's "Short Dealer" records. The audit assessed sales tax for items shown on the short dealer records that had no sales tax remitted to the Department of Revenue.

In reviewing the audit report and the file, it is noted that the assessment stems from BMV's "Short Dealer" records and the taxpayer had numerous opportunities to provide additional information. Taxpayer provided nothing to aid in the resolution of the audit because it could not prove that the sales were not made in the course of its business.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020249.LOF

LETTER OF FINDINGS NUMBER: 02-0249
Sales Tax
Calendar Years 1998, 1999, and 2000

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

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

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

The taxpayer sells snowplows, mini-spreaders, and Del liftgates. These items are installed onto vehicles at the taxpayer's place of business. The taxpayer has one business location which is in northern Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty assessment be waived. The error in the audit was the result of the taxpayer not collecting sales tax on taxable sales.

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

The Department finds the taxpayer did not act with reasonable care in that the taxpayer was inattentive to tax duties. Inattention is negligence and negligence is subject to penalty. As such, the taxpayer's penalty protest is denied.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420020335.LOF

LETTER OF FINDINGS NUMBER: 02-0335
Use Tax
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. Use Tax – Electric Utilities

Authority: 45 IAC 2.2-5-12 (f); 45 IAC 2.2-8-12 (f); IFB #55

Taxpayer protests tax on electricity purchased exempt.

STATEMENT OF FACTS

Taxpayer is a qualified bulk distributor of motor fuel from two locations in Indiana. They also operate several convenience stores in Indiana with sales of motor fuel through metered pumps, as well as sales of convenience items.

Upon audit, it was discovered that the taxpayer had two electric utility meters on which the utility company was charging no sales tax. Taxpayer protests the assessment on one of its utility meter (TC) purchases because it had been audited on numerous occasions and at no time was it advised that the exemption no longer was valid. Taxpayer protests the assessment for the audit period.

I. Use Tax – Electric Utilities

DISCUSSION

Taxpayer states that it was audited previously and never advised that the exemption was no longer valid. Taxpayer states that it can accept the fact that the exemption is no longer valid but protests the position that it was invalid for the audit period. Taxpayer states that the Indiana Department of Revenue never notified them or the electric company, that the exemption was no longer valid.

On October 15, 1985 the taxpayer filed a claim for refund for sales tax paid on an electric meter that it stated was used for an exempt purpose which was approved by the Department. The Department refunded the requested monies for 1984 and 1985.

Taxpayer's contention is that the Department issued an exemption in 1985 and has not notified them in writing that the exemption is no longer valid. The taxpayer filed a form ST-200 Sales Tax Exemption Application that was stamped approved by the Department on November 12, 1985. The taxpayer filed a claim for refund of tax on that meter for 1984 and 1985 at the time. The taxpayer has been audited since 1985 and states that there have been no adjustments to assess tax on this meter since exemption was granted sixteen years ago.

The Department determines what constitutes a valid exemption certificate as evidenced by 45 IAC 2.2-8-12 (f). In regard to the issuance of utility exemption certificates, the Department's Sales Tax Information Bulletin #55 (dated 5/31/89) details the procedure required for the taxpayer to purchase electricity exempt from tax at the time of purchase. A validated ST-109 form is required. The utility company is not allowed to accept any other exemption. Therefore, the 1985 photocopied ST-200 that the taxpayer provided to the utility company became invalid no later than 5/31/89. At that point, the utility purchases became subject to reporting of use tax under 45 IAC 2.2-3-4, the same as any other purchases on which tax was due and not remitted. The fact that the taxpayer has escaped taxation on this issue for approximately twelve years does not preclude assessment of the tax once the error is discovered.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

4120020337.LOF

LETTER OF FINDINGS NUMBER: 02-0337
International Registration Plan
For the Year 2000

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

ISSUE

I. IRP Assessment

Authority: IC 6-8.1-5-4; IC 9-28-4-6; IRP 233; IRP 1500; Indiana 2000 IRP Information Handbook; IRP Audit Procedure Manual

Taxpayer challenged the adequacy of the Department of Revenue's audit of taxpayer's mileage records pursuant to the International Registration Plan.

STATEMENT OF FACTS

Taxpayer is in the trucking business. During the years considered, taxpayer was primarily involved in disposing of environmentally contaminated materials. Taxpayer operates its fleet of trucks from an Indiana location. The taxpayer's trucks also operate within Illinois.

The Department of Revenue (Department) conducted an International Registration Plan (IRP) audit of taxpayer's records. The audit concluded that taxpayer's records detailing the number of miles taxpayer's trucks operated within Indiana and Illinois were inadequate. Accordingly, the audit assessed a penalty in which 100 percent of the miles driven were allocated to Indiana.

The taxpayer submitted a protest of the assessment, and an administrative hearing was conducted. During that hearing, taxpayer indicated that it could now produce records which would correctly and accurately apportion the total number of miles its trucks had driven within Indiana and within Illinois. Taxpayer was provided an opportunity to assemble the missing information and produce those records for a supplemental audit. Thereafter, the supplemental audit was conducted resulting in a substantially reduced assessment.

This Letter of Findings is written to address taxpayer's remaining challenge to the original audit report, the supplemental audit, and the propriety of the 100 percent penalty assessment.

DISCUSSION

I. IRP Assessment

The IRP is a program for registering commercial vehicles – such as taxpayer's fleet of trucks – that operate within member jurisdictions including Indiana and Illinois. Under this program, taxpayer originally filed an apportioned registration application in Indiana because Indiana is the state in which taxpayer is based. The number of taxpayer's trucks and the miles traveled in Indiana and Illinois were listed on the application. Taxpayer paid the full registration fee, was issued an "apportioned" license plate for the fleet of vehicles, and the plate fees were apportioned between Indiana and Illinois based upon the aggregate mileage generated by all of taxpayer's trucks or tractors that were part of its apportioned fleet during the reporting period.

In 2002, the Department conducted an audit of taxpayer's records to determine if the reported operating miles comported with the number of miles taxpayer's fleet of trucks had actually operated during the year 2000. The audit's responsibility was to assure that the initial apportionment of the license fees between Indiana as the "base state" and Illinois correctly reflected the number of miles actually driven within those two jurisdictions.

Every registrant under the IRP is responsible for maintaining accurate source records. An acceptable source record is called an Individual Vehicle Mileage Record (IVMR). As specifically provided in Indiana 2000 IRP Information Handbook – provided to each registrant – "Your operational records must be documents that support the miles traveled in each jurisdiction, and the miles traveled." IRP Handbook p. 30.

The audit determined the taxpayer's records were inadequate, incomplete, inaccurate or entirely absent. The movements, mileage, and destinations of taxpayer's trucks could not be traced. The taxpayer had maintained IVMRs, but the information contained on the individual form was – in many cases – incomplete. For example, some of the IVMRs recorded total miles but no jurisdictional miles. Some of the IVMRs indicated an Illinois destination but did not record any miles within that state. Some of the IVMRs indicated an Indiana destination but did not record any miles within Indiana. Some of the IVMRs did not indicate the routes traveled. Other IVMRs did not specify the destination for each trip. Some of the IVMRs simply stated that the destination was "local" or "various."

Because the IVMRs were insufficient, the taxpayer was asked to provide supplementary information which documented the origins and destinations by city and state. The taxpayer attempted to assemble payroll information, customer invoices, load tickets, job numbers, and dispatch logs. The taxpayer was only able to provide incomplete, reconstructed, or speculative information which did not permit the audit to be properly completed; it was not possible to complete the IRP audit. Because the audit could not be completed, it was also not possible to determine if the taxpayer's initial reported mileage apportionment between Indiana and Illinois was correct. The resolution is provided for in the IRP regulations and – in this case – appeared especially well-warranted.

Pursuant to the audit, taxpayer was assessed a 100 percent penalty. "If adequate records are not available thirty days after notice is given, the registrant may be assessed the potential liability due to all jurisdictions or the registrant may be assessed 100 [percent] registration fees for the base jurisdiction." IRP Audit Procedure Manual 603. In effect, because the audit could not substantiate the miles driven within the two jurisdictions, taxpayer was reassessed the amount of license fees taxpayer would have paid if it had driven exclusively Indiana miles.

During the protest hearing, taxpayer maintained that – after substantial delay – it could now produce records which would allow an accurate apportionment of the Indiana and Illinois miles. Accordingly, taxpayer was specifically informed as to what records it would need to provide and was allowed 60 days in which to gather that information.

Taxpayer assembled its various records and submitted that information in order to permit a supplemental audit. However, the supplemental information taxpayer provided was itself incomplete and did not contain all the original records requested. Nonetheless, the supplemental audit was performed based on the available information.

IC 9-28-4-6 is the source document implementing the IRP provisions and requirements within this state.

(a) The department of state revenue, on behalf of the state, may enter into reciprocal agreements providing for the registration of vehicles on an apportionment or allocation basis with the proper authority of any state, any commonwealth, the District of Columbia, a state or province of a foreign country, or a territory or possession of either the United States or of a foreign country.

(b) To implement this chapter, the state may enter into and become a member of the International Registration Plan or other designation that may be given to a reciprocity plan developed by the American Association of Motor Vehicle Administrators.

(c) The department of state revenue may adopt rules under 4-22-2 to carry out and enforce the provisions of the International Registration Plan or any other agreement entered into under this chapter.

As a licensee within Indiana, a member jurisdiction of IRP, taxpayer is subject to IC 6-8.1-5-4 which states that, "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."

In addition, IRP1500 states that, "Any registrant whose application for apportioned registration has been accepted shall preserve the records on which it is based for a period of three years after the close of the registration year. Such records shall be made available to the Commissioner at his request for audit as to accuracy of computation, payments, and assessments for deficiencies or allowances for credits during the normal business hours of the day." The IRP specifies which records each registrant must maintain; "'Operational Records' means documents supporting the total distance traveled in each jurisdiction and total distance traveled such as fuel reports, trip sheets and driver logs." IRP232.

Specifically, taxpayer is responsible for maintaining source documents which includes the following basic information.

The starting and ending dates of the trip.

The trip origin and destination by city and state.

The route of travel and/or the beginning and ending odometer or hubometer reading of the trip.

The total trip miles.

The mileage by jurisdiction.
The unit number or the vehicle identification number.
The vehicle fleet number.
The registrant's name.
The trailer unit number.
The driver's signature and/or name. IRP Handbook p. 30.

The nature of the specified information is clear, precise, and admits of no ambiguity. As stated in the Handbook, "IVMR's *must* contain the... basic information." Id. (*Emphasis in original*). During an audit, supplemental, recreated, or summarized information are not an acceptable substitute for the source documents. "Computer printouts and monthly reports such as fuel reports are merely recaps and are not acceptable at face value. These *must* be supported by an IVMR in order to be of any use during an audit." Id. (*Emphasis in original*).

Taxpayer's argument, that it was not required to record trip origins and destinations by city and state and that all was necessary to do was record either odometer readings or routes of travel together with a generalized breakdown in jurisdiction miles, is entirely fanciful and is unsupported by the rules cited or by simple, common sense. In addition, taxpayer's assertion that the audit carelessly lost or deliberately stole the missing records is equally far-fetched and does not warrant further discussion within this Letter of Findings.

The original audit was entirely justified in determining that the records presented at that time were inadequate; the audit was equally justified in imposing the 100 percent reassessment. Nonetheless, taxpayer was provided an additional opportunity to belatedly assemble information necessary to perform a supplemental audit and, despite the inadequacy of the after-assembled information, the original assessment was adjusted downward. Taxpayer has no basis whatsoever in challenging the results of the supplemental audit. Taxpayer may have been blithely unaware of the record keeping requirements imposed under IRP; such is no longer the case. If taxpayer was previously oblivious of these requirements, it now no longer is. The taxpayer is given notice that the Department will no longer accept or consider records which are incomplete, inadequate, or ambiguous.

FINDING

Taxpayer's challenge to the results of the original and supplemental audit is denied.

DEPARTMENT OF STATE REVENUE

0420020354.LOF

LETTER OF FINDINGS NUMBER: 02-0354
Gross Income and Sales/Use Tax
For the Years 1991-2000

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 and Use Tax – Calculation

Authority: IC 6-2.5-2-2

The taxpayer protests the method of calculating the tax due for 1991.

II. Tax Administration – Fraud Penalty

Authority: IC 6-8.1-10-4, IC 6-2.5-2-1(b), 45 IAC 15-5-7(3)

The taxpayer protests the imposition of the fraud penalty.

STATEMENT OF FACTS

The taxpayer owns and operates an automotive repair shop. The taxpayer is not incorporated and reports the business income on his individual income tax return. The taxpayer bills his customers separately for the service and parts, collecting sales tax from customers on the parts. The taxpayer paid sales tax when he purchased the parts. The taxpayer never registered with the state to collect sales tax or remitted the collected sales tax to the state. In an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," gave the taxpayer credit for sales taxes incorrectly paid when the taxpayer purchased the parts for resale to his customers. The audit also assessed sales tax on the parts the taxpayer sold to customers and use tax on tangible personal property used by the taxpayer. After the audit, the department assessed additional tax, interest and the fraud penalty. The taxpayer protested the calculation of the tax due for 1991 and the assessment of the fraud penalty.

I. Sales and Use Tax – Calculation

DISCUSSION

Due to a fire, the taxpayer only had sales tax records for the years 1999 and 2000. The taxpayer and department agreed to use the 1999 and 2000 records to develop percentages to be applied in determining the sales tax due for 1991-1998. To determine taxable sales and purchases, these percentages were applied to the gross sales and cost of purchases taken off past tax returns. At the time of the audit, the taxpayer was able to provide copies of all tax returns other than 1991. The department used an average of sales and part purchases for the previous years to arrive at the taxable sales and purchases for 1991. After the audit, the taxpayer obtained a copy of the 1991 tax return from the IRS. The taxpayer presented the actual return at the hearing and requested that the tax due be recalculated based upon the actual figures on the tax return rather than the estimate used in the audit.

Pursuant to IC 6-2.5-2-2, the sales tax "is measured by the gross retail income received by a retail merchant in a retail unitary transaction." The taxpayer's production of the previously missing 1991 income tax return provides the means to compute the actual amount of the gross retail income subject to the income tax that was received by the taxpayer in 1991. It is preferable to determine the tax due from the actual 1991 income figures rather than from an estimate of taxpayer's 1991 income.

FINDING

The taxpayer's protest is sustained and the 1991 sales tax due will be recalculated based upon the 1991 tax return.

II. Tax Administration – Fraud Penalty

DISCUSSION

The taxpayer protests the imposition of the one hundred per cent (100%) fraud penalty.

The fraud penalty is imposed pursuant to IC 6-8.1-10-4 as follows:

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.

The Regulations set out five required elements for establishing fraud. These five elements are found at 45 IAC 15-5-7 (3) as follows:

(A) Misrepresentation of a material fact: A person must truthfully and correctly report all information required by the Indiana Code and the department's regulations. Any failure to correctly report such information is a misrepresentation of a material fact. Failure to file a return may be a misrepresentation.

(B) Scienter: This is a legal term meaning guilty knowledge or previous knowledge of a state of facts, such as evasion of tax, which it was a person's duty to guard against. A person must have actual knowledge of the responsibility of reporting the information under contention. However, the reckless making of statements without regard to their truth or falsity may serve as an imputation of scienter for purposes of proving fraud.

(C) Deception: Deception operates on the mind of the victim of the fraud. If a person's actions or failure to act causes the department to believe a given set of facts which are not true, the person has deceived the department.

(D) Reliance: Reliance also concerns the state of mind of the victim and is generally considered along with deception. If the person's actions, failure to act, or misrepresentations cause the department to rely on these acts to the detriment or injury of the department, the reliance requirement of fraud will be met.

(E) Injury: The fraud instituted upon the department must cause an injury. This can be satisfied simply by the fact that the misrepresentation(s) caused the department not to have collected the money which properly belongs to the state of Indiana.

The department and the taxpayer agree that the elements of misrepresentation of a material fact, deception, reliance, and injury are met in the taxpayer's situation. The issue to be determined is whether or not the taxpayer exhibited the element of scienter in his actions.

The taxpayer argues that he did not have the requisite scienter or guilty knowledge necessary for two reasons. First he thought that he didn't need to remit the collected taxes because he paid taxes when he purchased parts. Secondly, the taxpayer argues that the preparer of his income tax returns had a duty to inform the taxpayer of his obligation to remit the sales taxes that the taxpayer collected from consumers.

Scienter can be imputed to the taxpayer through his actions. It is common knowledge that taxes are monies used to fund government and must therefore be remitted to the government. The taxpayer clearly knew of sales taxes. He paid taxes when he purchased tangible personal property. His computer programs automatically billed sales tax. He collected and retained sales tax exemption certificates. The taxpayer knew to remit his income taxes to the state. He also knew to do planning so he would not have to remit withholding taxes to the state. The taxpayer's explanation that he didn't know he was obligated to remit collected sales taxes to the state defies credulity. Nor does the taxpayer offer any explanation for his collection and retention of the sales taxes.

Further, the taxpayer took his income tax information to a tax preparer that advertises a specialty in the preparation of income taxes for preparation of his income tax returns. A tax preparer that specializes in income taxes and is hired to prepare income taxes has no duty to inform taxpayers of obligations to pay other taxes. T he department has offices throughout the state, a web site, and publications to instruct merchants how to collect and remit sales tax.

Pursuant to IC 6-2.5-2-1 (b), merchants collect the sales tax as an agent for the state. At no time did the taxpayer own or have any personal right to the collected sales taxes. The taxpayer's actions indicate that he knew taxes were to be remitted to the state. The taxpayer's self enrichment through the retention of collected sales taxes constitutes fraud.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0920020357.LOF

LETTER OF FINDINGS NUMBER: 02-0357
County Innkeeper's Tax
For the Tax Periods: 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

I. County Innkeeper's Tax – Markup for Long Distance Calls

Authority: IC 6-2.5-2-1, IC 6-9-8-2, IC 6-2.5-4-6, IC 6-2.5-4-4, *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994)

The Taxpayer protests the Department's assessment of County Innkeeper's tax on the markup of long distance telephone services offered to its guests.

STATEMENT OF FACTS

Taxpayer is in the business of providing guest accommodations for periods of less than 30 days. As part of its hotel operations, Taxpayer purchases telephone services from both a local carrier and a long distance carrier and passes these services through to its guests. The guests are not charged for local calls, however they are billed for long distance calls based on the length, location, and time of call. They are billed in a single un-segregated amount which includes Taxpayer's cost plus a markup.

During the audit, the auditor made adjustments after she determined that Taxpayer failed to include in taxable sales the long distance markup billed to the customer. More facts supplied as necessary.

I. County Innkeeper's Tax – Markup for Long Distance Calls

DISCUSSION

During the audit, the auditor found that Taxpayer failed to include in taxable sales the long distance markup for telephone calls billed to the customer. Taxpayer argues that the markup contains additional costs on which sales tax has been paid.

"An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana." IC 6-2.5-2-1. In addition, a County Innkeeper's tax may be imposed. IC 6-9-8-2 states in relevant part:

(a) Each year a tax shall be levied on every person engaged in the business of renting or furnishing, for periods of less than thirty (30) days, any lodgings in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which lodgings are regularly furnished for a consideration.

(b) This tax shall be in addition to the state gross retail tax and use tax imposed on such persons by IC 6-2.5. … the tax shall be imposed, paid, and collected in exactly the same manner as the state gross retail tax is imposed, paid and collected under IC 6-2.5.

IC 6-2.5-4-6 provides:

(a) As used in this section, "telecommunication services" means the transmission of messages or information by or using wire, cable, fiber-optics, laser, microwave, radio, satellite, or similar facilities. The term does not include value added services in which computer processing applications are used to act on the form, content, code, or protocol of the information for purposes other than transmission.

(b) A person is a retail merchant making a retail transaction when the person:

(1) furnishes or sells an intrastate telecommunication service; and

(2) receives gross retail income from billings or statements rendered to customers.

(c) Notwithstanding subsection (b), a person is not a retail merchant making a retail transaction when:

(1) The person provides, installs, construct, services, or removes tangible personal property which is used in connection with the furnishing of the telecommunication services described in subsection (a); or

(2) The person furnishes or sells the telecommunication services described in subsection (a) to another person described in this section or in section 5 of this chapter.

It is clear Taxpayer does not transmit messages, but, rather simply purchases telecommunication services from the long distance carrier and, in turn, permits guest to access the telecommunication services for a fee. Taxpayer, as purchaser rather than a seller of intrastate telecommunication services, is required to pay sales/use tax on telecommunication services purchased pursuant to the above referenced IC 6-2.5-2-1 and IC 6-2.5-4-6.

The fee charged by Taxpayer to its guests for access to the telecommunications services is also subject to sales/use tax to be collected by Taxpayer as provided by IC 6-2.5-4-4 and 45 IAC 2.2-4-8. 45 IAC 2.2-4-8, interpreting IC 6-2.5-4-4, states that every person renting or furnishing rooms, lodgings or other accommodations for periods of less than thirty (30) days must collect the gross retail tax on the gross receipts from such transactions. It further states,

> The gross receipts subject to tax include the amount which represents consideration for the rendition of these services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

Id.

In this case, Taxpayer's provision of access to telephone services for its guests is a service regularly provided in furnishing an accommodation by Taxpayer, hence, the fee for this is defined as gross receipts received from furnishing accommodations for periods of less than thirty (30) days and is subject to sales/use tax. While Taxpayer must pay sales/use tax to the telecommunications provider, they are not required to collect sales tax on the reimbursement of the long distance charge. However, the markup is considered to be a service charge that is in fact essential to and regularly provided in the furnishing of the accommodation. As such, the markup charge on long distance telephone calls is subject to the collection of sales tax.

Taxpayer contends that a portion of the markup consists of other costs such as call accounting software, special computers, telephone equipment and wiring which sales tax was also paid. They state that this is tax pyramiding and that only the markup minus these associated costs should be taxed.

In *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994), the taxpayer, who was a motel owner and operator, argued that tax pyramiding occurs in its industry because they are providing a taxable service and are not exempt from sales tax on their purchases of consumable items, non-consumable items, and utilities. The Court stated, "Not every purchase incorporated into service is exempt from sales tax."

While IC 6-2.5-4-6(c) explicitly excludes Taxpayer as a retail merchant making a retail transaction for providing telecommunications services, there is no such provision for Taxpayer with regards to the additional costs associated with the long distance service.

FINDING

The Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420020358.LOF

LETTER OF FINDINGS NUMBER: 02-0358
Sales and Use Tax
For the Tax Periods: 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

I. Sales Tax – Markup for Long Distance Calls

Authority: IC 6-2.5-2-1, IC 6-2.5-4-6, IC 6-2.5-4-4, *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994)

The Taxpayer protests the Department's assessment of sales tax on the markup of long distance telephone services offered to its guests.

STATEMENT OF FACTS

Taxpayer is in the business of providing guest accommodations for periods of less than 30 days. As part of its hotel operations, Taxpayer purchases telephone services from both a local carrier and a long distance carrier and passes these services through to its guests. The guests are not charged for local calls, however they are billed for long distance calls based on the length, location, and time of call. They are billed in a single un-segregated amount which includes Taxpayer's cost plus a markup.

During the audit, the auditor made adjustments after she determined that Taxpayer failed to include in taxable sales the long distance markup billed to the customer. More facts supplied as necessary.

I. Sales Tax – Markup for Long Distance Calls

DISCUSSION

During the audit, the auditor found that Taxpayer failed to include in taxable sales the long distance markup for telephone calls billed to the customer. Taxpayer argues that the markup contains additional costs on which sales tax has been paid.

"An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana," IC 6-2.5-2-1. Also, IC 6-2.5-4-6 provides:

> (a) As used in this section, "telecommunication services" means the transmission of messages or information by or using wire, cable, fiber-optics, laser, microwave, radio, satellite, or similar facilities. The term does not include value added services in which computer processing applications are used to act on the form, content, code, or protocol of the information for purposes other than transmission.

(b) A person is a retail merchant making a retail transaction when the person:

(1) furnishes or sells an intrastate telecommunication service; and

(2) receives gross retail income from billings or statements rendered to customers.

(c) Notwithstanding subsection (b), a person is not a retail merchant making a retail transaction when:

(1) The person provides, installs, construct, services, or removes tangible personal property which is used in connection with the furnishing of the telecommunication services described in subsection (a); or

(2) The person furnishes or sells the telecommunication services described in subsection (a) to another person described in this section or in section 5 of this chapter.

It is clear Taxpayer does not transmit messages, but, rather simply purchases telecommunication services from the long distance carrier and, in turn, permits guest to access the telecommunication services for a fee. Taxpayer, as purchaser rather than a seller of intrastate telecommunication services, is required to pay sales/use tax on telecommunication services purchased pursuant to the above referenced IC 6-2.5-2-1 and IC 6-2.5-4-6.

The fee charged by Taxpayer to its guests for access to the telecommunications services is also subject to sales/use tax to be collected by Taxpayer as provided by IC 6-2.5-4-4 and 45 IAC 2.2-4-8. 45 IAC 2.2-4-8, interpreting IC 6-2.5-4-4, states that every person renting or furnishing rooms, lodgings or other accommodations for periods of less than thirty (30) days must collect the gross retail tax on the gross receipts from such transactions. It further states,

> The gross receipts subject to tax include the amount which represents consideration for the rendition of these services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

Id.

In this case, Taxpayer's provision of access to telephone services for its guests is a service regularly provided in furnishing an accommodation by Taxpayer, hence, the fee for this is defined as gross receipts received from furnishing accommodations for periods of less than thirty (30) days and is subject to sales/use tax. While Taxpayer must pay sales/use tax to the telecommunications provider, they are not required to collect sales tax on the reimbursement of the long distance charge. However, the markup is considered to be a service charge that is in fact essential to and regularly provided in the furnishing of the accommodation. As such, the markup charge on long distance telephone calls is subject to the collection of sales tax.

Taxpayer contends that a portion of the markup consists of other costs such as call accounting software, special computers, telephone equipment and wiring which sales tax was also paid. They state that this is tax pyramiding and that only the markup minus these associated costs should be taxed.

In *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994), the taxpayer, who was a motel owner and operator, argued that tax pyramiding occurs in its industry because they are providing a taxable service and are not exempt from sales tax on their purchases of consumable items, non-consumable items, and utilities. The Court stated, "Not every purchase incorporated into service is exempt from sales tax."

While IC 6-2.5-4-6(c) explicitly excludes Taxpayer as a retail merchant making a retail transaction for providing telecommunications services, there is no such provision for Taxpayer with regards to the additional costs associated with the long distance service.

FINDING

The Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420020359.LOF

LETTER OF FINDINGS NUMBER: 02-0359
Sales and Use Tax
For the Tax Periods: 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

I. Sales Tax – Markup for Long Distance Calls

Authority: IC 6-2.5-2-1, IC 6-2.5-4-6, IC 6-2.5-4-4, *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994)

The Taxpayer protests the Department's assessment of sales tax on the markup of long distance telephone services offered to its guests.

STATEMENT OF FACTS

Taxpayer is in the business of providing guest accommodations for periods of less than 30 days. As part of its hotel operations, Taxpayer purchases telephone services from both a local carrier and a long distance carrier and passes these services through to its guests. The guests are not charged for local calls, however they are billed for long distance calls based on the length, location, and time of call. They are billed in a single un-segregated amount which includes Taxpayer's cost plus a markup.

During the audit, the auditor made adjustments after she determined that Taxpayer failed to include in taxable sales the long distance markup billed to the customer. More facts supplied as necessary.

I. Sales Tax – Markup for Long Distance Calls

DISCUSSION

During the audit, the auditor found that Taxpayer failed to include in taxable sales the long distance markup for telephone calls billed to the customer. Taxpayer argues that the markup contains additional costs on which sales tax has been paid.

"An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana," IC 6-2.5-2-1. Also, IC 6-2.5-4-6 provides:

> (a) As used in this section, "telecommunication services" means the transmission of messages or information by or using wire, cable, fiber-optics, laser, microwave, radio, satellite, or similar facilities. The term does not include value added services in which computer processing applications are used to act on the form, content, code, or protocol of the information for purposes other than transmission.
>
> (b) A person is a retail merchant making a retail transaction when the person:
>
> (1) furnishes or sells an intrastate telecommunication service; and
>
> (2) receives gross retail income from billings or statements rendered to customers.
>
> (c) Notwithstanding subsection (b), a person is not a retail merchant making a retail transaction when:
>
> (1) The person provides, installs, construct, services, or removes tangible personal property which is used in connection with the furnishing of the telecommunication services described in subsection (a); or
>
> (2) The person furnishes or sells the telecommunication services described in subsection (a) to another person described in this section or in section 5 of this chapter.

It is clear Taxpayer does not transmit messages, but, rather simply purchases telecommunication services from the long distance carrier and, in turn, permits guest to access the telecommunication services for a fee. Taxpayer, as purchaser rather than a seller of intrastate telecommunication services, is required to pay sales/use tax on telecommunication services purchased pursuant to the above referenced IC 6-2.5-2-1 and IC 6-2.5-4-6.

The fee charged by Taxpayer to its guests for access to the telecommunications services is also subject to sales/use tax to be collected by Taxpayer as provided by IC 6-2.5-4-4 and 45 IAC 2.2-4-8. 45 IAC 2.2-4-8, interpreting IC 6-2.5-4-4, states that every person renting or furnishing rooms, lodgings or other accommodations for periods of less than thirty (30) days must collect the gross retail tax on the gross receipts from such transactions. It further states,

> The gross receipts subject to tax include the amount which represents consideration for the rendition of these services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

Id.

In this case, Taxpayer's provision of access to telephone services for its guests is a service regularly provided in furnishing an accommodation by Taxpayer, hence, the fee for this is defined as gross receipts received from furnishing accommodations for periods of less than thirty (30) days and is subject to sales/use tax. While Taxpayer must pay sales/use tax to the telecommunications provider, they are not required to collect sales tax on the reimbursement of the long distance charge. However, the markup is considered to be a service charge that is in fact essential to and regularly provided in the furnishing of the accommodation. As such, the markup charge on long distance telephone calls is subject to the collection of sales tax.

Taxpayer contends that a portion of the markup consists of other costs such as call accounting software, special computers, telephone equipment and wiring which sales tax was also paid. They state that this is tax pyramiding and that only the markup minus these associated costs should be taxed.

In *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994), the taxpayer, who was a motel owner and operator, argued that tax pyramiding occurs in its industry because they are providing a taxable service and are not exempt from sales tax on their purchases of consumable items, non-consumable items, and utilities. The Court stated, "Not every purchase incorporated into service is exempt from sales tax."

While IC 6-2.5-4-6(c) explicitly excludes Taxpayer as a retail merchant making a retail transaction for providing telecommunications services, there is no such provision for Taxpayer with regards to the additional costs associated with the long distance service.

FINDING

The Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0920020360.LOF

LETTER OF FINDINGS NUMBER: 02-0360
County Innkeeper's Tax
For the Tax Periods: 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

I. County Innkeeper's Tax – Markup for Long Distance Calls

Authority: IC 6-2.5-2-1, IC 6-9-8-2, IC 6-2.5-4-6, IC 6-2.5-4-4, 45 IAC 2.2-4-8, *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994)

The Taxpayer protests the Department's assessment of County Innkeeper's Tax on the markup of long distance telephone services offered to its guests.

STATEMENT OF FACTS

Taxpayer is in the business of providing guest accommodations for periods of less than 30 days. As part of its hotel operations, Taxpayer purchases telephone services from both a local carrier and a long distance carrier and passes these services through to its guests. The guests are not charged for local calls, however they are billed for long distance calls based on the length, location, and time of call. They are billed in a single un-segregated amount which includes Taxpayer's cost plus a markup.

During the audit, the auditor made adjustments after she determined that Taxpayer failed to include in taxable sales the long distance markup billed to the customer. More facts supplied as necessary.

I. County Innkeeper's Tax – Markup for Long Distance Calls

DISCUSSION

During the audit, the auditor found that Taxpayer failed to include in taxable sales the long distance markup for telephone calls billed to the customer. Taxpayer argues that the markup contains additional costs on which sales tax has been paid.

"An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana." IC 6-2.5-2-1. In addition, a County Innkeeper's tax may be imposed. IC 6-9-8-2 states in relevant part:

(a) Each year a tax shall be levied on every person engaged in the business of renting or furnishing, for periods of less than thirty (30) days, any lodgings in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which lodgings are regularly furnished for a consideration.

(b) This tax shall be in addition to the state gross retail tax and use tax imposed on such persons by IC 6-2.5. … the tax shall be imposed, paid, and collected in exactly the same manner as the state gross retail tax is imposed, paid and collected under IC 6-2.5.

IC 6-2.5-4-6 provides:

(a) As used in this section, "telecommunication services" means the transmission of messages or information by or using wire, cable, fiber-optics, laser, microwave, radio, satellite, or similar facilities. The term does not include value added services in which computer processing applications are used to act on the form, content, code, or protocol of the information for purposes other than transmission.

(b) A person is a retail merchant making a retail transaction when the person:

(1) furnishes or sells an intrastate telecommunication service; and

(2) receives gross retail income from billings or statements rendered to customers.

(c) Notwithstanding subsection (b), a person is not a retail merchant making a retail transaction when:

(1) The person provides, installs, construct, services, or removes tangible personal property which is used in connection with the furnishing of the telecommunication services described in subsection (a); or

(2) The person furnishes or sells the telecommunication services described in subsection (a) to another person described in this section or in section 5 of this chapter.

It is clear Taxpayer does not transmit messages, but, rather simply purchases telecommunication services from the long distance carrier and, in turn, permits guest to access the telecommunication services for a fee. Taxpayer, as purchaser rather than a seller of intrastate telecommunication services, is required to pay sales/use tax on telecommunication services purchased pursuant to the above referenced IC 6-2.5-2-1 and IC 6-2.5-4-6.

The fee charged by Taxpayer to its guests for access to the telecommunications services is also subject to sales/use tax to be collected by Taxpayer as provided by IC 6-2.5-4-4 and 45 IAC 2.2-4-8. 45 IAC 2.2-4-8, interpreting IC 6-2.5-4-4, states that every person renting or furnishing rooms, lodgings or other accommodations for periods of less than thirty (30) days must collect the gross retail tax on the gross receipts from such transactions. It further states,

> The gross receipts subject to tax include the amount which represents consideration for the rendition of these services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

Id.

In this case, Taxpayer's provision of access to telephone services for its guests is a service regularly provided in furnishing an accommodation by Taxpayer, hence, the fee for this is defined as gross receipts received from furnishing accommodations for periods of less than thirty (30) days and is subject to sales/use tax. While Taxpayer must pay sales/use tax to the telecommunications provider, they are not required to collect sales tax on the reimbursement of the long distance charge. However, the markup is considered to be a service charge that is in fact essential to and regularly provided in the furnishing of the accommodation. As such, the markup charge on long distance telephone calls is subject to the collection of sales tax.

Taxpayer contends that a portion of the markup consists of other costs such as call accounting software, special computers, telephone equipment and wiring which sales tax was also paid. They state that this is tax pyramiding and that only the markup minus these associated costs should be taxed.

In *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994), the taxpayer, who was a motel owner and operator, argued that tax pyramiding occurs in its industry because they are providing a taxable service and are not exempt from sales tax on their purchases of consumable items, non-consumable items, and utilities. The Court stated, "Not every purchase incorporated into service is exempt from sales tax."

While IC 6-2.5-4-6(c) explicitly excludes Taxpayer as a retail merchant making a retail transaction for providing telecommunications services, there is no such provision for Taxpayer with regards to the additional costs associated with the long distance service.

FINDING

The Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0920020361.LOF

LETTER OF FINDINGS NUMBER: 02-0361
County Innkeeper's Tax
For the Tax Periods: 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

I. County Innkeeper's Tax – Markup for Long Distance Calls

Authority: IC 6-2.5-2-1, IC 6-9-8-2, IC 6-2.5-4-6, IC 6-2.5-4-4, *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994)

The Taxpayer protests the Department's assessment of County Innkeeper's tax on the markup of long distance telephone services offered to its guests.

STATEMENT OF FACTS

Taxpayer is in the business of providing guest accommodations for periods of less than 30 days. As part of its hotel operations, Taxpayer purchases telephone services from both a local carrier and a long distance carrier and passes these services through to its guests. The guests are not charged for local calls, however they are billed for long distance calls based on the length, location, and time of call. They are billed in a single un-segregated amount which includes Taxpayer's cost plus a markup.

During the audit, the auditor made adjustments after she determined that Taxpayer failed to include in taxable sales the long distance markup billed to the customer. More facts supplied as necessary.

I. County Innkeeper's Tax – Markup for Long Distance Calls

DISCUSSION

During the audit, the auditor found that Taxpayer failed to include in taxable sales the long distance markup for telephone calls billed to the customer. Taxpayer argues that the markup contains additional costs on which sales tax has been paid.

"An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana." IC 6-2.5-2-1. In addition, a County Innkeeper's tax may be imposed. IC 6-9-8-2 states in relevant part:

> (a) Each year a tax shall be levied on every person engaged in the business of renting or furnishing, for periods of less than thirty (30) days, any lodgings in any hotel, motel, inn, tourist camp, tourist cabin, or any other place in which lodgings are regularly furnished for a consideration.

(b) This tax shall be in addition to the state gross retail tax and use tax imposed on such persons by IC 6-2.5. … the tax shall be imposed, paid, and collected in exactly the same manner as the state gross retail tax is imposed, paid and collected under IC 6-2.5.

IC 6-2.5-4-6 provides:

(a) As used in this section, "telecommunication services" means the transmission of messages or information by or using wire, cable, fiber-optics, laser, microwave, radio, satellite, or similar facilities. The term does not include value added services in which computer processing applications are used to act on the form, content, code, or protocol of the information for purposes other than transmission.

(b) A person is a retail merchant making a retail transaction when the person:

(1) furnishes or sells an intrastate telecommunication service; and

(2) receives gross retail income from billings or statements rendered to customers.

(c) Notwithstanding subsection (b), a person is not a retail merchant making a retail transaction when:

(1) The person provides, installs, construct, services, or removes tangible personal property which is used in connection with the furnishing of the telecommunication services described in subsection (a); or

(2) The person furnishes or sells the telecommunication services described in subsection (a) to another person described in this section or in section 5 of this chapter.

It is clear Taxpayer does not transmit messages, but, rather simply purchases telecommunication services from the long distance carrier and, in turn, permits guest to access the telecommunication services for a fee. Taxpayer, as purchaser rather than a seller of intrastate telecommunication services, is required to pay sales/use tax on telecommunication services purchased pursuant to the above referenced IC 6-2.5-2-1 and IC 6-2.5-4-6.

The fee charged by Taxpayer to its guests for access to the telecommunications services is also subject to sales/use tax to be collected by Taxpayer as provided by IC 6-2.5-4-4 and 45 IAC 2.2-4-8. 45 IAC 2.2-4-8, interpreting IC 6-2.5-4-4, states that every person renting or furnishing rooms, lodgings or other accommodations for periods of less than thirty (30) days must collect the gross retail tax on the gross receipts from such transactions. It further states,

The gross receipts subject to tax include the amount which represents consideration for the rendition of these services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

Id.

In this case, Taxpayer's provision of access to telephone services for its guests is a service regularly provided in furnishing an accommodation by Taxpayer, hence, the fee for this is defined as gross receipts received from furnishing accommodations for periods of less than thirty (30) days and is subject to sales/use tax. While Taxpayer must pay sales/use tax to the telecommunications provider, they are not required to collect sales tax on the reimbursement of the long distance charge. However, the markup is considered to be a service charge that is in fact essential to and regularly provided in the furnishing of the accommodation. As such, the markup charge on long distance telephone calls is subject to the collection of sales tax.

Taxpayer contends that a portion of the markup consists of other costs such as call accounting software, special computers, telephone equipment and wiring which sales tax was also paid. They state that this is tax pyramiding and that only the markup minus these associated costs should be taxed.

In *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994), the taxpayer, who was a motel owner and operator, argued that tax pyramiding occurs in its industry because they are providing a taxable service and are not exempt from sales tax on their purchases of consumable items, non-consumable items, and utilities. The Court stated, "Not every purchase incorporated into service is exempt from sales tax."

While IC 6-2.5-4-6(c) explicitly excludes Taxpayer as a retail merchant making a retail transaction for providing telecommunications services, there is no such provision for Taxpayer with regards to the additional costs associated with the long distance service.

FINDING

The Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420020362.LOF

LETTER OF FINDINGS NUMBER: 02-0362
Sales and Use Tax
For the Tax Periods: 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

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ISSUE

I. Sales Tax – Markup for Long Distance Calls

Authority: IC 6-2.5-2-1, IC 6-2.5-4-6, IC 6-2.5-4-4, *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994)

The Taxpayer protests the Department's assessment of sales tax on the markup of long distance telephone services offered to its guests.

STATEMENT OF FACTS

Taxpayer is in the business of providing guest accommodations for periods of less than 30 days. As part of its hotel operations, Taxpayer purchases telephone services from both a local carrier and a long distance carrier and passes these services through to its guests. The guests are not charged for local calls, however they are billed for long distance calls based on the length, location, and time of call. They are billed in a single un-segregated amount which includes Taxpayer's cost plus a markup.

During the audit, the auditor made adjustments after she determined that Taxpayer failed to include in taxable sales the long distance markup billed to the customer. More facts supplied as necessary.

I. Sales Tax – Markup for Long Distance Calls

DISCUSSION

During the audit, the auditor found that Taxpayer failed to include in taxable sales the long distance markup for telephone calls billed to the customer. Taxpayer argues that the markup contains additional costs on which sales tax has been paid.

"An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana," IC 6-2.5-2-1. Also, IC 6-2.5-4-6 provides:

> (a) As used in this section, "telecommunication services" means the transmission of messages or information by or using wire, cable, fiber-optics, laser, microwave, radio, satellite, or similar facilities. The term does not include value added services in which computer processing applications are used to act on the form, content, code, or protocol of the information for purposes other than transmission.
>
> (b) A person is a retail merchant making a retail transaction when the person:
>
> (1) furnishes or sells an intrastate telecommunication service; and
>
> (2) receives gross retail income from billings or statements rendered to customers.
>
> (c) Notwithstanding subsection (b), a person is not a retail merchant making a retail transaction when:
>
> (1) The person provides, installs, construct, services, or removes tangible personal property which is used in connection with the furnishing of the telecommunication services described in subsection (a); or
>
> (2) The person furnishes or sells the telecommunication services described in subsection (a) to another person described in this section or in section 5 of this chapter.

It is clear Taxpayer does not transmit messages, but, rather simply purchases telecommunication services from the long distance carrier and, in turn, permits guest to access the telecommunication services for a fee. Taxpayer, as purchaser rather than a seller of intrastate telecommunication services, is required to pay sales/use tax on telecommunication services purchased pursuant to the above referenced IC 6-2.5-2-1 and IC 6-2.5-4-6.

The fee charged by Taxpayer to its guests for access to the telecommunications services is also subject to sales/use tax to be collected by Taxpayer as provided by IC 6-2.5-4-4 and 45 IAC 2.2-4-8. 45 IAC 2.2-4-8, interpreting IC 6-2.5-4-4, states that every person renting or furnishing rooms, lodgings or other accommodations for periods of less than thirty (30) days must collect the gross retail tax on the gross receipts from such transactions. It further states,

> The gross receipts subject to tax include the amount which represents consideration for the rendition of these services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

Id.

In this case, Taxpayer's provision of access to telephone services for its guests is a service regularly provided in furnishing an accommodation by Taxpayer, hence, the fee for this is defined as gross receipts received from furnishing accommodations for periods of less than thirty (30) days and is subject to sales/use tax. While Taxpayer must pay sales/use tax to the telecommunications provider, they are not required to collect sales tax on the reimbursement of the long distance charge. However, the markup is considered to be a service charge that is in fact essential to and regularly provided in the furnishing of the accommodation. As such, the markup charge on long distance telephone calls is subject to the collection of sales tax.

Taxpayer contends that a portion of the markup consists of other costs such as call accounting software, special computers, telephone equipment and wiring which sales tax was also paid. They state that this is tax pyramiding and that only the markup minus these associated costs should be taxed.

In *Greensburg Motel v. Dept. of State Revenue*, 629 N.E.2d 1302 (Ind. Tax 1994), the taxpayer, who was a motel owner and operator, argued that tax pyramiding occurs in its industry because they are providing a taxable service and are not exempt from sales tax on their purchases of consumable items, non-consumable items, and utilities. The Court stated, "Not every purchase incorporated into service is exempt from sales tax."

While IC 6-2.5-4-6(c) explicitly excludes Taxpayer as a retail merchant making a retail transaction for providing telecommunications services, there is no such provision for Taxpayer with regards to the additional costs associated with the long distance service.

FINDING

The Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0120020462.LOF

LETTER OF FINDINGS NUMBER: 02-0462
Individual State Income Tax
For the Years 1998, 1999, and 2000

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

ISSUES

I. Proposed Assessments of Individual Income Tax

Authority: IC 6-8.1-5-1(a); Portillo v. Comm'r Internal Revenue, 988 F.2d 27 (5th Cir. 1993); 2002 U.S. Master Tax Guide (CCH 2001); Internal Revenue Service – Small Bus/Self-Employed, http://www.irs.gov/businesses/small/article

Taxpayer argues that there is no evidence establishing he received taxable income during the years at issue.

II. Disclosure of Federal Tax Information

Authority: IC 6-8.1-1-1; IC 6-8.1-3-1(a); I.R.C. § 6013(a); I.R.C. § 6013(c) to (o); I.R.C. § 6013(d)

Taxpayer maintains that the information, purportedly establishing that he received taxable income, was wrongly obtained from the Internal Revenue Service.

III. Exclusion of Federal Tax Information

Authority: United States v. Janis, 428 U.S. 433 (1975); Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914); Kievela v. Dep't of Treasury, 536 N.W.2d 498 (Mich. 1995); Black's Law Dictionary (7th ed. 1999)

Taxpayer argues the information obtained from the Internal Revenue may not be used as the basis for the proposed assessments on the ground that the information is "Fruit of the Poisonous Tree."

STATEMENT OF FACTS

The Department of Revenue (Department) obtained information from the Internal Revenue Service indicating that taxpayer received taxable income during 1998, 1999, and 2000. Based on that information, the Department determined taxpayer owed state income taxes and sent taxpayer notices of "Proposed Assessment." Taxpayer disagreed with the Department's assessments and submitted a protest to that effect. An administrative hearing was conducted, and this Letter of Findings results.

DISCUSSION

I. Proposed Assessments of Individual Income Tax

Taxpayer states that there is no information substantiating the conclusion that he received taxable income during 1998, 1999, and 2000 and that the Department "plucked the number[s] out of thin air."

The Department received information indicating that five separate businesses – during one or more of the years at issue – had prepared and submitted nine copies of IRS Form 1099 to the federal government. The five businesses reported that taxpayer received income during 1998, 1999, and 2000. The Form 1099 "is filed by payers for each person to whom at least $10 in gross royalty payments, or $600 for rents or services in the course of a trade or business, was paid." 2002 U.S. Master Tax Guide para. 2565, p. 649 (CCH 2001). The Form 1099 is accompanied by a Form 1096 "which is similar to a cover letter" identifying the name of the filer. Internal Revenue Service – Small Bus/Self-Employed, (October 10, 2002) http://www.irs.gov/businesses/small/article.

Taxpayer cites to Portillo v. Comm'r Internal Revenue, 988 F.2d 27 (5th Cir. 1993), in support of his argument that the Department incorrectly assessed the additional income taxes. In that case, the court stated that, "A naked assessment without any foundation is arbitrary and erroneous." Id. at 29. An assessment of additional income taxes, resting entirely on the credibility of a single witness was a "naked assertion" and was "not sufficient support for a notice of deficiency." Id.

The Department based the notices of "Proposed Assessment" on the amount of income specified on the Form 1099s. There is nothing to indicate the information stated on the forms was incorrect. There is nothing to indicate that the calculations used in determining the amount of "State Taxable Income" were improperly or inaccurately performed. IC 6-8.1-5-1(a) states that if the Department "reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available."

Taxpayer has failed to establish that the amount of taxes listed on the notices of “Proposed Assessment” was erroneous. Taxpayer’s assertion, that the Department “plucked the number[s] out of thin air,” is incorrect. Unlike the “naked assessment” criticized in Portillo, the proposed assessments were not an “arbitrary and erroneous notice of deficiency” but were based on the unchallenged amounts of income specified on the Form 1099s. Portillo, 988 F.2d at 28.

FINDING

Taxpayer’s protest is denied.

II. Disclosure of Federal Tax Information

Taxpayer challenges the proposed assessments on the ground that the information contained on the federal Form 1099s should not have been provided to the Department. According to taxpayer, because the information was wrongly disclosed to the state, the proposed assessments of additional income taxes cannot stand.

I.R.C. § 6013(a) states that, “Returns and return information shall be confidential” and that no person who has access to the information “shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.” However, I.R.C. § 6013(c) to (o) allows the disclosure of taxpayer information under thirteen specific circumstances. Included among those specific exceptions, is I.R.C. § 6013(d) which states that, “Returns and return information... shall be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws....”

Under IC 6-8.1-3-1(a), “The department [of revenue] has the primary responsibility for the administration, collection, and enforcement of the listed taxes.” The term “listed tax” is defined at IC 6-8.1-1-1 which specifically includes “the adjusted gross income tax” as one of the Indiana’s “listed taxes.”

Because the Department is charged with the responsibility for administering, collecting, and enforcing Indiana’s adjusted gross income tax laws, it was entitled to request and obtain the information contained on the Form 1099s. Under I.R.C. § 6013(d), the Internal Revenue Service was authorized to disclose the information on those forms to the designated state representative. There is no indication that the Department acted in derogation of its “primary responsibility” as set out in IC 6-8.1-3-1(a) in obtaining the challenged information or that the Internal Revenue exceeded its mandate under I.R.C. § 6013 by releasing that information to the state.

FINDING

Taxpayer’s protest is denied.

III. Exclusion of Federal Tax Information

According to taxpayer, even if the Department had the authority to request the information contained on the Form 1099s, the information should be excluded from consideration because the information is “Fruit of the Poisonous Tree.”

Taxpayer’s argument is somewhat obscure. As best that can be determined, taxpayer maintains that the taxpayer’s federal “IMF” (Individual Master File) contains mistaken information. Therefore, because the information reported on the Form 1099s came from the same source that encoded the information on the IMF, the Form 1099s are irretrievably tainted, and the 1099s should be excluded pursuant to the “Fruit of the Poisonous Tree” doctrine.

Taxpayer submitted one page of his federal IMF report. That one page contains information presented in cryptic form using various codes, acronyms, numbers, and enigmatic entries. The taxpayer also produced one page of the “IMF Filing Requirement Codes.” According to taxpayer, reading the two documents in conjunction, reveals that the IMF page incorrectly designates taxpayer’s profession.

Taxpayer seeks to preclude the Department from relying on the Form 1099s because the information contained is “Fruit of the Poisonous Tree.” Taxpayer refers to the exclusionary rule that “evidence derived from an illegal search, arrest, or interrogation is inadmissible because the evidence... was tainted by the illegality.” Black’s Law Dictionary 679 (7th ed. 1999). In Weeks v. United States, 232 U.S. 383, 389 (1914), the court found that evidence seized in violation of the U.S. Const. amend. IV is not admissible in a federal criminal proceedings. In Mapp v. Ohio, 367 U.S. 643, 655 (1961), the Supreme Court held that the exclusionary rule also applies in state criminal proceedings. However, the courts have determined that the exclusionary rule does not apply in all civil proceedings. “Unless there is collusion between the agency that performed the illegal search and the agency seeking to admit the incriminating evidence, the evidence is admissible.” Kievela v. Dep’t of Treasury, 536 N.W.2d 498, 500 (Mich. 1995). *See also* United States v. Janis, 428 U.S. 433 (1975) (finding that the exclusionary rule did not apply to “federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer” stemming from an unpaid tax assessment).

Taxpayer’s argument fails. The “Fruit of the Poisonous Tree” doctrine is inapplicable because the Form 1099s were not obtained by means of an illegal search, arrest, or seizure. Taxpayer may – or may not – have reason to question the accuracy of the information contained on the IMF, but his contention, that the Department obtained the Form 1099s in contravention of his U.S. Const. amend. IV rights, is entirely frivolous.

FINDING

Taxpayer’s protest is denied.

DEPARTMENT OF STATE REVENUE

0120020471.LOF

LETTER OF FINDINGS NUMBER: 02-0471
Individual Adjusted Gross Income Tax
For the Years 1999, 2000, and 2001

NOTICE: Under 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. Administrative Hearing Denial

Authority: U.S. Const. amends. V, XIV; Ind. Const. art. 1, § 12; IC 6-8.1-5-1(a); IC 6-8.1-5-1(c); 45 IAC 15-5-2(c); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)

Taxpayer challenged the Department's authority to schedule an administrative hearing on his behalf.

II. Applicability and Imposition of Indiana Individual Income Tax

Authority: IC 6-2.1-1-16(a); IC 6-3-1-1 et seq.; 45 IAC 1.1-1-22; Commissioner v. Earl, 281 U.S. 111 (1930); Eisner v. Macomber, 252 U.S. 189 (1920); United States v. Connor, 898 F.2d 942 (3rd Cir. 1990); United States v. Koliboski, 732 F.2d 1328 (7th Cir. 1984); United States v. Romero, 640 F.2d 1014 (9th Cir. 1981); Connor v. United State, 303 F.Supp. 1187 (S.D. Tex. 1969); I.R.C. § 911; I.R.C. § 861; I.R.C. § 61(a); Treas. Reg. § 1.1-1(b)

Taxpayer argues that Indiana is without authority to impose a tax on his personal income.

STATEMENT OF FACTS

The Indiana Department of Revenue (Department) determined that taxpayer failed to pay income taxes for 1999, 2000, and 2001. Accordingly, the Department sent taxpayer notices of "Proposed Assessment" for those years. In response, taxpayer forwarded an "Administrative Notice of Debt Not Owed." The Department interpreted taxpayer's response as a tax protest. The taxpayer was contacted on October 10, 2002, for the purpose of scheduling a hearing in order to "permit the taxpayer an opportunity to present, facts, issues, and arguments in support of [his] position." The taxpayer declined to respond, and the Department again contacted taxpayer on December 2, 2002, asking him how he wished to proceed with his protest. Taxpayer declined to respond. On February 13, 2003, taxpayer was given notice that a hearing had been scheduled on his behalf for March 13, 2003. Taxpayer declined to participate but sent a letter indicating that he "denied" the hearing because he did "not wish to waive [his] Unalienable Rights granted by God are [sic] Creator and protected by both the United States and Indiana Constitutions." Accordingly, this Letter of Findings was based upon the arguments set out in taxpayer's initial protest letter and his subsequent correspondence.

DISCUSSION

I. Administrative Hearing Denial

Taxpayer argues that the administrative process – by which he was entitled to explain the basis for his protest – violates both his God-given rights and his rights under the Indiana and United States Constitutions.

Taxpayer was sent notices of "Proposed Assessment" pursuant to IC 6-8.1-5-1(a) which states that, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department."

An individual taxpayer is entitled to challenge this "Proposed Assessment." IC 6-8.1-5-1(c) states that the taxpayer, after receiving the assessments, "has sixty (60) days from the date the notice is mailed to pay the assessment or to file a written protest." Having filed a protest, "the department shall: (1) set the hearing at the department's earliest convenient time." IC 6-8.1-5-1(c). If the taxpayer determines that a hearing is not necessary, "The taxpayer may, in lieu of a hearing, submit written objections to the assessment." 45 IAC 15-5-2(c).

Taxpayer maintains that the administrative procedures deny his fundamental rights under the Indiana and United States Constitutions. Taxpayer does not specify as much, but he apparently argues the Department's hearing procedures violate the Due Process Clause of both the federal and state constitutions. (U.S. Const. amends. V, XIV; Ind. Const. art. 1, § 12). Under the Due Process Clause, the essential guarantee is that of fairness. Any procedure must be fundamentally fair to the individual in the resolution of the factual and legal basis for government actions which will potentially deprive the citizen of life, liberty, or property. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

Taxpayer has provided no basis for substantiating his argument that the Department's administrative hearing procedure violates his constitutional due process rights. To the contrary, taxpayer was plainly provided a full, fair opportunity to address the issues raised within his protest. There is no indication the available procedure was not "fundamentally fair."

FINDING

Taxpayer's protest is denied.

II. Applicability and Imposition of Indiana Individual Income Tax

Taxpayer states that he "took the trouble to actually read the tax laws and found that I am not liable for federal or state income taxes." Taxpayer suggests that the state income tax laws do not apply to the income received by ordinary citizens such as himself. Specifically, taxpayer states that, "I am not a government employee, I have not operated as a corporation, not have I contracted for the federal income tax, nor have I volunteered for the federal or state income tax."

Taxpayer provides numerous case citations in support of his contentions. For example, taxpayer cites to Eisner v. Macomber, 252 U.S. 189 (1920), a case in which the Court addressed the issue of whether the U.S. Const. amend. XVI permitted the government to tax a taxpayer's stock dividends resulting from a corporation's accumulated profits. The Court held that the stock dividend did not involve the realization of a taxable gain but that the corporation's accumulated profits were simply capitalized or retained as surplus. Id. at 211. In effect, the taxpayer in Eisner had not yet realized a gain severed from and independent of the corporations' assets. Id. at 211-12. In reaching that decision, the Court stated that income is the "gain derived from capital, from labor, or from both combined." Id. at 201.

In addition, taxpayer cites to Connor v. United State, 303 F.Supp. 1187 (S.D. Tex. 1969). In particular, taxpayer points to the court's statement that, "Whatever may constitute income, therefore, must have the essential feature of gain to the recipient." In Connor, the district court found that the plaintiffs' receipt of insurance proceeds, in the form of rental payments, did not constitute taxable income and that the IRS had erroneously included the rental payments in the plaintiffs' gross income. Id. at 1188.

Taxpayer's case citations do not get him where he wants to go. The Eisner case simply stands for the proposition that unrealized corporate income does not constitute taxable corporate income. Taxpayer relies on this case to support the argument that only corporate income is taxable income. However, nowhere in this opinion does the Court address the question of whether individual income is or is not taxable. In Eisner, the Court was asked the question of what did or did not constitute corporate income; the Court answered that question.

Taxpayer's reliance on Connor is equally unavailing, because the issue of whether ordinary wages were or were not taxable income was not before the district court. The Connor court simply determined that the plaintiffs did not realize taxable income when their insurance company reimbursed them for the cost of renting accommodations when plaintiffs' original home was destroyed in a fire.

Taxpayer places special reliance on the Supreme Court's ruling found in Commissioner v. Earl, 281 U.S. 111 (1930). The particular quotation cited by taxpayer states that, "It is to be noted that by the language of the Act it is not salaries, wages or compensation for personal services that are to be included in gross income. That which is to be included is gains, profits, and income derived from salaries, wages or compensation for personal services." The above language is not the Supreme Court's language authored by Justice Holmes nor is language taken from the Court's opinion. Taxpayer quotes the language of one of the appellate counsel which – as customary in earlier printed opinions – was set out before the court rendered its opinion. The language represents appellate counsel's argument; it does not represent and is not part of the Court's decision.

Taxpayer argues that the Internal Revenue Code – on which Indiana's own adjusted gross income tax is based – exempts ordinary income. Taxpayer errs. I.R.C. § 61(a) states as follows:

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
> (2) Gross income derived from business;
> (3) Gains derived from dealings in property;
> (4) Interest;
> (5) Rents;
> (6) Royalties;
> (7) Dividends;
> (8) Alimony and separate maintenance payments;
> (9) Annuities;
> (10) Income from life insurance and endowment contracts;
> (11) Pensions.

As if the language in I.R.C § 61 was not sufficiently straightforward, Treas. Reg. § 1.1-1(b) provides that, "[i]n general, all citizens of the United States, wherever resident, and all resident alien individuals are liable to the income taxes imposed by the code whether the income is received from sources within or without the United States."

Taxpayer relies on I.R.C. §§ 861, 911 for the contention that only nonresident aliens and foreign corporation are liable for income taxes based on the privilege of receiving income from sources within the United States. Taxpayer's reliance is entirely misbegotten. I.R.C. §§ 861, 911 define the sources of income – United States and non-United States source income – for such purposes as the prevention of double taxation of income that is subject to tax by more than one country. These sections neither specify whether income is taxable nor do they determine or define gross income. Taxpayer's conclusion, that only income received by foreign corporations and nonresident aliens, is clearly contrary to well established legal precedent and common sense. There is not a single court decision which has ever determined that the wages of an ordinary, resident citizen are not subject to income tax.

"Let us now put [the question] to rest: WAGES ARE INCOME. Any reading of tax cases by would-be tax protesters now should preclude a claim of good-faith belief that wages – or salaries – are not taxable" United States v. Koliboski, 732 F.2d 1328, 1329 n. 1 (7th Cir. 1984) (Emphasis in original). "Compensation for labor or services, paid in the form of wages or salary, has been universally held by the courts of this republic to be income, subject to the income tax laws currently applicable.... [Taxpayer] seems to have been inspired by various tax protesting groups across the land who postulate weird and illogical theories of tax avoidance all to the detriment of the common weal [sic] and of themselves." United States v. Romero, 640 F.2d 1014, 1016 (9th Cir. 1981). "Every court which has ever considered the issue has unequivocally rejected the argument that wages are not income." United States v. Connor, 898 F.2d 942, 943 (3rd Cir. 1990).

Taxpayer argues that even if his income is subject to the federal income tax, nonetheless, that same income is not subject to Indiana's Gross Income tax. In support, taxpayer cites to IC 6-2.1-1-16 which states in its entirety:

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

Taxpayer correctly points out that a "private citizen" is not one of the enumerated categories of taxpayer as defined under IC 6-2.1-1-16. Indeed, 45 IAC 1.1-1-22 specifically states that, "[t]he term [taxpayer] does not include... an individual." Taxpayer can rest secure in the knowledge that he is not subject to Indiana Gross Income Tax. However, that determination is entirely pointless because no individual is *ever* subject to gross income tax. The state's gross income tax is imposed exclusively on business entities which are either resident or domiciliarys of Indiana or on non-resident business entities which nonetheless derive income from doing business within the state. IC 6-2.1-2.

Taxpayer's concern is – or should be – with the provisions of the individual adjusted gross income tax provisions as set out in IC 6-3-1-1 et seq. because that is the tax for which he was assessed.

Taxpayer's remaining misguided arguments are equally frivolous and the Department will not expend further resources in addressing them.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120020566.LOF

LETTER OF FINDINGS NUMBER: 02-0566
Individual Adjusted Gross Income Tax
For the Year 2001

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

ISSUES

I. Proposed Assessment – Indiana Individual Income Tax

Authority: IC 6-8.1-5-1(a); IC 6-8.1-5-1(b); IC 6-8.1-5-1(c)

Taxpayers argue that Department of Revenue acted outside of its authority in issuing a "Proposed Assessment" of additional Indiana income taxes.

II. Voluntary Compliance with the State's Adjusted Gross Income Tax

Authority: IC 6-8.1-11-2; Helvering v. Mitchell, 303 U.S. 391 (1938); United States v. Gerads, 999 F.2d 1255 (9th Cir. 1993); McLaughlin v. United States, 832 F.2d 986 (7th Cir. 1987); McKeown v. Ott, No. H 84-169, 1985 WL 11176 at *2 (N.D. Ind. Oct. 30, 1985)

Taxpayers maintain that the state's income tax is based on "voluntary compliance" and that they no longer volunteer to pay state income taxes.

STATEMENT OF FACTS

Taxpayers prepared and submitted a 2001 Income Tax Return. On that return, taxpayers reported that they had zero federal adjusted gross income and requested a refund of the amount of taxes previously withheld. Subsequently, the Department of Revenue (Department) concluded that taxpayers erred and sent taxpayers a notice of "Proposed Assessment." Thereafter, in September of

2002, the taxpayers submitted a protest challenging the proposed assessment of additional tax. The protest was assigned to the hearing officer in December of 2002. Taxpayers were offered the opportunity to explain further the basis for the protest during an administrative hearing but declined the opportunity to schedule a hearing. On February 4, 2003, taxpayers were informed that an administrative hearing had been scheduled on their behalf for March 4, 2003, and were invited to participate in the March 4 hearing or to suggest an alternative date and time for the hearing. Taxpayers forwarded correspondence to the effect that they would be unable to attend the scheduled hearing but were unwilling or unable to suggest an alternative date. In the absence of any verifiable, substantive reason for further delaying a timely resolution of the taxpayer's protest, this Letter of Findings was prepared which attempts to address the issues raised by taxpayers.

DISCUSSION

I. Proposed Assessment – Indiana Individual Income Tax

Taxpayers are much aggrieved by the notice of "Proposed Assessment." Taxpayers argue that there is no law which permits the Department to issue such an assessment, that they have already submitted a legitimate return, and that the Department is without authority to correct or amend the information submitted on that original return. As taxpayers state, "The state of Indiana cannot Legally take a taxpayer's LEGAL Indiana IT-40 based on Voluntary Compliance of Self Assessment and change it... we being LEGAL do not LEGALLY recognize the ILLEGAL 'PROPOSE ASSESSMENT,' that the Indiana Dept. of Revenue has sent us." (Emphasis in original).

The notice of proposed assessment was rendered pursuant to IC 6-8.1-5-1(a) which states that, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a *proposed assessment* of the unpaid tax on the basis of the best information available to the department." (*Emphasis added*).

Taxpayers indicated on their 2001 Indiana return that they had received no adjusted gross income during the year. However, the W-2 forms attached to the 2001 return would – on their face – seem to indicate otherwise. Acting pursuant to IC 6-8.1-5-1(a), the Department was entitled to consider the information contained on the W-2 forms and to act accordingly. Taxpayers' arguments to the contrary, the Department was not only entitled to act on that information, but was required to do so. The statute is unambiguous; "The department shall make a proposed assessment of the unpaid tax...." Id.

Nonetheless, having received the notice of "Proposed Assessment," the taxpayers were authorized, under IC 6-8.1-5-1(c), to contest the notice. However, the taxpayers thereafter were required to demonstrate how the proposed assessment was incorrect. "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person[s] against whom the proposed assessment is made." IC 6-8.1-5-1(b).

Despite having been afforded three months in which to explain the basis for challenging the original notice of proposed assessment, the taxpayers have failed to do so. There is no basis whatsoever for a determination that the notice of proposed assessment is either legally insufficient or factually incorrect.

FINDING

Taxpayers' protest is denied.

II. Voluntary Compliance with the State's Adjusted Gross Income Tax

Although denied the benefit of taxpayers' more detailed explanation, it would appear that taxpayers believe that Indiana's individual income tax is entirely voluntary. Having arrived at this conclusion, taxpayers decided that they no longer wish to "voluntarily" pay Indiana income taxes. As taxpayers state, "By what law, has the state of Indiana, the right to take a tax payer's, LEGAL IT-40 based on SELF ASSESSMENT by VOLUNTARY COMPLIANCE and changed it to meet the state of Indiana's wants???" (Emphasis in original).

Taxpayers' assertion is apparently based on IC 6-8.1-11-2 which states as follows:

> The general assembly makes the following findings: (3) The Indiana tax system is based largely on *voluntary compliance*. (4) The development of understandable tax laws and the education of taxpayers concerning the tax laws will improve *voluntary compliance* and the relationship between the state and taxpayers. (*Emphasis added*).

Taxpayers' conclusion is unsupported and wholly frivolous. In describing the nature of the complementary federal tax system, the Supreme Court has stated that, "In assessing income taxes the Government relies primarily upon the disclosure by the taxpayer of the relevant facts. This disclosure it requires him to make in his annual return. To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions. Such sanctions may confessedly be either criminal or civil." Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

Taxpayers' fundamental contention – that Indiana depends on its citizens' voluntary compliance with the tax laws – is undeniable. Indeed, the state also depends on its licensed drivers to drive on the right side of the road. However, that does not mean that failure to comply with the law is without predictable consequences. "Any assertion that the payment of income taxes is voluntary is without merit. It is without question that the payment of income taxes is not voluntary." United States v. Gerads, 999 F.2d 1255, 1256 (9th Cir. 1993). "The notion that the federal income tax is contractual or otherwise consensual in nature is not only utterly without foundation, but despite [appellant's] protestation to the contrary, has been repeatedly rejected by the courts." McLaughlin v. United States, 832 F.2d 986, 987 (7th Cir. 1987). "[A]rguments about who is a 'person' under the tax laws, the assertion that 'wages are not income', and maintaining that *payment of taxes is a purely voluntary function do not comport with common sense - let alone the law*." McKeown v. Ott, No. H 84-169, 1985 WL 11176 at *2 (N.D. Ind. Oct. 30, 1985) (*Emphasis added*). Such arguments "have been clearly and repeatedly rejected by this and every other court to review them." Id. at *1.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020599.LOF

LETTER OF FINDINGS NUMBER: 02-0599
Sales and Use Taxes
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.

II. Tax Administration – Interest

Authority: IC 6-8.1-10.1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer is a retailer of diesel fuel and wholesaler of gasoline, diesel fuel, grease, oil, and other petroleum products. The taxpayer made sales on which it failed to collect sales tax and for which it did not have a valid exemption certificate. The taxpayer was able to obtain a Special Sales/Use Tax Exemption Certificate (AD-70) from most of its customers. Sales tax was assessed in accordance with 45 IAC 2.2-8-12. Taxpayer also failed to self assess use tax for a rented forklift that is used in its warehouse, a pager, tires, repair parts, trailers and diesel fuel for its own use. Audit determined that the taxpayer had no use tax accrual system in place although it was previously audited.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it had reasonable cause to believe that no tax was due on its transportation equipment.

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

Taxpayer failed to self-assess use tax on clearly taxable items and had no use tax accrual system in place. Taxpayer's tax liability increased more than sevenfold for the current audit period and the Taxpayer has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

II. Tax Administration – Interest

DISCUSSION

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

FINDING

Taxpayer's protest is denied.

CONCLUSION

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

DEPARTMENT OF STATE REVENUE

0420020606.LOF

LETTER OF FINDINGS NUMBER: 02-0606
Sales and Use Tax
For Tax Periods: 1998-2000

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

ISSUES

1. Sales and Use Tax – Free Distribution Newspapers

Authority: IC 6-8.1-5-1(b), IC 6-2.5-3-2(a), IC 6-2.5-5-31

The taxpayer protests the assessment of use tax on publications that it contends qualify for exemption as free distribution newspapers.

2. Tax Administration – Penalty

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

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

STATEMENT OF FACTS

The taxpayer is a publishing company that publishes and distributes free-of-charge apartment listings for major metropolitan areas throughout the United States. In particular, the taxpayer publishes listings for several cities throughout Indiana wherein various real estate management companies place advertisements. Each advertisement contains detail information on the types of apartment available (within a defined region), features available at the apartment complex itself, square footage, amenities, and contact information for the corresponding management office. Pictures of the apartment and maps for locating the apartments are frequently provided. 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 issues of use tax assessed on the taxpayer's publications and penalty. The taxpayer conceded that the racks used in the distribution of the publications were properly subject to the use tax.

1. Sales and Use Tax – Free Distribution Newspapers

DISCUSSION

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

Pursuant to IC 6-2.5-3-2 (a), Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana. The department assessed use tax on the taxpayer's cost of printing, labor and materials utilized in the production of the guides. The taxpayer argues that pursuant to IC 6-2.5-5-31(d), these items qualify for exemption because they are used in the production of a free distribution newspaper. The issue to be determined is whether the taxpayer's publication is a free distribution newspaper.

The Indiana Code defines a "free distribution newspaper" at IC 6-2.5.5.31 as follows:

(a) As used in this section, "free distribution newspaper" means any community newspaper, shopping paper, shoppers' consumer paper, penny-saver, shopping guide, town crier, dollar stretcher, or other similar publication which:

(1) is distributed to the public on a community-wide basis, free of charge;
(2) is published at stated intervals of at least once a month;
(3) has continuity as to title and general nature of content from issue to issue;
(4) does not constitute a book, either singly or when successive issues are put together;
(5) contains advertisements from numerous unrelated advertisers in each issue;
(6) contains news of general or community interest, community notices, or editorial commentary by different authors, in each issue; and
(7) is not owned by, or under the control of, the owners or lessees of a shopping center, a merchant's association, or a business that sells property or services (other than advertising) whose advertisements for their sales of property or services constitute the predominant advertising in the publication.

(b) The term "free distribution newspaper" does not include mail order catalogs or other catalogs, advertising fliers, travel brochures, house organs, theater programs, telephone directories, restaurant guides, shopping center advertising sheets, and similar publications.

The department agrees that the taxpayer's publication meets many of the statutory requirements for classification as a free distribution newspaper. It is necessary, however, that the taxpayer's publication meet all the requirements. The statute requires that a free distribution newspaper contain "news of general or community interest, community notices, or editorial commentary by different authors, in each issue." The taxpayer argues that its publication meets this requirement by offering lists of Indianapolis phone numbers, a welcoming letter from the mayor, a moving checklist, apartment locator maps, a guide on how to use the guide, and a welcoming letter from the president of the Apartment Association of Indiana.

The few cited items listed in a several hundred page publication do not meet the statutory standard. They do not contain information on recent events of general interest or notices of specific events in the near future. There are no articles setting out the opinions of the publication's editors. The publications do not give any community information that is not more fully and easily accessible in the local phone book. The publication is marketed to persons looking for apartments and they are the only persons likely to read it. Someone interested in specific community events of general interest or analysis of an issue of general concern would not choose to read this publication in lieu of others readily available in any market.

Of all the examples given in the statute, this publication most closely resembles restaurant guides. The statute specifically states that restaurant guides are not free distribution newspapers. Neither is this publication.

FINDING

The taxpayer's protest is denied.

2. Tax Administration – Penalty

DISCUSSION

The taxpayer also protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Negligence is defined at 45 IAC 15-11-2(b) 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.

Although they were clearly subject to the tax, the taxpayer failed to self assess and remit use tax on the racks used in the distribution of the taxpayer's publication. This breach of the taxpayer's duty to use the reasonable care expected of an ordinary taxpayer constituted negligence. Therefore the negligence penalty properly applies in this instance.

FINDING

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

DEPARTMENT OF STATE REVENUE

0220030063P.LOF

LETTER OF FINDINGS NUMBER: 03-0063P
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 was audited for Calendar Year 1999. At audit, it was determined that the taxpayer failed to report Gross Income from Royalties from affiliated corporations that own and operate retail businesses in Indiana. The department issued a penalty billing.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer, in a letter dated January 17, 2003 merely states that the Indiana return was completed with reasonable care to the best of their ability and was consistent with prior years. Taxpayer requests the penalty be waived.

In reviewing the audit and taxpayer's account, it is noted that the taxpayer was not registered to do business in the State of Indiana until the audit was completed and no tax returns were filed.

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

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220030064P.LOF

LETTER OF FINDINGS NUMBER: 03-0064P
Gross Income Tax
For Calendar Year 2000

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

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalties assessed.

STATEMENT OF FACTS

Taxpayer was assessed a penalty for failing to file and make payment by the due date of the return and a penalty for the underpayment of estimated income taxes. Taxpayer protests the proposed penalty assessments for the underpayment of estimated tax and the late penalty. Taxpayer's Calendar Year 2000 Return was filed on March 5, 2002 with a balance due in the amount of $17,784 that it remitted with the return. Taxpayer made no estimated payments throughout the year.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalties assessed for the underpayment of estimated income taxes and the late payment of taxes. Taxpayer paid none of its prior year's estimated taxes by the due date of the return. Taxpayer filed its return and payment late, which generated a late payment penalty. Taxpayer made no quarterly estimated payments throughout the year and was assessed a penalty for the underpayment of estimated income taxes.

Taxpayer requests an abatement of the penalty and states it was not "deliberate or negligent" but based its tax liability upon the trial balance available at the time of filing an extension.

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. Taxpayer failed to make the quarterly estimated payments. Taxpayer also failed to pay tax timely and has not provided reasonable cause to allow a penalty waiver. Procedures should have been in effect to assure that taxes were timely paid.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220030066P.LOF

LETTER OF FINDINGS NUMBER: 03-0066P
Indiana S Corporation Income Tax
For Calendar Year 2000

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer filed its S Corporation return late and was assessed a late penalty. The original due date of the return was April 15, 2001. Taxpayer filed for a Federal Extension of time until September 17, 2001. The Department allows an additional thirty days. The Taxpayer's tax liability was nil.

Taxpayer filed a penalty protest dated November 27, 2002. Taxpayer filed its return on May 2, 2002.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it filed its return late because it did not have the information available to correctly file the return. Taxpayer further states that it needed to review the correctness of the K-1. Therefore, it was impossible to file the return timely. Taxpayer requests abatement of the penalty for reasonable cause.

Taxpayer was assessed a penalty for the late filing of its tax return.

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 had an extended due date of September 17, 2001 but failed to file its tax return timely and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030067P.LOF

LETTER OF FINDINGS NUMBER: 03-0067P
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 all of its taxable purchases on which no sales tax had been charged.

Taxpayer requests abatement of the penalty due to major changes at its company.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it had major changes during the audit period. Several positions were eliminated and the workload remaining did not leave time for procedural audits in accounting that would have shed light on the deficiency. It has issued written instructions for accounts payable, including an extensive list of items that it should pay use tax on.

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 had no use tax accrual system in place and has not provided reasonable cause to allow a waiver of the negligence penalty. Procedures should have been in place.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220030079P.LOF

LETTER OF FINDINGS NUMBER: 03-0079P
Gross and Adjusted Gross Income Tax
For Calendar Year 2001

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer filed its return with payment of $62,352 that included $2,398 in interest on September 12, 2002 and was assessed a late penalty. The original due date of the return was April 15, 2002.

Taxpayer's representative filed a penalty protest dated November 11, 2002. Taxpayer states that the penalty is a result of an unintentional error in the calculation of the Indiana gross receipts tax. The taxpayer further states that the appropriate calculation of the Indiana Income Tax base was overlooked and steps have been taken by them and its CPA firm to remedy this in the future periods. Taxpayer paid 32.64% of its tax by the due date of the return.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that the penalty was the result of an unintentional error.

Taxpayer was assessed a penalty for the late payment of its taxes.

Taxpayer failed to remit 67.36% of its tax 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 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

0120030080P.LOF

LETTER OF FINDINGS NUMBER: 03-0080P
Individual Income Tax
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.

II. Tax Administration – Interest

Authority: IC 6-8.1-10.1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

The Indiana Department of Revenue received W-2G information that the taxpayer had won money in riverboat gaming during 1999 and 2000. The Department billed the taxpayer on gambling income from Indiana plus penalty and interest. The taxpayer filed IT-40PNR returns. Taxpayer, in a letter dated February 7, 2003, requested an abatement of the penalty and interest assessed.

Taxpayer filed its returns late with a tax balance due of $862.92, $886.38, and $113.22 respectively for 1999, 2000, and 2001 after the Department advised her of her failure to file.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer, an Ohio full year resident, states that the casino was instructed to withhold the necessary tax and withheld it for Federal and the State of Ohio instead of the State of Indiana. Taxpayer further states it was not her intent not to pay her tax liability and the instructions for Form IT-40PNR does not specifically state that gambling income is excluded from the reciprocal agreement that exists between the State of Indiana and the State of Ohio.

Taxpayer filed Indiana returns upon notification that she should have reported Indiana gambling income to Indiana. Taxpayer has applied for a refund in her state of residence and is awaiting receipt.

Taxpayer could not have known that tax was due to the state of Indiana because she was not a resident of the State and the Riverboat did not correctly withhold tax.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration – Interest

DISCUSSION

Taxpayer requests a waiver of the interest assessed, however, the Department has no authority to waive interest. Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest is sustained for Issue I. and denied for Issue II.

DEPARTMENT OF STATE REVENUE

0220030081P.LOF

LETTER OF FINDINGS NUMBER: 03-0081P
Gross and 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 was audited for Calendar Years 1997, 1998, and 1999. At audit, it was determined that the taxpayer had several audit adjustments, some of which resulted in refunds in prior years. The penalty addressed in the letter of findings pertains to the 1999 year only.

I. Tax Administration – Penalty

DISCUSSION

In a letter dated February 3, 2003 the taxpayer requests a penalty waiver because it consistently filed its returns with reasonable care and to the best of its ability.

In reviewing the audit, it is noted that the taxpayer filed an amended return to correct the supplemental net income tax. The taxpayer incorrectly calculated the supplemental net income tax using the adjusted gross income tax rather than the adjusted gross income. Taxpayer did not pay the penalty at the time of filing the return that increased its adjusted gross income by $825,104.

The taxpayer has not provided reasonable cause to allow a penalty waiver for that portion of the audit. The Department will waive the balance of the penalty assessment for 1999 to coincide with the waiver of prior years that were minimal.

FINDING

Taxpayer's protest is partially sustained and partially denied.

DEPARTMENT OF STATE REVENUE

0420030093P.LOF

LETTER OF FINDINGS NUMBER: 03-0093P
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 self-assess use tax on clearly taxable items such as capital items, uniforms, janitorial supplies, miscellaneous auto parts, maintenance and repair items, and other miscellaneous purchases.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that it diligently reviews the invoices for proper sales and use tax and the tax due was not based upon willful neglect but an oversight in the system.

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. Those items amounted to 81.61%, 68.13%, and 51.39% of unpaid tax for calendar years 1999, 2000, and 2001, respectively and the taxpayer has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220030094P.LOF

LETTER OF FINDINGS NUMBER: 03-0094P
Adjusted Gross Income 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 penalties assessed.

II. Tax Administration – Interest

Authority: IC 6-8.1-10.1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer was audited for Calendar Years 1998, 1999, and 2000. Upon audit, it was discovered that the taxpayer made several errors and failed to timely reported the results of an RAR in 1998. Taxpayer was assessed a penalty upon audit for that failure and failure to correctly report gross income and the correct sales apportionment factor. Taxpayer was also assessed a penalty for the underpayment of estimated income taxes. Taxpayer made only one estimated payment during the audit period.

Taxpayer protests the proposed penalty and interest assessments for the underpayment of estimated tax and the audit penalty.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalties and interest assessed for the underpayment of estimated income taxes and the penalty for failing to correctly report its tax liabilities.

Taxpayer was audited for 1998, 1999, and 2000 that generated an underpayment in tax upon which was assessed a penalty and interest. Based upon review of the audit, the assessment was minimal compared to the total paid.

Taxpayer made no quarterly estimated payments throughout the year and was assessed an additional penalty for the underpayment of estimated income taxes.

Taxpayer states that the Department did not properly recognize the timing of the EDGE credits. For that reason it kept taking the carryforward credits (in lieu of quarterly payments). Taxpayer states that (after years) the credit was acknowledged, a refund was generated, which made it look like it was underpaid. Taxpayer states he was the one that brought it to the attention of the auditor.

Taxpayer requests an abatement of the penalties.

For the audit period, the penalty is waived for taxpayer's failure to correctly report its gross and adjusted gross income.

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. Taxpayer failed to make the quarterly estimated payments.

Taxpayer's argument that it kept taking carryforward credits in lieu of quarterly payments is in error. The 1996 return asked for a refund for the total amount in tax. Taxpayer was refunded interest to date of payment. Taxpayer had no carryforward credits available.

Taxpayer's audit penalty is waived. Taxpayer's underpayment penalty is denied because the taxpayer failed to make estimated payments in all years except 1998 in which it paid $1,000. Taxpayer has not provided reasonable cause to allow a penalty waiver.

FINDING

Taxpayer's protest is partially sustained and partially denied.

II. Tax Administration – Interest

DISCUSSION

Taxpayer protests the interest assessed because it seems high and not fair to the taxpayer under the circumstances.

Under IC 6-8.1-10.1 the Department has no authority to waive interest.

FINDING

Taxpayer's protest is denied

CONCLUSION

Taxpayer's protest is partially denied and partially sustained for Issue I and denied for Issue II.

DEPARTMENT OF STATE REVENUE

0420030100P.LOF

LETTER OF FINDINGS NUMBER: 03-0100P
Sales Tax
For the Periods February 2002 through 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.

II. Tax Administration – Interest

Authority: IC 6-8.1-10-1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Taxpayer was assessed penalties for failing to file and pay its ST-103's timely.

Taxpayer registered with the Department more than a year after it began business in the State of Indiana and filed "zero" returns for the 2001 year. For the year at issue, the taxpayer filed returns indicating sales tax was due. All were filed late.

Taxpayer, in a letter dated October 25, 2002 requests that the department waive the penalties and interest because it had applied for a Retail Merchant Certificate that was issued on September 18, 2002.

I. Tax Administration – Penalty

DISCUSSION

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

Taxpayer states that it applied for its Retail Merchants Certificate that was not issued until September 18, 2002. Taxpayer further states it is currently up to date in paying its sales tax but failed to file previously because it was not familiar with the rules and regulations.

Department records indicate that the taxpayer has been in business since at least July 2001 but did not apply for its Retail Merchant Certificate until September 17, 2002. The returns with tax payment were filed shortly thereafter.

Taxpayer, upon opening its business, should have applied for its Retail Merchant Certificate timely which may have allowed it to file its ST103's timely. Taxpayer's filing and payment were clearly late and the 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

0220000389.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 00-0389
Adjusted Gross Income Tax
For Tax Years 1996 through 1998

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

ISSUES

I. Adjusted Gross Income – Throwback Sales

Authority: 45 IAC 3.1-1-64

Taxpayer protests imposition of adjusted gross income tax on out of state throwback sales.

II. Tax Administration – Negligence Penalty

Authority: 45 IAC 15-11-2

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

STATEMENT OF FACTS

Taxpayer manufactures mattresses with operations in several states. The Department conducted an audit for the tax years 1996 through 1998, and issued proposed assessments for those years. Taxpayer protested those assessments. The Department sustained taxpayer's protest in part and denied the protest in part. Taxpayer asked for and was granted a rehearing. Further facts will be supplied as needed.

I. Adjusted Gross Income – Throwback Sales

DISCUSSION

Taxpayer manufactures mattresses and has operations in several states. The Department conducted an audit for the tax years 1996 through 1998. As a result of this audit, the Department issued proposed assessments for adjusted gross income tax. One of the adjustments the Department made was to impose Indiana adjusted gross income tax on throwback sales taxpayer had in Arizona, Kansas and Minnesota. Taxpayer protested these adjustments. The Department sustained the protest for Arizona in 1997, Kansas in 1997 and 1998, and Minnesota for 1998, and denied the protest for Arizona in 1996 and 1998, Kansas in 1996, and Minnesota in 1996 and 1997.

The relevant regulation is 45 IAC 3.1-1-64, which states in relevant part:

Taxpayers are not subject to throwback on sales into states in which they are taxable under this regulation *[45 IAC 3.1-1-64]*.

Taxpayer requested a rehearing to clarify its position and to submit additional documentation in support of its protest. In the rehearing, taxpayer explained that it had an employee permanently based at its Arizona plant for all three years in question. Also, taxpayer explained that it had payroll in Kansas in 1996. Documentation was provided to support these explanations.

When combined with the information explained in the original Letter of Findings, taxpayer was taxable under 45 IAC 3.1-1-64 in: Arizona for 1996, 1997 and 1998; Kansas for 1996, 1997 and 1998; and Minnesota for 1998, and therefore was not subject to throwback on sales into those states for those years. Taxpayer's protest is sustained for Arizona for 1996, 1997 and 1998. Taxpayer's protest is sustained for Kansas for 1996, 1997 and 1998. Taxpayer's protest is sustained for Minnesota for 1998 and denied for Minnesota for 1996 and 1997.

FINDING

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

II. Tax Administration – Negligence Penalty

DISCUSSION

Taxpayer protests the imposition of a ten percent (10%) negligence penalty. Taxpayer did not protest the negligence penalty in the original Letter of Findings and the Department agreed to address the issue here for the first time. Taxpayer requests that all penalties be waived as it has acted in good faith at all times, and any remaining assessments are not the result of any willful disregard of Indiana's tax laws, or negligence on the part of taxpayer. Negligence is defined by 45 IAC 15-11-2(b), which states:

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

45 IAC 15-11-2(c) states in part:

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

While taxpayer’s protest was substantially sustained on Issue I (regarding throwback sales), the protest has not been completely sustained. Also, there were additional adjustments made as a result of the audit, which taxpayer did not protest. Therefore, the negligence penalty is appropriate for the remaining assessments.

FINDING

Taxpayer’s protest is denied.

DEPARTMENT OF STATE REVENUE

03-20020577P
03-20020596P.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBERS: 02-0577P through 02-0596P
Indiana Withholding Tax
For Tax Year 2001

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

ISSUE

I. Tax Administration – Penalty

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

Taxpayers protest the imposition of penalties associated with their failure to timely file with the Department Form WH-3 and state copies of Form W-2.

STATEMENT OF FACTS

The initial protest represented a consolidated appeal of proposed audit assessments. The issue: Taxpayers had filed Form WH-3 (“Annual Withholding Tax Reconciliation Return”) and state copies of Form W-2 (“Wage and Tax Statement”) late. For the 2001 tax year, in order to be considered “timely filed,” taxpayers must have submitted Form WH-3 and state copies of Form W-2 (collectively, “the Information Returns”) to the Department no later than February 28, 2002. The Information Returns submitted were postmarked March 14, 2002.

Pursuant to IC 6-8.1-10-6(b), the Department assessed penalties on taxpayers’ failure to timely file their Information Returns. Taxpayers requested abatement of these penalties. The Department declined to do so. *(See Letter of Findings 02-0577P.LOF through 02-0596P.LOF.)* Taxpayers, pursuant to IC 6-8.1-5-1(f) and 45 IAC 15-5-5, then asked the Department to reconsider its original findings. The results of which now follow.

DISCUSSION

I. Tax Administration – Penalty

Taxpayers offered several rationales in support of their rehearing request. “We provide…new, additional, and sufficient information and reasons to warrant a rehearing in th[is] penalty appeals case…and to warrant the abatement of penalties that have been assessed….” Specifically, taxpayers contend that (1) the Department’s findings contain both errors of omission and errors of commission, (2) new and relevant information exists, and (3) imposition of penalties represents an inequitable resolution of the issue and results in “undue hardship” to taxpayers’ “marginally profitable” businesses. However, regardless of form or guise, the substance of taxpayer’s arguments can be summarized as follows:

The IDR [Department] Letter of Findings implies that the taxpayers were willfully negligent in filing the Form WH-3 fourteen days late. This implication arises because if the taxpayers’ late filing were not due to willful neglect, and if IDR Appeals had properly applied Indiana Code Section 6-8.1-10-2.1(d), the appeal would have properly resulted in a waiving of the penalty for late filing of the Forms WH-3 as is provided by the Indiana Statute.

Law and Discussion

The liabilities at issue represent penalty assessments based on taxpayers' failure to timely file information returns. The language of IC 6-8.1-10-6 (b), which authorizes penalties for the late filing of "information returns," states:

If a person fails to file an information return required by the department, a penalty of ten dollars ($10) for each failure to file a timely return, not to exceed twenty-five thousand dollars ($25,000) in any one (1) calendar year, is imposed.

The language cited by taxpayers, IC 6-8.1-10-2.1(d), imposes penalty liability on the "failure to file a return for any of the listed taxes." IC 6-8.1-10-2.1(a)(1). The penalty portion of the statute, IC 6-8.1-10-2.1(d), reads:

If a person subject to the penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust, or pay the deficiency determined by the department *was due to reasonable cause and not due to willful neglect*, the department shall waive the penalty. (emphasis added.)

Unlike the language of IC 6-8.1-10-2.1(d) championed by taxpayer (penalty waiver required if taxpayer's failure to file "was due to reasonable cause and not due to willful neglect"), the language of IC 6-8.1-10-6(b) offers no "excuse" for similar behavior. Nevertheless, even if the "intent" requirement of IC 6-8.1-10-2.1(d) did apply to penalties imposed pursuant to IC 6-8.1-10-6(b), taxpayers' protest would still fail because, as the Department previously concluded, "*taxpayer[s] ha[ve] not provided reasonable cause for [their] failure to file*."

Taxpayers' argument spotlights the Department's alleged failure to timely distribute "controlled" pre-printed Form WH-3. ("Controlled" refers to the manner of distribution; only the department may distribute a "controlled" form.) Taxpayers contend that since they failed to "timely receive" their Form WH-3 from the Department, they could not be held accountable for their failure to timely complete and file the required forms (i.e., Form WH-3 along with state copies of Form W-2) with the State. Taxpayers explain:

It is not equitable for the IDR [Department] to benefit from its mistakes by collecting penalties that it caused or could have cured, but for the administrative delay of the Indiana Department of Revenue. Either the IDR failed to mail the Form WH-3 to the taxpayers or the IDR chosen delivery system, the U.S. Mail, did not deliver the form to the Illinois taxpayer. By Affidavit, the owner of the taxpayers avows that the Form WH-3 was never delivered to him. Within the time to timely file the Form WH-3 in question, the Illinois taxpayers requested a replacement Form WH-3. Since the IDR had designated the Form WH-3 a controlled document, it was necessary for the IDR to mail to the taxpayers a replacement form. The unnecessary and unreasonable mail delivery program to out of state taxpayers caused the replacement Form WH-3 to be filed 14 days late. … Had the taxpayers been allowed to quickly access or easily generate the Forms WH-3 from either a tax forms CD-ROM or via the Internet, these penalties would not have occurred.

Or more concisely: "The taxpayers were willing and able to file the Form WH-3, but were prevented from doing so because no form [WH-3] was delivered to their [taxpayers'] out of state offices."

According to its records, the Department mailed Form WH-3 to taxpayers on November 18, 2001. In February 2002, taxpayers discovered they had not received their Form WH-3. Taxpayers then contacted the Department "seeking the whereabouts of the original Form WH-3 and requested a replacement form. This telephone call was made in February [2002] before the due date of the Form WH-3…." In response, the Department "mail[ed] a replacement form [Form WH-3] which had been prepared by hand by Department personnel." Taxpayers assert that it was this delay by the Department that "caused" them to miss the filing deadlines.

Taxpayers are mistaken. The "cause" of taxpayers' failure to timely file their Information Returns was directly attributable to taxpayers' failure to recognize, in a timely manner, that their Indiana tax forms (Form WH-3) were "missing." Taxpayers' *inability* to marshal their Indiana tax forms in a time, place, and manner sufficient to ensure the forms were timely filed directly "caused" these assessments. And such "inability" represents negligence.

FINDING

Taxpayers' protests are denied.