INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Review of Sanitary Sewer Construction Permit Applications For Communities with Combined Sewer Overflow Outfalls
Identification Number: Water – 005 – NRD
Date Originally Effective: June 7, 2003
Dates Revised: None
Other Policies Repealed or Amended: None
Brief Description of Subject Matter: This document outlines IDEM's procedures for review of sewer construction permit applications for communities with combined sewer overflow outfalls
Citations Affected: 327 IAC 3-1-1 through 327 IAC 3-6-32.

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document should be used in conjunction with the applicable laws. This document does not replace applicable laws, and if it conflicts with those laws, the laws shall control. This nonrule policy document may be put into effect by IDEM thirty (30) days after presentation to the appropriate board and after it is made available to public inspection and comment, pursuant to IC 13-14-1-11.5. If this nonrule policy is presented to more than one (1) board, it will be effective thirty (30) days after presentation to the last board. IDEM will submit the policy to the Indiana Register for publication. Revisions to this nonrule policy document will follow the same procedure of presentation to the board and publication.

BACKGROUND/DISCUSSION

The Water Pollution Control Board (board) received a petition on September 12, 2001, for rulemaking per provisions under IC 13-14-8-5. After five (5) public hearings, the board adopted the hearing officer's report and recommendations; and, at its December 2001 meeting, the board requested IDEM to develop a nonrule policy document under IC 13-14-1-11.5 to outline policies and procedures for processing sewer construction permit applications in communities with combined sewer overflows.

The permitting program for construction of sanitary sewers is regulated under Article 3 of Title 327 of the Indiana Administrative Code (327 IAC 3). That article includes administrative rules for obtaining a construction permit as well as technical standards for the design and installation of sanitary sewers.

The issuance requirements for sanitary sewer construction permits are listed in 327 IAC 3-6-7. These requirements are basically reiterated in 327 IAC 3-6-4, "Certifications", as language that is to be certified by both the design engineer and an authorized representative of the owner of the affected treatment and collection system.

The implementation of the rule, wherever possible, should not create disincentives to implementation of a long-term control plan or other capital projects designed to reduce CSO volumes, first flush discharges, or to provide treatment to previously untreated overflows.

In addition, this nonrule policy document should not create disincentives to urban redevelopment, brownfield revitalization, or provision of sanitary sewer service to unsewered areas. These activities and types of sewer connections represent a net environmental gain in terms of improved water quality, reduced urban sprawl, green space preservation, and reduced air pollution.

The five basic requirements in 327 IAC 3-6-7, with IDEM's interpretation for application in communities with CSOs, are as follows:

1. "The peak daily flow rate, in accordance with section 11 of this rule, generated in the area that will be collected by the project system, will not cause overflowing or bypassing in the collection system from locations other than NPDES authorized discharge points."

IDEM interprets this requirement to mean that the peak daily flow for the new sewer will not result in overflows from any discharge point that is not authorized to discharge in the NPDES permit for the facility serving the sewer system. For combined sewer systems, CSO discharge points listed in an NPDES permit are generally authorized to discharge during wet weather events. A CSO community is required by its NPDES permit (or will be required when the NPDES permit is renewed) to implement a CSO Operational Plan and to develop and implement a Long Term Control Plan (LTCP) for CSO Management. For combined sewer systems, CSO discharge points are not authorized to discharge except during wet weather events as addressed in the CSO Operational Plan and to be further addressed in the Long Term Control Plan. For purposes of implementing the wastewater construction permitting rule, IDEM will review available bypass/overflow incident reports and attempt to determine whether unauthorized discharges are occurring from NPDES discharge points for the affected system. If a community has reported a dry weather overflow from a CSO discharge point on the portion of the collection system affected by the permit application, IDEM will review the data further to determine the action to be taken as described in the review procedure section of this nonrule policy document.

Discharges from Combined Sewer Overflows (CSOs) that are not related to wet weather events are prohibited by the Clean Water Act. CSOs caused by wet weather events are contemplated and allowed within certain ascertained circumstances.

2. "Sufficient capacity exists in the receiving water pollution treatment/control facility to treat the additional daily flow."

IDEM interprets this requirement to mean that there will be sufficient capacity in the receiving water pollution treatment/control facility to treat the proposed additional daily flow and prevent hydraulic or organic overload of the receiving water pollution treatment / control facility.

The water pollution treatment/control facility refers only to the wastewater treatment plant and does not include the sewer system (observe that there are separate definitions for "water pollution treatment/control facility" and "sanitary sewer" in 327 IAC 3-1-2 and the language "water pollution treatment/control facility or sanitary sewer" in 327 IAC 3-2-1).

3. "The receiving water pollution treatment/control facility will remain in compliance with applicable NPDES permit effluent limitations."

IDEM interprets this requirement to mean that there should be sufficient capacity in the receiving water pollution treatment/control facility to treat the additional daily flow and not cause exceedances of applicable NPDES permit effluent limitations.

4. "The sanitary sewer or collection system that is the subject of the construction permit application is to connect to a water pollution treatment/control facility that has been completed and put into operation."

IDEM interprets this requirement to mean that the ability of the collection system to comply with 327 IAC 3 can not be contingent on water pollution treatment/control facility construction that has not been completed and put into operation.

5. "The proposed collection system does not include new combined sewers or a combined sewer extension to existing combined sewers."

IDEM interprets this requirement to mean that neither the construction of new combined sewers nor the construction of additional combined sewers as an extension to an existing combined sewer system will be approved.

The Capacity Certification/Allocation Letter is included as Appendix A.

Application Review Procedure

On an annual basis, IDEM (currently by the Office of Water Quality, Compliance Evaluation Section) will review the compliance status of Indiana's CSO communities. This compliance review may include, but not be limited to, the following:

• *CSO Discharge Monitoring Reports* (DMRs) for the previous calendar year
• *Monthly Reports of Operation* (MROs) for the previous calendar year
• Bypass/Overflow Incident Reports for the previous calendar year
• Status of the *Combined Sewer System Operating Plan* (i.e., whether submitted, approved, updated, etc.)
• Status of the *CSO Long Term Control Plan* (LTCP) (i.e., whether submitted; approved or neither)
• Early Warning Sewer Ban (327 IAC 4) List
• Sewer Ban (327 IAC 4) List

The following should occur, dependant on the compliance status of the community, when reviewing construction permit applications:

• If there have been dry weather combined sewer overflows (CSOs) attributable to inadequate hydraulic capacity (i.e., not attributable to maintenance or mechanical failures) in the previous calendar year in any of the sewers downstream of the proposed construction, the construction permit application should be denied since dry weather CSOs were attributable to inadequate hydraulic capacity problems.

• If the community is on neither the Early Warning Sewer Ban nor the Sewer Ban lists (and there are no other known or identified compliance issues or problems), the permit application will be reviewed to determine adherence to the administrative requirements and technical standards described in 327 IAC 3.

• The certification statements will be reviewed to ensure that the administrative information and the technical standards are in concert with the statements.

• i. If there are no discrepancies and the following are verified, the permit will be issued:

•1. Sufficient capacity exists in the receiving water pollution treatment/control facility to treat the additional daily flow.

• 2. The receiving water pollution treatment/control facility will remain in compliance with applicable NPDES permit effluent limitations.

• 3. The sanitary sewer or collection system that is the subject of the construction permit application is to connect to a water pollution treatment/control facility that has been completed and put into operation.

• 4. The proposed collection system does not include new combined sewers or a combined sewer extension to existing combined sewers.

• ii. If there are discrepancies, the reviewer will contact the community and/or the design engineer to obtain information to resolve the discrepancies. Information that may be requested could include the provision of the hydraulic capacity of sewers (separate sanitary and combined) downstream of any proposed connection or, if appropriate to the community's collection system, information that would indicate if the wastewater treatment plant was at peak design flow rate or capacity before combined sewer overflow activation when there were wet weather events.

• iii. The IDEM annual review of CSO community compliance status will be reviewed to assess the following:

• 1. If the evaluation concludes that adequate hydraulic capacity exists in the conveyance sewers that will transport the additional wastewater flows a construction permit may be issued.

• 2. If it is determined that there could be an increase in the annual number of unauthorized CSO activations due to the additional wastewater flow, the permit may not be issued until additional information is received from the community to verify that no increase in unauthorized discharges would occur. If information cannot be provided by the community to verify no increase in unauthorized CSO activations then a variance (per IC 13-14-8-8) would have to be granted for a construction permit to be reconsidered.

• If the community is on the Early Warning Sewer Ban list or if compliance issues or problems are identified, the permit application review staff will review the CSO community's annual compliance review regarding compliance with all NPDES permit requirements.

• i. If the data evaluation concludes that the additional wastewater flow related to the proposed new sewer(s) can be successfully transported and treated within existing downstream sewers and treatment plant, a construction permit for the proposed sewer(s) may be issued if administrative requirements and technical standards have been met and the certifications are in accordance with the requirements and standards.

• ii. If the data evaluation concludes that the additional wastewater flow cannot be transported or treated without causing NPDES Permit limit exceedances, the permit may not be issued.

• iii. If it is determined that there will be an increase in the annual number of unauthorized CSO activations due to the additional wastewater flow, the permit may not be issued. A variance (per IC 13-14-8-8), including the demonstration of undue hardship, would have to be granted for a construction permit to be reconsidered. Examples of the undue hardship may be if the additional wastewater flow is to be generated from the connection of failing septic systems, brownfields, or urban redevelopment areas. The connection of failing septic systems, brownfields, or urban development areas generally represents a net environmental gain due to net improvements in water quality, reduction of urban sprawl, preservation of green space, reduced air pollution, and other environmental benefits.

• iv. In addition, IDEM's review will determine if the community has reported combined sewer overflows on the affected sewer system in its Bypass/Incident Reports early in the review process. (It is noted that a wet weather event may be several days in duration because of extended periods of precipitation/snow melt and soil saturation extending the period that inflow and infiltration [I/I] may influence the hydraulic capacity of a sewer.)

If the community, or affected portion of the community's collection system, appears on the Sewer Ban list, a deficiency notice will be sent to the permit applicant that will include notification to them that a construction permit cannot be issued unless the community applies for and receives a Sewer Ban Waiver (per 327 IAC 4-1-6) and is granted a variance (per IC 13-14-8-8) from affected portions of 327 IAC 3 administrative requirements. Requests for the waivers and variances will be processed by the Office of Water Quality and the Office of Enforcement, as is appropriate for the specific request. If waivers and variances are granted, then the construction permit may be issued if all other administrative requirements and technical standards are met.

APPENDIX A

Capacity Certification/Allocation Letter

The authorized representative of the town, city, sanitary district, or any entity that has jurisdiction over the proposed collection system must sign and date the application and issue the following certification:

"I certify that I have reviewed and understand the requirements of 327 IAC 3 and that the sanitary collection system proposed, with the submission of this application, plans, and specifications, meets all requirements of 327 IAC 3. I certify that the daily flow generated in the area that will be collected by the project system will not cause overflowing or bypassing in the collection system from locations other than NPDES authorized discharge points and that there is sufficient capacity in the receiving water pollution treatment/control facility to treat the additional daily flow and remain in compliance with applicable NPDES permit effluent limitations. I certify that the proposed average flow will not result in hydraulic or organic overload. I certify that the proposed collection system does not include new combined sewers or a combined sewer extension to existing combined sewers. I certify that the ability for this collection system to comply with 327 IAC 3 is not contingent on water pollution/control facility construction that has not been completed and put into operation. I certify that the project meets all local rules, laws, regulations, and ordinances. The information submitted is true, accurate, and complete to the best of my knowledge and belief. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

Reference: *(Water Pollution Control Board; 327 IAC 3-6-4; filed May 17, 1999, 12:11 p.m.: 22 IR 3086; errata filed Dec 1, 2000, 5:25 p.m.: 24 IR 1033)*

INDIANA DEPARTMENT OF INSURANCE

Bulletin 117

May 19, 2003

Health Care Tax Credit of the Trade Adjustment Assistance Reform Act of 2002 Qualified Health Plans

This Bulletin is addressed to all health maintenance organizations and insurance companies authorized to sell group and/or individual accident and sickness products in Indiana.

<u>Background</u>

The Trade Adjustment Assistance Reform Act of 2002 (TAA) created a tax credit for the purchase of private health insurance for certain TAA and Pension Benefit Guaranty Corporation eligible individuals. These are individuals that have lost health insurance coverage because an employer was forced – under certain specified conditions – to discontinue its business. The tax credit is equal to sixty-five percent (65%) of the premium paid by eligible individuals.

Qualified Health Plans

The tax credit is available for the purchase of "qualified health insurance" as defined by the TAA. The following are always qualified health insurance.

A. Coverage available from former employers through COBRA

B. Coverage available from a spouse's employer – if the employer pays less than fifty percent (50%) of the premium

C. Individual Policy – if the policy became effective more than thirty (30) days prior to separation from the employer

In addition, the following state alternatives may constitute qualified health insurance. Each state is responsible for designating any of the following options as qualified health insurance. The options are:

1. Coverage offered through a state high-risk pool;
2. State-based continuation coverage provided by the state under a state law that requires such coverage;
3. Coverage under a health insurance program offered for state employees;
4. Coverage under a state based health insurance program that is comparable to the health insurance program offered for state employees;
5. Coverage through a state operated health plan that does not receive any federal financial participation; or
6. Coverage through an arrangement entered into by the state and a group health plan, an issuer of health insurance, an administrator, an employer or a purchasing pool.

The U.S. Department of Treasury is responsible for implementing the credit under its Health Coverage Tax Credit (HCTC) Program. Pursuant to the instructions from the U.S. Department of Treasury, each state is responsible for determining which of the above options 1-6 will be designated as "qualified health insurance" in its state. Qualified health insurance plans must include the following:

- Guaranteed issue: qualifying individuals guaranteed enrollment regardless of medical status;
- No pre-existing conditions exclusion: no pre-existing restriction may be imposed on qualifying individuals;
- Non-discriminatory premium: premium may not be greater than that for similarly situated individuals not receiving the credit; and
- Benefits: benefits are identical or substantially similar to those provided by coverage to similarly situated individuals not receiving the credit.

Qualified health insurance options 2 through 5 are not available in Indiana. Currently, Indiana has not designated any product or plan as qualified health insurance under option 6. Any entity wishing to have a product considered for certification as qualified health insurance in Indiana must file a proposal with the Indiana Department of Insurance by June 13, 2003. Proposals should include the following:

- Schedule of Benefits;
- Rates;
- Statement as to whether the product has been filed with and approved by the Indiana Department of Insurance (include policy form numbers and approval dates) or if new policy forms will need to be filed/approved assurance that entity is able to have the filing to the Department within fifteen (15) days of receiving notice that product has been chosen as qualified;
- Statement as to whether the submitting entity is proposing the product only if it is chosen to be the only qualified health insurance in Indiana or whether the proposal will stand if two (2) or more plans are certified in Indiana; and
- Certification that the plan/product will comply with the required conditions listed above (e.g. guarantee issue).

Until a plan or plans has been designated by the Department of Insurance as qualified health insurance, no entity or insurance producer should be representing any plan or product as qualified for the HCTC. Enforcement action will be taken against any entity or producer representing a plan or product as qualified for the HCTC before certification by the Department of Insurance.

Questions and/or proposals should be submitted to:

Joy S. Long, Deputy Commissioner – Health Issues
Indiana Department of Insurance
300 W. Washington St.
Indianapolis, IN 46204
jlong@doi.state.in.us
(317) 232-5695; fax (317) 232-5251

INDIANA DEPARTMENT OF INSURANCE
Sally McCarty, Commissioner

INDIANA DEPARTMENT OF LABOR
POLICY:
BuSET TRAINING COURSES
Effective April 1, 2001

Courses

Bureau of Safety Education and Training (BuSET) consultants conduct OSHA 10-Hour and 20-Hour training courses, and other courses related to safety and health, according to the policies set forth in this document, which are subject to change at BuSET's discretion. The 20-Hour courses require an OSHA 10-Hour certification within the previous six months. To efficiently utilize state resources, BuSET will not conduct continuous OSHA 30-Hour courses; however, the timely completion of the OSHA 10-Hour and 20-Hour courses will qualify for an OSHA 30-Hour certification. Sponsorship of each course/seminar will be determined on a case-by-case basis, and sponsors and courses must conform to the policies set forth in this document.

Topics

Subjects to be covered during each OSHA 10-Hour and 20-Hour course are attached in Appendices A and B. BuSET consultants may be available to perform specific training seminars, in relation to an identified hazard, a new or updated standard, or a hazardous industry. Topics and length of the short seminars will vary according to each request.

Length

Each OSHA 10-Hour course will be conducted in a minimum of 10 hours. Each 20-Hour course will be conducted in a minimum of 20 hours. Extra hours for each course will remain at the discretion of BuSET. Other seminars may be conducted based on the sponsor's request.

Scheduling & Priority

The number and timing of general industry and construction OSHA 10-Hour courses conducted by BuSET during the fiscal year will be determined by BuSET.

OSHA 10-Hour courses will be scheduled on a first-come, first-served basis according to written request. Course assignments will be made to consultants or other personnel deemed appropriate by BuSET. Requests for specific consultants will be considered, but BuSET retains the right to conduct courses with personnel deemed appropriate by BuSET.

20-Hour general industry courses, which require attendees to hold an OSHA 10-Hour certification card obtained in the previous six months, will be scheduled four (4) times per year, once per fiscal quarter.* The locations for these courses are as follows:

• Indianapolis area (60-mile radius from I-465)
• Southern Indiana
• Indianapolis area (60-mile radius from I-465)
• Northern Indiana

Sponsorship of the 20-Hour courses will be assigned on a rotating basis, and sponsorship assignments will be made by BuSET.

Special-topic and short seminars will be assigned on a first-come, first-served basis.

* Due to the publication date of this policy, three (3) 20-Hour courses will be conducted in 2001.

Attendee Requirements

For each OSHA 10-Hour course, the sponsor must ensure that no less than twenty (20) attendees are registered three (3) weeks prior to the beginning date of the course, and must confirm this number with the lead BuSET consultant for the course. The sponsor will also confirm, with the lead BuSET consultant, the number of paid attendees one (1) week prior to the beginning date of the course. If the number of attendees falls below twenty (20) one week prior to the course, BuSET reserves the right to cancel their participation in the course. The maximum number of attendees is fifty (50); however, this number may be modified at the BuSET consultant's discretion.

For each 20-Hour course, the sponsor must ensure that no less than thirty (30) attendees are registered three (3) weeks prior to the beginning date of the course, and must confirm this number with the lead BuSET consultant for the course. The sponsor will also confirm, with the lead BuSET consultant, the number of paid attendees one (1) week prior to the beginning date of the course. If the number of attendees falls below thirty (30) one week prior to the course, BuSET reserves the right to cancel their participation in the course. The maximum number of attendees is sixty (60); however, this number may be modified at the BuSET consultant's discretion.

For each short seminar, the sponsor must ensure that no less than fifteen (15) attendees are registered one (1) week prior to the date of the seminar. The sponsor will confirm the number of attendees with the scheduled BuSET consultant one (1) week prior to the date of the seminar, and BuSET reserves the right to cancel their participation in the course if the number of attendees falls below fifteen (15).

General Requirements

The following requirements are mandated by BuSET for sponsorship of a training course that is conducted by BuSET personnel:

<u>The Training Program Sponsor will furnish:</u>

• Appropriate facilities suitable for training, including a room large enough for each attendee to have adequate table space. The room must be equipped with a functional Internet connection method, which may consist of an activated phone line or direct connection to an Internet service provider. (Please contact the lead consultant assigned to your training course in advance for discussion of this issue.)

- Food and drink, as appropriate, for morning and afternoon breaks
- Lunches, or a listing of eating establishments in the area which will allow attendees to return within one hour
- Large projection screen
- Printed outreach ring binder, with all sections as contained in the BuSET master, and with the sections numbered and tabbed*
  - Master may be obtained from BuSET and returned to BuSET
  - Copies will be provided by the sponsor
- Occupational Safety and Health Standards Books, subject to the following qualifications:
  - Books must contain:
    - The entire 29 CFR 1910 or 1926, as appropriate for the course
    - 29 CFR 1903 and 29 CFR 1904
  - Books must be the current year's edition, as of the date of the course
  - One book for each attendee
  - Books may be purchased from BuSET at BuSET's current pricing, or from outside sources.
- Highlighter pen for each attendee
- Pen or pencil for each attendee
- Note paper tablet for each attendee
- Name card or name tag for each attendee
- TV and VCR (if applicable)

* Not required for attendees to a 20-Hour course who previously attended an OSHA 10-Hour course. Attendees are requested to bring materials previously obtained at the OSHA 10-Hour course, or they must purchase new materials.

<u>The Training Program Sponsor will:</u>

- Make the training course available to personnel outside the confines of the sponsoring company or organization
- Provide notice to the BuSET trainers of the course schedule and assigned topics, in advance of the course
- Provide an agenda of the course to attendees
- Create and mail program advertisement fliers (if applicable)
- Ensure that the mandated number of attendees is met
- Collect all fees assessed by the sponsor
- Mail all certificates of completion and OSHA cards to attendees
- Allow BuSET to post the training program on their website
- Make miscellaneous copies of documents used in the course
- Sign BuSET's Training Courses Policy sponsor agreement
- Utilize all training material and supplies as deemed appropriate by BuSET.

In addition to these requirements set forth for the training program sponsors, BuSET will abide by the following requirements:

<u>BuSET will:</u>

- Provide instructors, at BuSET's discretion
- Provide an OSHA card and certificate of completion for each 10-Hour and 20-Hour course attendee who has attended all required portions of the specified course, and one certificate per company per company location. Exception: The sponsor may distribute the cards and certificates; however, the cards and certificates shall not be issued prior to the attendees' completion of the course.
- Mail the cards and certificates to the sponsor for distribution
- Ensure that the topics outlined in the appendices to this policy are covered appropriately
- Maintain a database of scheduled training courses
- Provide a method of evaluation of its instructors for each OSHA 10-Hour, 20-Hour, and 30-Hour course
- Distribute BuSET publications as deemed appropriate by BuSET.

<u>BuSET will furnish:</u>

- Instructors
- Computer
- Projector
- An evaluation worksheet for each attendee.

Sponsor Agreement

By signing below, I signify that I understand and agree to abide by the terms and conditions contained in the course policy. I also agree and understand that BuSET reserves the right to cancel their participation in a training course or seminar if the sponsor fails to meet the requirements contained in the policy.

______________________________ ________________

Sponsor Representative Date

____

Sponsor Organization

Appendix D
Effective July 1, 2003

Dear Sponsor:

Thank you for going the extra mile for safety and health by sponsoring a training session with the Bureau of Safety Education and Training (BuSET). BuSET is dedicated to working with employers and employees to identify and resolve workplace health and safety issues. One of the ways we do this is through training seminars such as yours.

According to the attached published course policy, everyone who attends an OSHA 10-Hour course is required to have a standards book, which is provided by the sponsor and may be purchased through BuSET. The prices for occupational safety and health standards books purchased from BuSET are:

29 CFR 1910 (General Industry):	$13.50
29 CFR 1926 (Construction):	$12.00

These prices are typically $30 lower than those offered by other suppliers. These books are provided as a public service, and by purchasing large quantities of books, BuSET is able to pass the savings on to you.

Again, thank you for promoting workplace safety and health by sponsoring these training courses for your fellow Hoosiers.

NATURAL RESOURCES COMMISSION
Information Bulletin #9 (Repeal)
July 1, 2003

SUBJECT: Target Yields for Proof of Productivity on Nonprime Farmland

PURPOSE: Repeal of *Target Yields for Proof of Productivity on Nonprime Farmland*, Information Bulletin #9, published at 18 IR 2180.

EXPLANATION: The subject matter of the *Target Yields for Proof of Productivity on Nonprime Farmland* Information Bulletin #9, published at 18 IR 2180, is now addressed by rule.

DEPARTMENT OF NATURAL RESOURCES
Information Bulletin #20
(First Amendment)
Ratemaking Process for Resorts and Marinas under Lease with the Department of Natural Resources

1. Purpose

The purpose of this information bulletin is to implement an informal process for the administrative review of ratemaking recommendations for resorts and marinas under lease with the department of natural resources. The process was established by the natural resources commission during a meeting held March 24, 1998 and made applicable to rate increases to become effective in 1999 and in subsequent years. The process was published in the Indiana Register on May 1, 1998 at page 3209 as Information Bulletin #20. Amendments were made to the information bulletin during the commission meeting held on May 20, 2003, and amendments were made effective July 1, 2003. The timeframes established by the information bulletin are essential to its effective implementation.

2. Rate Increase Requests

A lessee shall submit its request for a guestroom, slip, or houseboat (if applicable) fee increase to the department of natural resources, division of state parks and reservoirs (the "department") in accordance with the existing lease agreement for the following year by April 1 of the preceding year. The lessee shall include justification for the increase request along with comparable rates from other marinas.

3. Processing Rate Increase Requests and Comments

(A) Upon receiving a request, the department will inform the division of hearings of the natural resources commission (the "hearings division"). The hearings division will assign a cause number and, in consultation with the department, select the date and time for a rate hearing to be held in Marion County. The department will advise the lessee of the date, time, and location of the rate hearing, at which time the lessee and affected persons will have the opportunity to provide comments to a hearing officer for the commission. This hearing will be held in early June or July of each year.

(B) By May 30, the lessee shall notify by must provide written notice, by personal delivery or U.S. first class mail, to each slip renter or buoy renter that the lessee is requesting a rate increase. The lessee shall include the time, date, and location of the rate hearing. This notice shall include the proposed new rates. The notice shall also advise the renter of the opportunity to provide comments to the hearing officer, either by U.S. first class mail or electronic mail. Before the public hearing, the lessee must provide the hearings division with a listing that includes the names and addresses of persons notified under this paragraph. The lessee shall, by affidavit or affirmation, authenticate that all addressees were served as indicated in the listing. If the lessee asserts the listing contains trade secrets, the Uniform Trade Secrets Act (IC 24-2-3) applies.

(C) Petitions, requests, documentation, exhibits, and other pertinent materials concerning the proposed rate increase request shall be made available for the public to review at the lessee's business office, during normal business hours. A copy will be available for review at the Division of State Parks and Reservoirs, 402 West Washington Street, Room W298, Indianapolis, IN 46204. The listing of persons notified required in paragraph (B) is not governed by this paragraph.

(D) Affected persons may send written comments concerning the proposed rate increase to the Division of Hearings, Natural Resources Commission, 402 West Washington Street, Room W272, Indianapolis, IN 46204. Email comments may also be submitted to the hearing officer. The email address will be provided in the letter sent by the lessee to the affected parties by May 30.

(E) In accordance with the existing lease agreements, the department will analyze comparable facilities to compare rates with those sought by the lessee. Results of that analysis will be presented at the rate hearing conducted by the hearing officer. Information used in this analysis will also be available for inspection at the division of state parks and reservoirs office in Indianapolis.

4. Public Hearing and Presentation to Commission

Affected persons may attend the rate hearing and provide oral or written statements.

The hearing officer shall conduct the hearing in an orderly and informal manner designed to develop a fair and complete agency record. The administrative orders and procedures act (IC 4-21.5) does not apply, but the commission delegates authority to the hearing officer under IC 14-11-1-3 to make any reasonable orders to implement this information bulletin.

The lessee's request and any supporting documentation, written comments provided by affected persons, the analysis by the department, and oral and written statements received during the rate hearing form the record upon which the hearing officer shall review the request for rate increase. Following the completion of the review, the hearing officer shall make a written report to the natural resources commission. The report shall include written findings with respect to the requested rate increase and a proposal to the commission for recommendations to the U.S. Army Corps of Engineers. The hearing officer shall also forward a copy of the report to the lessee, the department, and any other person who requests a copy.

The hearing officer shall present the findings and recommendations to the natural resources commission during a meeting to be held in August or September. During that meeting, the commission shall either recommend approval of the rate increase, disapproval of the rate increase, or approval of a rate increase in an amount less than requested by the lessee. Recommendation for favorable consideration of a rate increase shall not be withheld unless, in the opinion of the commission, fees submitted exceed the fair market rates charged by operators of other similar privately-owned resort developments comparable to the project in the area.

5. Recommendation by Commission and Final Action by Army Corps

The commission's secretary shall memorialize the commission's recommendations in writing. Within seven (7) days after the commission meeting, the department shall forward the recommendation to the District Engineer of the U.S. Army Corps of Engineers for final action. No rate increase is effective until the lessee receives a letter of approval noting both the recommendation by the commission and the approval of a rate increase by the U.S. Army Corps of Engineers.

6. Interim Rate Adjustments or Clarifications

The commission delegates authority to the director of the division of state parks and reservoirs to approve interim rate adjustments for projects or slips not addressed in this process due to new construction or modification of existing facilities. The rates apply only until the next rate request cycle, however, when a lessee must present a petition for rate approval as provided in this information bulletin.

7. Index of Commission Findings and Recommendations

The hearings division is directed to index, and place on the commission's website, findings and recommendations made under this information bulletin after August 1, 2003. To promote equity and consistency, the department and the commission may consider these indexed findings and recommendations as precedents.

DEPARTMENT OF STATE REVENUE
Audit-Gram Number IR-020
May 12, 2003

[This Audit-Gram replaces the prior issue dated May 10, 2001 published at 24 IR 2931]

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

Property Purchased or Used in Indiana

Authority: IC 6-2.5-2-1(a); IC 6-2.5-3-1(b); IC 6-2.5-3-2(a); IC 6-2.5-3-5; 45 IAC 2.2-3-17; *Rhoade v. Ind. State Revenue*, Ind. Tax Court (2002)

IC 6-2.5-2-1. Sales tax imposed.

(a) [T]he state gross retail tax, is imposed on retail transactions made in Indiana.

[1980]

IC 6-2.5-3-2. Use tax imposed.

(a) [T]he use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

[1980]

IC 6-2.5-3-5. Credit against use tax.

(a) A person is entitled to a credit against the use tax… equal to the amount… of sales tax… paid to another state… for the acquisition of that property.

[1980]

I. GENERAL STATEMENT

A. Property acquired or rented in Indiana is subject to the Indiana Sales Tax to be collected by the Indiana vendor.

B. Property acquired or rented outside Indiana for storage, use, or consumption in Indiana is subject to the Indiana Use Tax to be paid by the purchaser either directly to the Department or to a vendor holding an Indiana Registered Retail Merchants Certificate.

II. EXEMPTION FROM SALES TAX OR USE TAX [FN 1]

A. Property acquired or rented in Indiana is not subject to Indiana Sales Tax if the purchaser is allowed an exemption contained in IC 6-2.5 Chapters 4 and 5.

B. Property acquired or rented outside Indiana is not subject to Indiana Use Tax if the property:

1. is not stored, used, or consumed in Indiana, or
2. is stored in Indiana, including no more than incidental handling, and is subsequently transported and used solely outside Indiana, [FN 2] or
3. is processed, printed, fabricated, or manufactured into, attached to, or incorporated into tangible personal property in Indiana, and is subsequently transported out of Indiana for use solely outside Indiana. [FN 3]

III. PROPERTY USED "SOLELY OUTSIDE INDIANA" [FN 4]

If property upon which no Indiana Sales Tax has been paid is shipped from a point in Indiana to an out-of-state location for storage and that property is subsequently shipped back to Indiana for use, the property is then subject to the Indiana Use Tax.

IV. CREDIT FOR TAX PAID OUTSIDE INDIANA

A. A purchaser who has acquired or rented property in Indiana upon which Indiana Sales Tax was required to be paid is not allowed a credit for Use Tax paid to another state. A state which imposes a Use Tax upon property used in that state should allow a credit for Sales Tax required to be paid to an Indiana vendor.

B. A purchaser who has acquired or rented property in a transaction occurring outside Indiana upon which the sales tax was required to be paid to a state other than Indiana is allowed a credit in the amount of such tax paid against any Indiana Use Tax due. [FN 5] Such credit shall not exceed the Indiana Use Tax.

[FN1] The use of a Direct Payment Certificate (IC 6-2.5-8-9) does not constitute an exemption from Sales Tax but only the certificate holder's agreement to pay any tax due directly to the Department.

[FN 2] IC 6-2.5-3-1(b)

[FN 3] IC 6-2.5-3-2(d)

[FN 4] As contained in footnote 2 and 3 above.

[FN 5] Note: IC 6-2.5-3-5(b) [45 IAC 2.2-3-17] which excludes motor vehicles from this credit was found by the Ind. Tax Court in *Rhoade v. Dept*, Sept. 6, 2002 to violate the Commerce Clause of the U.S. Constitution.

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #70
Sales Tax
May 2003

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

SUBJECT: Farm Markets

REFERENCES: IC 6-2.5-2; IC 6-2.5-5-20; IC 6-2.5-6; IC 6-2.5-8-1; IC 6-2.5-8-8; IC 6-2.5-8-9; IC 6-8.1-10

The purpose of this bulletin is to provide Indiana sales tax information for persons operating private Farm Markets or participating in organized Farmers or City Markets.

I. Persons selling produce and various items of food for human consumption are not required to charge and remit sales tax on these items and are not required to register with the Indiana Department of Revenue as a Retail Merchant if that is the only item they sell. This exemption for food items does not apply to items such as candy, soft drinks and food items sold for immediate consumption such as sandwiches, soups and other prepared food items sold for consumption at or near the premises.

II. Persons selling arts, crafts and items not suitable or intended for human consumption are retail merchants and must register and collect Indiana Sales Tax on such sales. Items in this category may include but are not limited to: Potholders, bird houses, candles, cut flowers and flower arrangements, picnic tables, benches, chairs and other forms of lawn and patio furniture, and decorative and ornamental items such as gourds, ornamental corn and bittersweet.

III. If a person is selling taxable items such as described in Item II above, they must register with the Indiana Department of Revenue by completing and filing Form BT-1 Business Tax Application. **There is a one-time registration fee of $25.00**. Upon registration and for the first full year the merchant will be required to file sales tax returns [Form ST 103] based on their estimated taxable sales volume as provided under items A. thru D. below. After the first year the account will be evaluated and the merchant will be required to file sales tax returns under the following schedule:

A. If the average monthly tax collected is $10.00 or less the return will be due on an annual basis.

B. If the average monthly tax collected is between $10.00 and $25.00 the return will be due on a semi-annual basis.

C. If the average monthly tax collected is between $25.00 and $75.00 the return will be due on a quarterly basis.

D. If the average monthly tax collected is more than $75.00 the return will continue to be due on a monthly basis.

A merchant that only does business during specific months of the year can elect to file on a seasonal basis which will only require the filing of monthly sales tax returns for the specific months the merchant is actually open for business.

Sales tax returns are due on the 30th day of the month following the close of the reporting period. (NOTE: Tax due in excess of $1000.00 must be filed by the 20th day of the month following the close of the reporting period).

Any person desiring to register as a Retail Merchant may do so at the Taxpayer Services Office located on the 1st floor of Government Center North in Indianapolis or at any District Office of the Indiana Department of Revenue located through out the State. Registration may also be accomplished on the internet at: [http://www.in.gov/dor/taxforms/pdfs/bt-1.pdf]

IV. It may be expected that persons selling taxable items may, at times, sell their products to a commercial buyer for resale. If a person buys items for resale, he must issue an exemption certificate [Form ST-105 or other approved exemption certificate or a direct payment permit issued by the Indiana Department of Revenue] to the merchant. The merchant must retain a copy of the form or permit and will then report these sales as exempt sales on their Sales Tax return.

V. It is extremely important for a person, registered as a retail merchant, to file periodic sales tax returns in a timely manner. For each period, that a sales tax return is due, the person must file a return. If no tax was collected for that particular period, a return must be filed showing no tax due. The frequency and due date of such returns will be evaluated, after the first year, as provided under Item III.

VI. Failure to file returns or filing returns after the due date will result in the assessment of interest on any delinquent payment and the assessment of a penalty. If no return is filed for a taxable period the Department may issue a billing for that period based on the "Best Information Available" [BIA]. If such a billing is issued by the Department it will be the responsibility of the merchant to prove that billing was in error and establish the correct amount of tax, if any, that was actually due for that period. Penalty for delinquent payments is 10% of the tax due or $5.00 whichever is greater. Penalty for failure to file a return is 20% of the tax due.

Persons having questions or desiring additional information may contact Taxpayer Services at (317) 233-4015 or any District Office of the Indiana Department of Revenue.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

03990176.LOF

LETTER OF FINDINGS NUMBER: 99-0176
State Withholding Tax
For the 1995, 1996, and 1996 Tax Years

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. Employee Travel Expense Payments – State Withholding Tax

Authority: IC 6-3-4-8(a); IC 6-3-4-8(g); I.R.C. § 162(a)(2); I.R.C. § 274(d); I.R.C. § 3401(a); I.R.C. § 3402; American Airlines, Inc. v. United States, 204 F3d 1103 (Fed. Cir. 2000); Treas. Reg. § 1.62-2(c); Treas. Reg. § 1.62-2(c)(5); Treas. Reg. § 1.62-2(f)(1); Treas. Reg. § 31.3121(a) to 1(h)

Taxpayer argues that the audit erred in determining that it was required to withhold state adjusted gross income tax from the amount of money it paid to its employees in the form of travel expense payments.

II. Abatement of the Ten Percent Negligence Penalty

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

Taxpayer maintains that it is entitled to abatement of the ten percent negligence penalty because – based upon industry standards and practices – it acted in good faith in deciding it was not required to withhold taxes on amounts it paid its employees for travel expenses.

STATEMENT OF FACTS

Taxpayer is in the construction business. Taxpayer performs construction work for customers both inside and outside the state. Taxpayer has its own regular employees and occasionally subcontracts work as necessary.

The Department of Revenue (Department) conducted a review of taxpayer's business records and income tax returns. During that audit review, the Department concluded that taxpayer had failed to withhold taxes on certain travel expense payments it made to its employees. Accordingly, the Department assessed additional amounts of withholding taxes. Taxpayer disagreed with this conclusion and submitted a protest to that effect. An administrative hearing was held during which taxpayer explained the basis for its protest. This Letter of Findings results.

I. Employee Travel Expense Payments – State Withholding Tax

Taxpayer performs construction work at off-site locations. Each workday, taxpayer instructs its employees to travel directly from their homes to a particular construction site. The distance from each employee's home to the construction site varies as does the amount of time each employee needs to travel to that site. However, taxpayer regularly compensates its employees for the time spent in traveling from their homes to the construction site.

Taxpayer compensates each employee on the basis of the employee's hourly wage. Taxpayer compensates each employee on the basis of the distance from that employee's home to the site. An employee who needs one hour to travel to the site will be paid for that one hour. An employee, who needs two hours to travel to the site, will be paid for two hours. An employee who needs one hour to travel to the site and who is paid an hourly wage of $10 will be paid an extra $10. Another employee – who also lives one hour from the site but who is paid $20 per hour – will be paid an extra $20.

If a number of employees decide to carpool to the site, they will receive the same amount as if they each had traveled individually. If an employee rides along with the company truck to the construction site, that employee will receive the same amount as if that employee drove his or her own vehicle. Theoretically, if a employee traveled to the construction site Monday morning, took up temporary residence near the site for the remainder of the work-week and traveled home Friday afternoon, that employee would be paid the same amount as if the employee traveled to and from the construction site every day of the workweek.

The audit determined taxpayer had not withheld state and county taxes from the amounts paid as travel expenses. The audit concluded that these amounts were wages from which taxpayer should have withheld taxes. Taxpayer disagrees arguing that the amounts were simply reimbursements for the employees own expenses incurred as a result of traveling to and from work.

Every Indiana business – which is required under federal law to withhold, collect, and remit withholding taxes to the Internal Revenue Service on wages paid employees – must also withhold Indiana withholding tax on those same wages. IC 6-3-4-8(a). If the Indiana employer fails to withhold the state tax from its employees' wages, the employer itself becomes liable for the tax. IC 6-3-4-8(g).

Taxpayer argues that because it was not required under federal law to withhold taxes from the travel compensation payments, it was not required to do so under Indiana law.

I.R.C. § 3402 requires employers to withhold wages for payment of an employee's income taxes. "Wages" are defined as including "all remuneration" subject to stated exceptions. *See* I.R.C. § 3401(a). One of these exceptions includes amounts paid employees as “traveling and other expenses.” The expenses are defined at Treas. Reg. 31.3121(a) to 1(h) which states:

> Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages and are not subject to withholding. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicting the separate amounts where both wages and expense allowances are combined as a single payment.

The employer’s obligation to withhold federal (and state) taxes from an expense allowance depends on whether the amount is paid under an accountable or a non-accountable plan. Treas. Reg. § 1.62-2(c). *See* I.R.C. § 274(d). Expenses that are reimbursed under an accountable plan are not reported as income. Any expense amounts paid under a non-accountable plan must be included in the employee’s income, and the employer must withhold taxes. Treas. Reg. § 1.62-2(c)(5).

> A plan under which an employee is reimbursed for expenses – or receives an allowance to cover those expenses – is an accountable plan only if three conditions are satisfied: (1) there must be a business connection for the expenses; (2) the employee must either substantiate or be deemed to have substantiated the expenses; and (3) the employee must return to the employer amounts in excess of the substantiated expense. Treas. Reg. § 1.62-2(c).

Although I.R.C. § 162(a)(2) allows a deduction from an employee’s income for ordinary and necessary business expenses including the employee’s travel expenses, no deduction is allowed unless the person claiming the deduction meets the substantiation requirements of I.R.C. § 274(d). Therefore, unless taxpayer reasonably believed that its employees were keeping adequate records of their traveling expenses to meet the substantiation requirements of I.R.C. § 274(d), taxpayer had no reason to assume that the employees could exclude from their gross income the amount taxpayer paid as travel expenses. American Airlines, Inc. v. United States, 204 F3d 1103, 1106 (Fed. Cir. 2000).

Taxpayer paid each employee a travel allowance based upon the number of days the employee worked and the distance that employee lived from the current work-site. Whether the employee drove those miles each work-day, whether the employee car-pooled with other employees, or whether the employee rode with the taxpayer’s truck to the worksite was not relevant to the amount of travel allowance actually paid. There is no indication taxpayer expected the employees to substantiate their actual travel expenses or that the employees would be entitled to exclude that portion of their wages as travel expenses. Taxpayer’s travel allowance payments do meet the substantiation requirement because the plan was not reasonably calculated not to exceed the amount of expenses or anticipated expenses are required under I.R.C. § 274(d).

The federal regulation requires an employee to return to the employer with a reasonable time any “amount paid under the arrangement in excess of the expense substantiated in accordance with paragraph (e) of this section.” Treas. Reg. 1.62-2(f)(1). Under taxpayer’s travel allowance plan, each employee was paid an allowance based, in part, on that employee’s hourly wage. There is no indication those employees whose travel allowance exceeded their actual expenses ever returned or were ever expected to return any portion of the allowance payment to the taxpayer. This conclusion goes hand-in-hand with the determination that no employee was ever expected to substantiate their actual expenses.

There is insufficient information to establish whether or not taxpayer ever paid the travel hours “by making a separate payment or by specifically indicating the separate amounts...” as required under Treas. Reg. 31.3121(a) to (h). Nevertheless, taxpayer’s travel allowance plan was not an “accountable plan” as defined under Treas. Reg. § 1.62-2(c) because the travel allowance payments were not calculated to reimburse its employees for the expenses each employee actually incurred in traveling to and from the worksites as required under I.R.C. § 274(d).

Taxpayer paid its employees for the time they spent traveling to and from their workplace. The payments were made in exchange for time the employee was reasonably expected to spend in traveling to the workplace. As such, the payments constituted wages for which taxpayer was required to withhold federal, state, and county taxes.

FINDING

Taxpayer’s protest is respectfully denied.

II. Abatement of the Ten Percent Negligence Penalty

Taxpayer argues that it is justified in requesting the Department to exercise its discretion to abate the ten percent negligence penalty assessed at the conclusion of the original audit examination. Taxpayer maintains that its practice of paying its employees for time spent in traveling to and from the worksite – and not withholding income taxes – is a common practice in the construction industry. In addition, taxpayer maintains that there are no Indiana appellate or Supreme Court decisions directly addressing this issue. Further, taxpayer states that the Department has not addressed the issue in any previous Letter of Findings, Revenue Ruling, or Information Bulletin. Taxpayer points to a number of judicial precedents addressing the question which taxpayer states are “inconsistent at best.” Taxpayer also states that the issue was not raised in any of the Department’s previous audits.

IC 6-8.1-10-2.1 requires that a ten percent penalty be imposed if the tax deficiency results from the taxpayer’s negligence. Departmental regulation 45 IAC 15-11-2(b) defines negligence as “the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer.” Negligence is to “be determined on a case-by-case basis according to the facts and circumstances of each taxpayer.” Id.

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

Taxpayer has demonstrated that its failure to withhold state income taxes was “not due to willful neglect.”

FINDING

Taxpayer’s protest is sustained.

DEPARTMENT OF STATE REVENUE

04990404.LOF

LETTER OF FINDINGS NUMBER: 99-0404
Indiana Sales and Use Tax
For the Tax Years 1995, 1996, and 1997

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

ISSUES

I. Production Equipment

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

Taxpayer maintains that certain items of equipment, attached to its production machinery and used to service and maintain that machinery, are entitled to the production exemption.

II. Material Handling Equipment

Authority: IC 6-2.5-5-3(b); 45 IAC 2.2-5-8(d); 45 IAC 2.2-5-10(c)(2)(D)

Taxpayer argues that equipment used in handling and packaging its completed plastic bottles is entitled to the manufacturing exemption because the packaging of the bottles occurs within its direct production activities.

III. Air-Conditioning Equipment

Authority: IC 6-2.5-5-3(b); Indiana Dept. of State Revenue v. Cave Stone, 457 N.E.2d 520 (Ind. 1983); Dept. of State Revenue v. Kimball International, Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Ind. Dept. of Revenue v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974)

According to taxpayer, the air conditioning equipment used to maintain temperature and humidity levels inside of its production plant, is directly involved in the direct production of its tangible personal property and is exempt from sales and use tax.

IV. Storage Silos

Authority: 45 IAC 2.2-3-9(e)(3); 45 IAC 2.2-3-12(c); 45 IAC 2.2-5-8(e); 50 IAC 2.2-1-3

Taxpayer disagrees with the audit’s conclusion that its storage silos were “storage equipment” subject to use tax. According to taxpayer, the storage silos are actually improvements to “real property” exempt from the gross retail tax.

V. 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 argues that the imposition of the ten percent negligence penalty was incorrect and that the Department is required to abate the penalty.

STATEMENT OF FACTS

Taxpayer produces empty plastic bottles by injection molding. The empty plastic bottles are then sold to other manufacturers which use them for packaging various consumer products. Taxpayer’s production facility is located within the state. The Department conducted an audit which resulted in the assessment of additional sales and use tax. Taxpayer disagreed with a number of those assessments and submitted a protest. A number of the protested issues were resolved at the protest review stage. An administrative hearing was conducted, and this Letter of Findings results.

DISCUSSION

I. Production Equipment

Taxpayer purchased a number of items of equipment which it uses with, or are attached to, its production machinery. These items consist of stairs, platforms, guards, ladder, and crossover steps. The audit concluded these items were not directly involved in the production of plastic bottles and assessed use tax accordingly. Taxpayer disagrees arguing that the equipment is directly involved in the production of its plastic bottles.

In Indiana, a sales tax is imposed on retail transactions, and a complementary use tax is imposed on tangible personal property that is stored, used, or consumed in the state. IC 6-2.5-1-1 et seq. In this instance, taxpayer relies on the tax exemption found at IC 6-2.5-5-3(b). That particular exemption states that: "Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for *direct* use in the *direct* production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property." (*Emphasis added*). It is taxpayer's contention that the various items of equipment fall within the definition of "direct use" as provided in 45 IAC 2.2-5-8(c). That regulation reads as follows:

> The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

The Legislature has provided Indiana manufacturers a sales tax exemption for certain purchases of equipment directly involved in the direct production of manufactured goods. However, in enacting the stringently worded exemption, the Legislature plainly did not intend to create a global exemption for any and all equipment which a manufacture purchases for use within its manufacturing facility. The manufacturing exemption, "fairly read, is meant to exempt capital equipment that meets the 'double direct' test." Mumma Bros. Drilling Co. v. Dept. of Revenue, 411 N.E.2d 676, 678 (Ind. Ct. App. 1980). The court has held that capital equipment "in order to be exempt, (1) must be *directly* used by the purchaser and (2) be used in the *direct* production, manufacture, fabrication, assembly, extraction, mining, processing, refining or finishing of tangible personal property." Indiana Dept. of State Revenue v. Cave Stone, 457 N.E.2d 520, 525 (Ind. 1983) (*Emphasis added*). "[T]he test for directness requires the equipment to have an 'immediate link with the product being produced.'" Id. Accordingly, the sales tax exemption is applicable to that equipment which meets the "double direct" test and is "essential and integral" to the manufacture of taxpayer's tangible personal property. General Motors Corp. v. Dept. of State Revenue, 578 N.E.2d 399, 401 (Ind. Tax Ct. 1991).

Undoubtedly, the various items of equipment play a significant role in the production of taxpayer plastic bottles. However, the equipment does not have an immediate relationship to the production of the bottles, does not meet the double direct test, and is not essential and integral to the production of taxpayer's plastic bottles. As noted in 45 IAC 2.2-5-8(g), "The fact that particular property may be considered essential to the conduct of the business of manufacturing because its use is required... by practical necessity does not itself mean that the property 'has an immediate effect upon the article being produced.'"

FINDING

Taxpayer's protest is respectfully denied.

II. Material Handling Equipment

Taxpayer argues that the purchase of the tilt tables, pack stands, and a palletizer are exempt from the gross retail tax because these items of equipment are involved in the direct production of the plastic bottles. The pack stands are used by production workers to fill empty boxes with plastic bottles. The palletizer is used to stack the filled boxes unto a skid before the loaded skid is shrink-wrapped and banded. Taxpayer failed to precisely describe the manner in which the "tilt tables" are used; apparently, the "tilt tables" are used to assist workers in handling the packaged or partially packaged material.

The audit determined that this equipment was used to move taxpayer's finished bottles after the production process was complete and indicated that the equipment was subject to use tax.

As stated above, taxpayer is entitled to an exemption for equipment and machinery purchased "for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property." IC 6-2.5-5-3(b). Common sense and practical experience indicate that there are some activities which occur *before* a manufacturer begins producing tangible personal property and that there are some activities which occur *after* the manufacturer completes producing its tangible personal property. 45 IAC 2.2-5-8(d), entitled "Pre-production and post-production activities," defines those parameters stating that, "'Direct use in the production process' begins at the point of the first operation or activity constituting part of the integrated production process and ends at the point that the production has altered the items to its completed form, including packaging, if required."

The regulation provides specific guidance in classifying taxpayer's own equipment as either "pre-production" or "post-production." In one of the examples provided in 45 IAC 2.2-5-10(c)(2)(D), a manufacturer's "production process" concluded "with the final packaging of the product onto the case palletizers." Using the cited example as the benchmark, the Department concludes that taxpayer's own palletizer is entitled to the exemption provided under IC 6-2.5-5-3(b). In addition – using the palletizer as a reference – the Department concludes that the remaining items of equipment are entitled to this same exemption to the extent that the equipment is involved in handling the plastic bottles before arriving at the palletizer.

FINDING

Taxpayer's protest with respect to the palletizer is sustained. Taxpayer's protest with respect to the tilt tables and the pack stands is sustained to the extent that these two specific categories of equipment are used to handle the plastic bottles before reaching the palletizer.

III. Air-Conditioning Equipment

Taxpayer purchased cooling equipment which is used to air-condition its manufacturing plant. Taxpayer argues that, because the cooling equipment is necessary for the production of its plastic bottles, its initial purchase of the cooling equipment was exempt from sales tax pursuant to IC 6-2.5-5-3(b). The audit disagreed with taxpayer's argument, found that the cooling equipment was only peripherally involved with the direct production of taxpayer's plastic bottles, and assessed additional use tax accordingly.

Taxpayer makes its bottles using raw plastic pellets. The pellets are blended, dried, melted, and then injected into molds. According to taxpayer, the molding must occur in a moisture-free environment, or unacceptable levels of condensation would accumulate on the molds.

The molding machines are enclosed in large plexiglas structures. Separate air-handling equipment supplies air to these enclosed structures. This separate air-handling equipment is not at issue; what is at issue is the primary cooling equipment used to air-condition the entire manufacturing facility. Taxpayer argues that, because doors to the plexiglas structures are opened and closed during production of the bottles, air from the plant migrates into the enclosures. According to taxpayer, unless the entire plant was air conditioned, the unconditioned plant air would contaminate the production of the plastic bottles.

Taxpayer cites to Dept. of State Revenue v. Kimball International, Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988) in support of its argument that its air conditioning equipment is entitled to the exemption. In that case, the court found that the manufacturer's air make up units were exempt because, without the air make up units, "the manufacturing process would not be possible" and because the units were "essential and integral parts of the entire manufacturing process." Id. at 457.

However, the taxpayer's plant-wide cooling equipment is not analogous to the air make up units in Kimball. In Kimball, the air make up units were used to supply conditioned air to the manufacturer's isolated paint booths. Id. at 455. There is no indication that taxpayer's plant-wide air conditioning equipment is as essential or integral to the production of the plastic bottles. Although the court noted that, "qualification for the exemption is highly fact sensitive," taxpayer's circumstances are more comparable to that of the picture tube manufacturer in Ind. Dept. of Revenue v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974). Id. 456. In that case, the court found that the picture tube manufacturer's environmental control equipment, used to maintain a plant-wide dust free environment, was not entitled to the exemption. RCA at 100. The picture tube manufacturer's air conditioning equipment was not exempt because the equipment's "immediate effect [was] on the surroundings in which the manufacturing process [took] place and only through the intervening agency of those surroundings, on the tubes or on the process by which they [were] manufactured." Id.

Taxpayer's plant-wide air conditioning equipment is not entitled to the exemption because the equipment is not directly used in the production of the plastic bottles and has no "immediate link with the product being produced." Cave Stone, 457 N.E.2d at 525.

FINDING

Taxpayer's protest is respectfully denied.

IV. Storage Silos

Taxpayer purchased "silos" for the purpose of storing raw plastic pellets. The silos are located outside of the manufacturing plant. When the raw plastic pellets first arrive at taxpayer's facility, they are loaded into the silos. When taxpayer is ready to use the pellets, they are transferred to "surge bins," combined to achieve the desired color, and then moved to the molding machines in the production area.

The audit found that, pursuant to 45 IAC 2.2-5-8(e), the silos were not exempt and assessed use tax accordingly. The regulation states that, "Tangible personal property used in or for the purpose of storing raw materials... is subject to tax...." There is no question that the silos are used to store taxpayer's "raw materials." According to taxpayer, what is it at issue is whether the silos are "[t]angible personal property."

The audit determined the silos were tangible personal property more similar to "equipment" then to "real property." In support of that conclusion, the audit noted that the silos were subject to extensive wear and tear, were replaced frequently (approximately every two years), were not of a "permanent or substantial nature," and would likely be moved if the plant were ever moved.

Taxpayer argues that the silos are "real property" exempt from sales and use tax pursuant to 45 IAC 2.2-3-9(e)(3). That regulation states, in relevant part, as follows:

> With respect to construction materials a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax... to the Department of Revenue when he disposes of such property in the following manner... (3) Lump sum contract. [The contractor] converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in a total contract price.

In addition, taxpayer – in support of the argument that the storage silos should be classified as real property – cites to the "Real Property Assessment" of the Indiana Administrative Coe. In particular, taxpayer points to 50 IAC 2.2-1-3, which states in part that, "The use of a unit of machinery, equipment, or a structure determines its classification a Real or Personal Property. If the unit is a land or building improvement, it is considered as Real Property." Because the storage silos hold the raw materials before taxpayer's manufacturing process begins, and because no "manufacturing" occurs *within* the silos, the silos should be classified as "real property" exempt from sales and use tax.

The Department declines to accept taxpayer's conclusion that the real property regulations and the sales and use tax regulations should be read in pari materia. Although 50 IAC 2.2-1-3 provides some indication that silos – together with "grain elevators" and "cupolas – are classified as "real property," there is nothing to indicate that the IC 6-1.1 et seq. (property tax) and IC 6-2.5 et seq. (gross retail tax) are in pari materia.

Rather, the Department finds that the pellet storage silos at issue are more similar to discharge bins or storage hoppers than to "an improvement to real estate" (45 IAC 2.2-3-12(c)) or "realty on land" (45 IAC 2.2-3-9(e)(3)). Because the Department agrees with taxpayer's position that the silos are used to store its plastic pellets before the onset of production, and because the Department finds that the silos are storage equipment, the audit's assessment of additional use tax was not erroneous. Under 45 IAC 2.2-5-8(e), "Tangible personal property used in or for the purpose of storing raw materials or finished goods is subject to tax...."

FINDING

Taxpayer's protest is respectfully denied.

V. Abatement of the Ten Percent Negligence Penalty

Taxpayer protests imposition of the ten percent negligence penalty. Taxpayer requests the Department to waive the penalty on the ground that the taxpayer "provided a bona fide interpretation of controlling authority for the overwhelming majority of the assessment" and because it "made a good faith attempt to self-assess use tax on all subject items."

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 finds no indication that the ten percent negligence penalty was assessed. To the contrary, the audit specifically recommended that imposition of the penalty was unwarranted. Therefore, the taxpayer's protest as to the issue of penalties is rendered moot.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120000137.LOF

LETTER OF FINDINGS NUMBER: 00-0137
Adjusted Gross Income Tax
For Years 1994, 1995, 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 – Loss Flow Through from S-corporation

Authority: 45 IAC 3.1-1-6; IRC 465

Taxpayers protest the denial of the flow through of their losses from their S-corporation to their individual return.

STATEMENT OF FACTS

Taxpayers are individuals who are eligible to file a joint income tax return for both federal and state income tax purposes. Taxpayers are the sole shareholders of two businesses, one of which is a retail sales outlet that was organized as a sub chapter S Corporation and sustained significant net operating losses which taxpayers flowed through to their individual return. The audit disallowed some of the losses inasmuch as the taxpayer was unable to provide all records necessary to accurately determine the amounts each shareholder had at-risk in the corporation. A timely protest was filed, with this letter of finding resulting.

I. Adjusted Gross Income Tax – Adequate Documentation

DISCUSSION

Taxpayer received an adjustment to their returns for the years at issue based on the Department's denial of their claim for losses flowing through to their individual return from their S- Corporation. The Taxpayer and Department agree that the issue centers on taxpayer's risk of loss for the S-Corporation losses and their flow through as outlined in 45 IAC 3.1-1-6. Specifically, both parties agree that IRC Section 465 specifies that a shareholder may only deduct losses to the extent that shareholder is at risk. While S-corporation shareholders are generally not at-risk for amounts borrowed by the S-corporation from third parties, S-corporation shareholders are at-risk for amounts personally borrowed from a bank and then loaned or contributed to the corporation. The Department and taxpayer agree that the money was actually a monetary loss by the S-corporation and thus, potentially, qualifies as a loss to flow through to the taxpayer.

With this understanding, the issue becomes a burden of proof. While there is no dispute as to the loss amount for the S-corporation, IRC 465(b)(4) provides that a taxpayer is not at risk for amounts lost that are protected against loss through nonrecourse financing, guarantees, stop loss agreements, or other similar arrangements. Taxpayer has now provided evidence to the effect that the loss did directly impact the shareholders and that they were not protected by the arrangements outlined in IRC 465(b)(4). Consequently, taxpayer protest is sustained.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420000439.LOF

LETTER OF FINDINGS NUMBER: 00-0439
Sales Tax
Calendar Years 1997, 1998, and 1999

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a sales tax assessment resulting from a Department audit conducted for the calendar years 1997, 1998, and 1999.

The taxpayer sells and services computer storage devices. The taxpayer ships equipment into Indiana. The taxpayer also leases equipment to Indiana customers and maintains a small amount of inventory at the customer's location. On October 9, 1997, the taxpayer filed for Chapter 11 Bankruptcy protection. The taxpayer continues to operate.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty assessment be waived since the taxpayer has always filed on a timely basis and the penalty is a hardship for a small company.

The Department points out the error in the audit is approximately 25% of the total sales tax for the audit period. The Department considers 25% to be a material error.

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

The Department finds the taxpayer 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

0220000441.LOF

LETTER OF FINDINGS NUMBER: 00-0441
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.

ISSUE

I. Adjusted Gross Income Tax – Method of Calculation

Authority: 45 IAC 3.1-1-153

Taxpayer protests the auditor's decision that the partnership distribution should be treated as allocated income for Indiana adjusted gross income tax purposes.

II. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Sale of Contracts

Authority: *Hunt Corporation v. Indiana Dept. of State Revenue,* 709 N.E.2d 766 (Ind. Tax Ct. 1999); IC 6-3-2-2; 45 IAC 3.1-1-153

Taxpayer protests the auditor's determination that income from the sale of contracts, received as a part of taxpayer's distributive share of partnership income, was allocable to Indiana for adjusted gross income tax purposes.

III. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Interest Income

Authority: 45 IAC 3.1-1-153

Taxpayer protests the auditor's determination that interest income, received from taxpayer's distributive share of partnership income earned from the long-term investment of the partnership's excess cash, was allocable to Indiana for adjusted gross income tax purposes.

STATEMENT OF FACTS

Taxpayer is a partner in an out-of-state partnership that is in the business of providing consumer information (hereinafter, "Partnership"). The Partnership was formed to operate debt collection and credit verification functions. The Partnership is affiliated with a large corporation headquartered in California. Taxpayer asserts that it holds its interest in the Partnership as an investment. All of taxpayer's income is from the Partnership through a distributive share.

The Department of Revenue conducted an audit for the years in question and issued various tax assessments against taxpayer. Additional facts will be supplied as necessary for discussion.

I. Adjusted Gross Income Tax – Method of Calculation

DISCUSSION

In its income tax return, Taxpayer apportioned its partnership income based upon its percentage of ownership of the Partnership as related to the net income. However, citing 45 IAC 3.1-1-153, the auditor determined that partnership distributions should be treated as allocated income for Indiana adjusted gross income tax purposes. As such, all of the net income that taxpayer apportioned was removed from the audit report; and, only the allocated distributive share of the partnership income attributable to Indiana was included as being subject to tax. Taxpayer disagrees with the auditor's method.

Upon completion of its audit of taxpayer, the auditor determined that taxpayer and the Partnership were non-unitary. Taxpayer offered no evidence to refute the auditor's determination. 45 IAC 3.1-1-153 dictates that when a corporate partner and its corporate partnership are non-unitary, the corporate partner's share of the partnership's business income attributable to Indiana is determined by applying a three-factor formula consisting of the property, payroll, and sales of the Partnership. The apportioned amount is then allocated to Indiana for adjusted gross income tax purposes. The auditor followed the mandates of the regulation in determining the amount of tax taxpayer owed on its distributive share of the Partnership income. No error occurred here.

FINDING

Taxpayer's protest is denied.

II. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Sale of Contracts

DISCUSSION

Taxpayer, a corporate partner of a corporate partnership, has characterized the income from the sale of consumer contracts, received as part of taxpayer's distributive share of partnership income, as non-business income. According to taxpayer, the contracts sold were located throughout the East, the South, and the Middle-West regions of the United States. There were no contracts located, or any services performed in Indiana. Taxpayer is adamant that the activities of the sale of the contracts did not occur in Indiana, and did not occur in the regular course of taxpayer's business, *i.e.*, a shareholder of the Partnership. According to taxpayer, the sale of the contracts was for investment purposes only, and not an integral part of taxpayer's regular business. Therefore, taxpayer requests that the proceeds from the sale of the contracts be classified as non-business income allocable to California, the state in which taxpayer is domiciled.

Corporate partners are taxed on their distributive share of the partnership's Indiana source income. The determination of the source of a partnership's income differs based upon whether or not the partnership maintains a unitary relationship with the corporate partner. The relevant regulation for determining the source of a partnership's income is 45 IAC 3.1-1-153.

45 IAC 3.1-1-153(b) states in relevant part that:

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

45 IAC 3.1-1-153(c) provides in relevant part that:

> [i]f the corporate partner's activities and the partnership's activities *do not* constitute a unitary business under established standards, disregarding ownership requirements, the corporate partner's share of the partnership income attributable to Indiana shall be determined as follows:
>
> > (1) If the partnership derives business income from sources within and without Indiana, the business income derived from sources within Indiana shall be determined by a three (3) factor formula consisting of property, payroll, and sales of the *partnership*. (*Emphasis Added*).

The effect of the regulation is that partnership income is apportioned only once; and, that apportionment may take place at either the corporate partner or the corporate partnership level depending on whether or not a unitary relationship exists between the corporate partner and the partnership.

On its face, regulation 45 IAC 3.1-1-153 does not appear to address whether or not a partnership may have non-business income at either the corporate partner or corporate partnership level. However, regardless of the relationship between the corporate partner and the corporate partnership, it is clear that the regulation refers to the apportionment of "business income." Nevertheless, to clarify the regulation and how it deals with non-business income it is necessary to examine the reasoning found in the Tax Court case *The Hunt Corp. v. Department of State Revenue*, 709 N.E.2d 766 (Ind. Tax 1999).

In *Hunt*, the Court determined that a corporate partner's income from a corporate partnership should be determined by apportionment of that income at the corporate partner level when the corporate partner and the corporate partnership enjoy a unitary relationship. *Id*. At 778. The Court made its determination based on the application of IC 6-3-2-2, the general provision that deals with how all of a corporate taxpayer's adjusted gross income is attributed by way of allocation and apportionment rules. Although the Court found that 45 IAC 3.1-1-153 was not applicable to the years at issue, the Court discussed the regulation at length and appeared to endorse it as a reasonable interpretation of the applicability of IC 6-3-2-2 to corporate partnerships. *Hunt*, 709 N.E.2d at 777. After determining that IC 6-3-2-2 applied to corporate partnerships, the Court in *Hunt* stated:

> *If the income from the partnerships constitutes business income (i.e., if the affiliated group and the partnerships are engaged in a unitary business)*, under section 6-3-2-2, all of that income would be subject to apportionment based on an application of the affiliated group's property, payroll, and sales factors. *If the income from the partnerships constitutes non-business income for the affiliated group (i.e., if the affiliated group and the partnerships are not engaged in a unitary business)*, that income would be allocated to a particular jurisdiction. (*Emphasis Added*).

Id. at 776.

The Court's reasoning in *Hunt* is clear: all of a corporate partner's income from a corporate partnership that enjoys a unitary relationship with that partner is business income; all of a corporate partner's income from a partnership with a non-unitary relationship is non-business income. Therefore, applying the reasoning in *Hunt*, there is no "business versus non-business" determination at the partnership level regardless of the relationship between the partner and the partnership.

In the instant case, it was determined that taxpayer and the Partnership did not enjoy a unitary relationship. However, while the income from a non-unitary partnership will be classified as non-business income, it is important to note that said income will not necessarily be allocated to a single state. When the non-business income is derived from sources within and without Indiana, the allocation is based on an apportionment of all partnership income at the partnership level. Although 45 IAC 3.1-1-153(c)(1) uses the term "business income" to describe the partnership income to be allocated through a factor apportionment, this description does not result in a characterization of that income as "business income" that flows through to the corporate partner. Such an interpretation would contradict the Court's findings in *Hunt*. *See Hunt*, 709 N.E.2d at 776. Further, the Court in *Hunt* comments in footnote number twenty-eight, that allocation of the income through a factor apportionment is necessary because it ensures that Indiana will be able to receive its fair share of income from a partnership doing business in Indiana. *Id*. at 777.

FINDING

Taxpayer's protest is denied. The Department did not err in calculating the apportionment percentage of the Partnership income earned in Indiana, and allocating said amount to Indiana for adjusted gross income tax purposes.

III. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Interest Income

DISCUSSION

Taxpayer contends that its distributive share of the interest income derived from the Partnership's long-term investment of excess cash is non-business income for the purpose of computing Indiana Adjusted Gross Income Tax. Taxpayer argues that the interest income arises from passive investments unrelated to the taxpayer's primary business. The auditor found that in 1996 and 1997, taxpayer treated its distributive share of interest income from the Partnership as business income. In 1998, however, taxpayer treated the interest income as non-business income and allocated said income to California. The auditor determined that taxpayer was clearly not unitary with the partnership, therefore pursuant to 45 IAC 3.1-1-153(c)(1) the auditor allocated the Indiana share of the income to the taxpayer.

Pursuant to 45 IAC 3.1-1-153(c) all of the partnership's income is required to be allocated based on the three-factor formula therein. As the partnership is not the taxpayer, the business non-business analysis takes place at the partnership's distribution to the taxpayer level.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000442.LOF

LETTER OF FINDINGS NUMBER: 00-0442
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.

ISSUE

I. Adjusted Gross Income Tax – Method of Calculation

Authority: 45 IAC 3.1-1-153

Taxpayer protests the auditor's decision that the partnership distribution should be treated as allocated income for Indiana adjusted gross income tax purposes.

II. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Sale of Contracts

Authority: *Hunt Corporation v. Indiana Dept. of State Revenue,* 709 N.E.2d 766 (Ind. Tax Ct. 1999); IC 6-3-2-2; 45 IAC 3.1-1-153

Taxpayer protests the auditor's determination that income from the sale of contracts, received as a part of taxpayer's distributive share of partnership income, was allocable to Indiana for adjusted gross income tax purposes.

III. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Interest Income

Authority: 45 IAC 3.1-1-153

Taxpayer protests the auditor's determination that interest income, received from taxpayer's distributive share of partnership income earned from the long-term investment of the partnership's excess cash, was allocable to Indiana for adjusted gross income tax purposes.

STATEMENT OF FACTS

Taxpayer is a partner in an out-of-state partnership that is in the business of providing consumer information (hereinafter, "Partnership"). The Partnership was formed to operate debt collection and credit verification functions. The Partnership is affiliated with a large corporation headquartered in California. Taxpayer was involved in the business of debt collection prior to becoming a partner in the Partnership. Taxpayer asserts that it holds its interest in the Partnership as an investment. All of taxpayer's income is from the Partnership through a distributive share.

The Department of Revenue conducted an audit for the years in question and issued various tax assessments against taxpayer. Additional facts will be supplied as necessary for discussion.

I. Adjusted Gross Income Tax – Method of Calculation

DISCUSSION

In its income tax return, Taxpayer apportioned its partnership income based upon its percentage of ownership of the Partnership as related to the net income. However, citing 45 IAC 3.1-1-153, the auditor determined that partnership distributions should be treated as allocated income for Indiana adjusted gross income tax purposes. As such, all of the net income that taxpayer apportioned was removed from the audit report; and, only the allocated distributive share of the partnership income attributable to Indiana was included as being subject to tax. Taxpayer disagrees with the auditor's method.

Upon completion of its audit of taxpayer, the auditor determined that taxpayer and the Partnership were non-unitary. Taxpayer offered no evidence to refute the auditor's determination. 45 IAC 3.1-1-153 dictates that when a corporate partner and its corporate partnership are non-unitary, the corporate partner's share of the partnership's business income attributable to Indiana is determined by applying a three-factor formula consisting of the property, payroll, and sales of the Partnership. The apportioned amount is then allocated to Indiana for adjusted gross income tax purposes. The auditor followed the mandates of the regulation in determining the amount of tax taxpayer owed on its distributive share of the Partnership income. No error occurred here.

FINDING

Taxpayer's protest is denied.

II. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Sale of Contracts

DISCUSSION

Taxpayer, a corporate partner of a corporate partnership, has characterized the income from the sale of consumer contracts, received as part of taxpayer's distributive share of partnership income, as non-business income. According to taxpayer, the contracts sold were located throughout the East, the South, and the Middle-West regions of the United States. There were no contracts located, or any services performed in Indiana. Taxpayer is adamant that the activities of the sale of the contracts did not occur in Indiana, and did not occur in the regular course of taxpayer's business, *i.e.*, a shareholder of the Partnership. According to taxpayer, the sale of the contracts was for investment purposes only, and not an integral part of taxpayer's regular business. Therefore, taxpayer requests that the proceeds from the sale of the contracts be classified as non-business income allocable to California, the state in which taxpayer is domiciled.

Corporate partners are taxed on their distributive share of the partnership's Indiana source income. The determination of the source of a partnership's income differs based upon whether or not the partnership maintains a unitary relationship with the corporate partner. The relevant regulation for determining the source of a partnership's income is 45 IAC 3.1-1-153.

45 IAC 3.1-1-153(b) states in relevant part that:

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

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

The effect of the regulation is that partnership income is apportioned only once; and, that apportionment may take place at either the corporate partner or the corporate partnership level depending on whether or not a unitary relationship exists between the corporate partner and the partnership.

On its face, regulation 45 IAC 3.1-1-153 does not appear to address whether or not a partnership may have non-business income at either the corporate partner or corporate partnership level. However, regardless of the relationship between the corporate partner and the corporate partnership, it is clear that the regulation refers to the apportionment of "business income." Nevertheless, to clarify the regulation and how it deals with non-business income it is necessary to examine the reasoning found in the Tax Court case *The Hunt Corp. v. Department of State Revenue*, 709 N.E.2d 766 (Ind. Tax 1999).

In *Hunt*, the Court determined that a corporate partner's income from a corporate partnership should be determined by apportionment of that income at the corporate partner level when the corporate partner and the corporate partnership enjoy a unitary relationship. *Id*. At 778. The Court made its determination based on the application of IC 6-3-2-2, the general provision that deals with how all of a corporate taxpayer's adjusted gross income is attributed by way of allocation and apportionment rules. Although the Court found that 45 IAC 3.1-1-153 was not applicable to the years at issue, the Court discussed the regulation at length and appeared to endorse it as a reasonable interpretation of the applicability of IC 6-3-2-2 to corporate partnerships. *Hunt*, 709 N.E.2d at 777. After determining that IC 6-3-2-2 applied to corporate partnerships, the Court in *Hunt* stated:

> *If the income from the partnerships constitutes business income (i.e., if the affiliated group and the partnerships are engaged in a unitary business),* under section 6-3-2-2, all of that income would be subject to apportionment based on an application of the affiliated group's property, payroll, and sales factors. *If the income from the partnerships constitutes non-business income for the affiliated group (i.e., if the affiliated group and the partnerships are not engaged in a unitary business),* that income would be allocated to a particular jurisdiction. (*Emphasis Added*).

Id. at 776.

The Court's reasoning in *Hunt* is clear: all of a corporate partner's income from a corporate partnership that enjoys a unitary relationship with that partner is business income; all of a corporate partner's income from a partnership with a non-unitary relationship is non-business income. Therefore, applying the reasoning in *Hunt*, there is no "business versus non-business" determination at the partnership level regardless of the relationship between the partner and the partnership.

In the instant case, it was determined that taxpayer and the Partnership did not enjoy a unitary relationship. However, while the income from a non-unitary partnership will be classified as non-business income, it is important to note that said income will not necessarily be allocated to a single state. When the non-business income is derived from sources within and without Indiana, the allocation is based on an apportionment of all partnership income at the partnership level. Although 45 IAC 3.1-1-153(c)(1) uses the term "business income" to describe the partnership income to be allocated through a factor apportionment, this description does not result in a characterization of that income as "business income" that flows through to the corporate partner. Such an interpretation would contradict the Court's findings in *Hunt*. *See Hunt*, 709 N.E.2d at 776. Further, the Court in *Hunt* comments in footnote number twenty-eight, that allocation of the income through a factor apportionment is necessary because it ensures that Indiana will be able to receive its fair share of income from a partnership doing business in Indiana. *Id*. at 777.

FINDING

Taxpayer's protest is denied. The Department did not err in calculating the apportionment percentage of the Partnership income earned in Indiana, and allocating said amount to Indiana for adjusted gross income tax purposes.

III. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Interest Income

DISCUSSION

Taxpayer contends that its distributive share of the interest income derived from the Partnership's long-term investment of excess cash is non-business income for the purpose of computing Indiana Adjusted Gross Income Tax. Taxpayer argues that the interest income arises from passive investments unrelated to the taxpayer's primary business. The auditor found that in 1996 and 1997, taxpayer treated its distributive share of interest income from the Partnership as business income. In 1998, however, taxpayer treated the interest income as non-business income and allocated said income to California. The auditor determined that taxpayer was clearly not unitary with the partnership, therefore pursuant to 45 IAC 3.1-1-153(c)(1) the auditor allocated the Indiana share of the income to the taxpayer.

Pursuant to 45 IAC 3.1-1-153(c) all of the partnership's income is required to be allocated based on the three-factor formula therein. As the partnership is not the taxpayer, the business non-business analysis takes place at the partnership's distribution to the taxpayer level.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000443.LOF

LETTER OF FINDINGS NUMBER: 00-0443
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.

ISSUE

I. Adjusted Gross Income Tax – Method of Calculation

Authority: 45 IAC 3.1-1-153

Taxpayer protests the auditor's decision that the partnership distribution should be treated as allocated income for Indiana adjusted gross income tax purposes.

II. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Sale of Contracts

Authority: *Hunt Corporation v. Indiana Dept. of State Revenue*, 709 N.E.2d 766 (Ind. Tax Ct. 1999); IC 6-3-2-2; 45 IAC 3.1-1-153

Taxpayer protests the auditor's determination that income from the sale of contracts, received as a part of taxpayer's distributive share of partnership income, was allocable to Indiana for adjusted gross income tax purposes.

III. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Interest Income

Authority: 45 IAC 3.1-1-153

Taxpayer protests the auditor's determination that interest income, received from taxpayer's distributive share of partnership income earned from the long-term investment of the partnership's excess cash, was allocable to Indiana for adjusted gross income tax purposes.

STATEMENT OF FACTS

Taxpayer is a partner in an out-of-state partnership that is in the business of providing consumer information (hereinafter, "Partnership"). The Partnership was formed to operate debt collection and credit verification functions. The Partnership is affiliated with a large corporation headquartered in California. Taxpayer asserts that it holds its interest in the Partnership as an investment. All of taxpayer's income is from the Partnership through a distributive share.

The Department of Revenue conducted an audit for the years in question and issued various tax assessments against taxpayer. Additional facts will be supplied as necessary for discussion.

I. Adjusted Gross Income Tax – Method of Calculation

DISCUSSION

In its income tax return, Taxpayer apportioned its partnership income based upon its percentage of ownership of the Partnership as related to the net income. However, citing 45 IAC 3.1-1-153, the auditor determined that partnership distributions should be treated as allocated income for Indiana adjusted gross income tax purposes. As such, all of the net income that taxpayer apportioned was removed from the audit report; and, only the allocated distributive share of the partnership income attributable to Indiana was included as being subject to tax. Taxpayer disagrees with the auditor's method.

Upon completion of its audit of taxpayer, the auditor determined that taxpayer and the Partnership were non-unitary. Taxpayer offered no evidence to refute the auditor's determination. 45 IAC 3.1-1-153 dictates that when a corporate partner and its corporate partnership are non-unitary, the corporate partner's share of the partnership's business income attributable to Indiana is determined by applying a three-factor formula consisting of the property, payroll, and sales of the Partnership. The apportioned amount is then allocated to Indiana for adjusted gross income tax purposes. The auditor followed the mandates of the regulation in determining the amount of tax taxpayer owed on its distributive share of the Partnership income. No error occurred here.

FINDING

Taxpayer's protest is denied.

II. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Sale of Contracts

DISCUSSION

Taxpayer, a corporate partner of a corporate partnership, has characterized the income from the sale of consumer contracts, received as part of taxpayer's distributive share of partnership income, as non-business income. According to taxpayer, the contracts sold were located throughout the East, the South, and the Middle-West regions of the United States. There were no contracts located, or any services performed in Indiana. Taxpayer is adamant that the activities of the sale of the contracts did not occur in Indiana, and did not occur in the regular course of taxpayer's business, *i.e.*, a shareholder of the Partnership. According to taxpayer, the sale of the contracts was for investment purposes only, and not an integral part of taxpayer's regular business. Therefore, taxpayer requests that the proceeds from the sale of the contracts be classified as non-business income allocable to California, the state in which taxpayer is domiciled.

Corporate partners are taxed on their distributive share of the partnership's Indiana source income. The determination of the source of a partnership's income differs based upon whether or not the partnership maintains a unitary relationship with the corporate partner. The relevant regulation for determining the source of a partnership's income is 45 IAC 3.1-1-153.

45 IAC 3.1-1-153(b) states in relevant part that:

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

45 IAC 3.1-1-153(c) provides in relevant part that:

> [i]f the corporate partner's activities and the partnership's activities *do not* constitute a unitary business under established standards, disregarding ownership requirements, the corporate partner's share of the partnership income attributable to Indiana shall be determined as follows:
>
> > (1) If the partnership derives business income from sources within and without Indiana, the business income derived from sources within Indiana shall be determined by a three (3) factor formula consisting of property, payroll, and sales of the *partnership*. (*Emphasis Added*).

The effect of the regulation is that partnership income is apportioned only once; and, that apportionment may take place at either the corporate partner or the corporate partnership level depending on whether or not a unitary relationship exists between the corporate partner and the partnership.

On its face, regulation 45 IAC 3.1-1-153 does not appear to address whether or not a partnership may have non-business income at either the corporate partner or corporate partnership level. However, regardless of the relationship between the corporate partner and the corporate partnership, it is clear that the regulation refers to the apportionment of "business income." Nevertheless, to clarify the regulation and how it deals with non-business income it is necessary to examine the reasoning found in the Tax Court case *The Hunt Corp. v. Department of State Revenue*, 709 N.E.2d 766 (Ind. Tax 1999).

In *Hunt*, the Court determined that a corporate partner's income from a corporate partnership should be determined by apportionment of that income at the corporate partner level when the corporate partner and the corporate partnership enjoy a unitary relationship. *Id*. At 778. The Court made its determination based on the application of IC 6-3-2-2, the general provision that deals with how all of a corporate taxpayer's adjusted gross income is attributed by way of allocation and apportionment rules. Although the Court found that 45 IAC 3.1-1-153 was not applicable to the years at issue, the Court discussed the regulation at length and appeared to endorse it as a reasonable interpretation of the applicability of IC 6-3-2-2 to corporate partnerships. *Hunt*, 709 N.E.2d at 777. After determining that IC 6-3-2-2 applied to corporate partnerships, the Court in *Hunt* stated:

> *If the income from the partnerships constitutes business income (i.e., if the affiliated group and the partnerships are engaged in a unitary business)*, under section 6-3-2-2, all of that income would be subject to apportionment based on an application of the affiliated group's property, payroll, and sales factors. *If the income from the partnerships constitutes non-business income for the affiliated group (i.e., if the affiliated group and the partnerships are not engaged in a unitary business),* that income would be allocated to a particular jurisdiction. (*Emphasis Added*).
>
> *Id*. at 776.

The Court's reasoning in *Hunt* is clear: all of a corporate partner's income from a corporate partnership that enjoys a unitary relationship with that partner is business income; all of a corporate partner's income from a partnership with a non-unitary relationship is non-business income. Therefore, applying the reasoning in *Hunt*, there is no "business versus non-business" determination at the partnership level regardless of the relationship between the partner and the partnership.

In the instant case, it was determined that taxpayer and the Partnership did not enjoy a unitary relationship. However, while the income from a non-unitary partnership will be classified as non-business income, it is important to note that said income will not necessarily be allocated to a single state. When the non-business income is derived from sources within and without Indiana, the allocation is based on an apportionment of all partnership income at the partnership level. Although 45 IAC 3.1-1-153(c)(1) uses the term "business income" to describe the partnership income to be allocated through a factor apportionment, this description does not result in a characterization of that income as "business income" that flows through to the corporate partner. Such an interpretation would contradict the Court's findings in *Hunt*. *See Hunt*, 709 N.E.2d at 776. Further, the Court in *Hunt* comments in footnote number twenty-eight, that allocation of the income through a factor apportionment is necessary because it ensures that Indiana will be able to receive its fair share of income from a partnership doing business in Indiana. *Id*. at 777.

FINDING

Taxpayer's protest is denied. The Department did not err in calculating the apportionment percentage of the Partnership income earned in Indiana, and allocating said amount to Indiana for adjusted gross income tax purposes.

III. Adjusted Gross Income Tax – Allocation of Corporate Partnership Distributive Share: Interest Income

DISCUSSION

Taxpayer contends that its distributive share of the interest income derived from the Partnership's long-term investment of excess cash is non-business income for the purpose of computing Indiana Adjusted Gross Income Tax. Taxpayer argues that the interest income arises from passive investments unrelated to the taxpayer's primary business. The auditor found that in 1996 and 1997, taxpayer treated its distributive share of interest income from the Partnership as business income. In 1998, however, taxpayer treated the interest income as non-business income and allocated said income to California. The auditor determined that taxpayer was clearly not unitary with the partnership, therefore pursuant to 45 IAC 3.1-1-153(c)(1) the auditor allocated the Indiana share of the income to the taxpayer.

Pursuant to 45 IAC 3.1-1-153(c) all of the partnership's income is required to be allocated based on the three-factor formula therein. As the partnership is not the taxpayer, the business non-business analysis takes place at the partnership's distribution to the taxpayer level.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010191.LOF

LETTER OF FINDINGS NUMBER: 01-0191
Adjusted Gross Income Tax
For the Years 1990

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 – Imposition
Authority: IC 6-3-2-1, IC 6-8.1-5-1(b)

The taxpayers protest the imposition of the Indiana adjusted gross income tax.

STATEMENT OF FACTS

The taxpayers are a husband and wife who are Indiana residents but winter in Florida. They owned rental property in Indiana and an 18-room motel. The taxpayers file as sole proprietors for federal income tax purposes. They did not file Indiana adjusted gross income tax returns throughout the tax period. After an investigation, the Indiana Department of Revenue, hereinafter referred to as the "department," determined the taxpayers' Indiana adjusted gross income tax liability based upon the taxpayers' federal individual income tax returns. The department then assessed adjusted gross income tax, penalty, and interest. The taxpayers protested that assessment and a telephone hearing was held.

DISCUSSION

An adjusted gross income tax is imposed upon all Indiana residents. IC 6-3-2-1.

The taxpayers contend that when the department assessed adjusted gross income tax, interest and penalty pursuant to the investigation, it erred in determining the taxpayers' expenses, depreciation, and losses from abandoned property.

All assessments made by the department are presumed to be correct. Taxpayers bear the burden of proving that an assessment is incorrect. IC 6-8.1-5-1 (b). In this case, the taxpayers' representative submitted a spreadsheet showing what the taxpayers' assert would be the computation of the correct tax liability. That spreadsheet lumped depreciation, losses from abandoned property, and expenses in the "expenses" line. On January 29, 2003, the department requested the submission of documentation concerning the purchase price of the properties so that it could audit the figures representing depreciation and losses from abandoned property. That information was not submitted. Without the purchase prices of the various properties, the department cannot determine if the taxpayers' proposal is correct.

The taxpayers have failed to sustain their burden of showing that the assessment is incorrect.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010192.LOF

LETTER OF FINDINGS NUMBER: 01-0192
Adjusted Gross Income Tax
For the Years 1991-1998

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

ISSUE

I. Adjusted Gross Income Tax – Imposition

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

The taxpayers protest the imposition of the Indiana adjusted gross income tax.

STATEMENT OF FACTS

The taxpayers are a husband and wife who are Indiana residents but winter in Florida. They owned rental property in Indiana and an 18-room motel. The taxpayers file as sole proprietors for federal income tax purposes. They did not file Indiana adjusted gross income tax returns throughout the tax period. After an investigation, the Indiana Department of Revenue, hereinafter referred to as the "department," determined the taxpayers' Indiana adjusted gross income tax liability based upon the taxpayers' federal individual income tax returns. The department then assessed adjusted gross income tax, penalty, and interest. The taxpayers protested that assessment and a telephone hearing was held.

DISCUSSION

An adjusted gross income tax is imposed upon all Indiana residents. IC 6-3-2-1.

The taxpayers contend that when the department assessed adjusted gross income tax, interest and penalty pursuant to the investigation, it erred in determining the taxpayers' expenses, depreciation, and losses from abandoned property.

All assessments made by the department are presumed to be correct. Taxpayers bear the burden of proving that an assessment is incorrect. IC 6-8.1-5-1 (b). In this case, the taxpayers' representative submitted a spreadsheet showing what the taxpayers' assert would be the computation of the correct tax liability. That spreadsheet lumped depreciation, losses from abandoned property, and expenses in the "expenses" line. On January 29, 2003, the department requested the submission of documentation concerning the purchase price of the properties so that it could audit the figures representing depreciation and losses from abandoned property. That information was not submitted. Without the purchase prices of the various properties, the department cannot determine if the taxpayers' proposal is correct.

The taxpayers have failed to sustain their burden of showing that the assessment is incorrect.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120010326.LOF

LETTER OF FINDINGS NUMBER: 01-0326
Individual Income Tax
Calendar Year 2000

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

ISSUE(S)

I. Individual Income Tax – Residency

Authority: IC 6-3-4-1; IC 6-3-2-12; IC 6-8.1-5-1

Taxpayer protests the assessment.

STATEMENT OF FACTS

Taxpayer filed an IT-40 for calendar year 2000 but failed to remit the amount due shown on his return. Taxpayer states he has always paid its taxes. Taxpayer's mailing address is in Virginia. Taxpayer received a W-2 from a Florida company that names Kosciusko as the locality where the taxpayer earned its income. Taxpayer's tax return indicates he lived in Kosciusko County, and taxpayer's IT-40 was prepared as an Indiana resident. Taxpayer argues that he has no state of domicile and is in the process of obtaining an attorney that promised to make him an international person not subject to tax in the United States. Taxpayer's return also indicates that he owned or leased a vehicle registered with the Indiana Bureau of Motor Vehicles. Taxpayer has an Indiana Driver's License.

Taxpayer filed its return with a tax balance due of $1,697.

I. Individual Income Tax – Residency

DISCUSSION

Taxpayer states that he is not subject to tax in Indiana because he was not a resident. Taxpayer filed a Full Year Resident return (IT-40) for 2000 with a balance due. Taxpayer has not provided a copy of a return filed in another state.

Taxpayer remitted no tax by the original due date of the return. Taxpayer states he is not a resident of any state since he is a Merchant Marine. Taxpayer's homeport is Newport News, Virginia. Taxpayer, however, registered his automobile with Indiana and has an Indiana driver's license. Taxpayer occasionally visits his mother in Indiana.

The Taxpayer signed and sent in a 2000 IT-40. "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 has not provided any evidence to overturn the Department's assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

1820020306.LOF

LETTER OF FINDINGS NUMBER: 02-0306
Financial Institutions Tax
For the Tax Years 1993 through 1998

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. Constitutionality of the Financial Institutions Tax

Authority: U.S. Const. art. I, § 8; Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1974); IC 6-5.5-1-12, 13; IC 6-5.5-1-17(a); IC 6-5.5-2-1(a); IC 6-5.5-2-2; IC 6-5.5-2-3; IC 6-5.5-3-1(6)

Taxpayer argues that, as an out-of-state entity with no physical presence within Indiana, the assessment of Financial Institutions Tax (FIT) is violative of the Commerce Clause.

II. Computational Errors

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

Taxpayer challenges the calculation of FIT on the ground that the audit made computational errors resulting in an over-assessment of the amount of tax due.

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 requests that the Department of Revenue (Department) exercise its discretion to abate the ten percent negligence penalty imposed at the conclusion of the audit examination.

STATEMENT OF FACTS

Taxpayer consists of a group of affiliated companies engaged in the business of offering various credit card services. Taxpayer receives income from Indiana customers based on the performance of those services. Taxpayer maintains its headquarters at an out-of-state location. One of taxpayer's affiliates was engaged in the business of extending loans on personal and real property within Indiana and had previously paid Indiana corporate income taxes.

The Department conducted an audit review of taxpayer's business records. The Department concluded that taxpayer was conducting the business of a financial institution within the state and assessed FIT accordingly. The taxpayer disagreed with the Department's conclusion and submitted a protest to that effect. An administrative hearing was held during which taxpayer explained the basis for its protest. This Letter of Findings follows.

DISCUSSION

I. Constitutionality of the Financial Institutions Tax

Pursuant to the audit's examination of taxpayer's business records, the Department concluded taxpayer was engaged in the business of a financial institution within Indiana and was subject to the FIT. Taxpayer challenges this conclusion on the ground that it has no "substantial nexus" with Indiana and that imposition of the tax offends the Commerce Clause. (U.S. Const. art. I, § 8).

Within Indiana, "There is imposed on each taxpayer a franchise tax measured by the taxpayer's adjusted gross income or apportioned income for the privilege of exercising its franchise or the corporate privilege of transacting the business of a financial institution in Indiana." IC 6-5.5-2-1(a).

For purposes of the FIT, a "'[t]axpayer' means a corporation that is transacting the business of a financial institution, including any of the following:

(1) A holding company.

(2) A regulated financial corporation.

(3) A subsidiary of a holding company or regulated financial corporation.

(4) Any other corporation organized under the laws of the United States, this state, another taxing jurisdiction, or a foreign government that is carrying on the business of a financial institution." IC 6-5.5-1-17(a).

The FIT is imposed on both "nonresident taxpayers" and "resident taxpayers" transacting business within this state. IC 6-5.5-1-12, 13. The statute defines a "nonresident taxpayer" as "a taxpayer that (1) is transacting business within Indiana as provided in IC 6-5.5-3; and (2) has its commercial domicile outside Indiana." A resident taxpayer, not filing a combined return, determines its FIT liability based on the resident taxpayer's adjusted gross income from whatever source derived. IC 6-5.5-2-2. In contrast, a nonresident taxpayer determines its FIT liability based on its apportioned income consisting of the taxpayer's adjusted gross income "multiplied by the quotient of (1) the taxpayer's total receipts attributable to transacting business in Indiana... divided by (2) the taxpayer's total receipts from transacting business in all jurisdictions...." IC 6-5.5-2-3.

The FIT definition of "transacting business" within this state includes the activities of a company which "regularly engages in transactions with customers in Indiana that involve intangible property, including loans... [that] result in receipts flowing to the taxpayer from within Indiana." IC 6-5.5-3-1(6).

Taxpayer challenges the FIT assessment on the ground that it does not have a substantial nexus with Indiana. In Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1974), the Supreme Court stated that a tax will not be deemed to interfere with interstate commerce when it is "applied to an activity with a substantial nexus within the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state." Id. at 279. Taxpayer's protest is based on the assertion that it does not have the minimum connection with the state necessary to establish the requisite "substantial nexus."

To the extent taxpayer maintains that Indiana's FIT is – on its face – inapplicable, the Department must disagree. Under IC 6-5.5-3-1, IC 6-5.5-1-12, and IC 6-5.5-1-17, taxpayer falls squarely within the definition of a non-resident entity conducting the business of a financial institution within this state; consequently, taxpayer is liable for FIT on the income derived from sources within Indiana.

To the extent taxpayer challenges the constitutionality of the FIT as applied to non-resident businesses having only an economic nexus with Indiana, the Department declines to address the question. An administrative hearing conducted by the Department of Revenue is not the appropriate forum in which to address this constitutional challenge.

FINDING

Taxpayer's protest is respectfully denied.

II. Computational Errors

Taxpayer challenges the tax assessment on the ground that the audit report contained substantive, computational errors. Taxpayer maintains that errors occurred in calculating the apportionment numerator and that three pages of the audit's worksheets contain numerical misstatements or omissions.

IC 6-8.1-5-1(b) states that, "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."

The administrative hearing is not the means by which purported computational errors may be analyzed, corrected, or refuted. Nonetheless, taxpayer has met its burden under IC 6-8.1-5-1(b) of demonstrating that its assertion is not frivolous or entirely groundless. Accordingly, the audit division is requested to conduct a supplemental review of the specific claimed errors and make whatever corrections it deems necessary.

FINDING

Subject to the results of the supplemental audit, taxpayer's protest is sustained.

III. Abatement of the Ten Percent Negligence Penalty

Taxpayer urges the Department to abate the ten percent negligence penalty arguing that "the current status of all economic nexus based taxes, including Indiana's Financial Institution Tax, support the finding that no filing requirement exists for out-of-state financial institutions such as [taxpayer]."

IC 6-8.1-10-2.1 requires that a ten percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

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

Taxpayer did not file FIT tax returns, was audited during 2001, and was assessed for six years of unpaid taxes. Taxpayer is a substantial, sophisticated business receiving large amounts of money from sources within Indiana. Taxpayer's larger constitutional question aside, the decision to simply ignore this state's FIT is not the evidence of the "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

0420020356.LOF
0220020355.LOF

LETTER OF FINDINGS NUMBER: 02-0355 and 02-0356
State Gross Retail and Gross Income Tax
For Years 1998 to 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. Gross Income Tax – Application to Municipality for the Operation of a Golf Course

Authority: Department of Treasury v. City of Evansville, 60 N.E.2d 952, (IN 1945); West Publishing Co. v. Indiana Dept. of Revenue, 524 N.E.2d 1329 (Ind. Tax Ct. 1988); City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax Ct. 1998); IC § 6-2.1-3-29; IC 6-8.1-3-3; 45 IAC 15-3-2

Taxpayer protests subjecting income from operation of a municipal golf course to Gross income tax.

II. Gross Retail Sales Tax – Assessment of Sales Tax on Transactions Related to a Municipal Golf Course
Authority: Department of Treasury v. City of Evansville, 60 N.E.2d 952 (Ind. 1945); 45 IAC 2.2-4-20

Taxpayer protests the assessment of sales tax on transactions related to the operation of its municipal golf course.

III. Tax Administration – Waiver of Penalty
Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2(b)

Taxpayer seeks waiver of the penalties because the tax liabilities were due to reasonable cause and not due to willful neglect.

STATEMENT OF FACTS

The taxpayer is an Indiana municipality. Its parks and recreation department operates a municipal golf course which charges admission fees and provides various items for rental, including golf carts. Gross income and Gross Retail Sales audits found that the income from the municipal golf course had not had the respective taxes paid on it and an assessment was made, with penalties. A timely protest was made, with a hearing held on February 20th, 2003 and this Letter of Finding resulting.

DISCUSSION

I. Gross Income Tax – Application to Municipality for the Operation of a Golf Course

Taxpayer bases its protest on the argument that while the Indiana Supreme Court held in Department of Treasury v. City of Evansville, 60 N.E.2d 952 (Ind. 1945) that the operation of a golf course was a proprietary or private activity, that holding was based entirely on the fact that Indiana courts had consistently held that the operation of a park system was a proprietary activity, and accordingly, the operation of a golf course should be treated in the same manner. Taxpayer then notes that IC 6-2.1-3-29, enacted after the Court's finding, specifically exempts from the gross income tax "…gross income … derived from the operation of a park or recreation facility…or the performance of similar governmental services is exempt if the gross income is received by the state of Indiana, an agency or instrumentality of the state of Indiana, or a municipal corporation or political subdivision of the state of Indiana." Taxpayer contends that if the golf course is not considered a park or recreation facility, it should, at least, be considered a similar governmental service.

While the above exemptions have been enacted, along with several other exemptions enumerated in Department of Treasury v. City of Evansville, golf courses, which were explicitly found to be a proprietary activity by the Indiana Supreme Court in this case, have never received a statutory or regulatory exemption.

Additionally, Taxpayer argues that if the Department does find the golf course to be a proprietary activity, the finding should be prospective and the assessment should be waived based upon estoppel. Under IC 6-8.1-3-3, the Department of Revenue is without authority to reinterpret a taxpayer's tax liability without promulgating and publishing a regulation giving taxpayer notice of that reinterpretation. IC 6-8.1-3-3(b) states that "[n]o change in the department's interpretation of a listed tax may take effect before the date the change is (1) adopted in a rule under this section or (2) published in the Indiana Register...."

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

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

The West letter directed to petitioner taxpayer read as follows:

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

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

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

Taxpayer argues, based on assurances it received from state officials and a remark by a presenter at a state Training School for municipal clerk-treasurers, that it is entitled to prospective treatment. Inasmuch as the state has many officials, not all of whom are authoritatively versed in the nuances of State tax law, nor are any authorized to verbally void existing statutes and case law, remarks and answers can be given that do not comport to state law. Admittedly the remarks at the training seminar focusing on the issues of municipal taxation may have been confusing, nonetheless taxpayer should have been aware that placing reliance on anything less than an explicit- and documented- assertion was questionable. Taxpayer did not make a specific written inquiry, in which taxpayer could have sought advice in writing as to the tax consequences of a particular transaction, pursuant to 45 IAC 15-3-2. Additionally, taxpayer does not provide any state issued documentation on which it relied to make its determination. In a matter of such complexity, reliance solely on verbal representations will not create estoppel.

FINDINGS

Taxpayer's appeal is respectfully denied.

II. Gross Retail Sales Tax – Assessment of Sales Tax on Transactions Related to a Municipal Golf Course

As in issue I, Taxpayer bases its protest on the argument that while the Indiana Supreme Court held in Department of Treasury v. City of Evansville, 60 N.E.2d 952 (Ind. 1945) that the operation of a golf course was a proprietary or private activity, that holding was based entirely on the fact that Indiana courts had consistently held that the operation of a park system was a proprietary activity, and accordingly, the operation of a golf course should be treated in the same manner. Taxpayer then argues that it can be inferred from 45 IAC 2.2-4-20, which states in relevant part, "Municipal corporations,…, shall, in the performance of private or proprietary activities or business, constitute retail merchants making retail transactions in respect to receipts which would constitute gross retail income from a retail transaction if received by a retail merchant." That inasmuch as the argument outlined in Issue I concludes the golf course was not proprietary, similar reasoning applied to this regulation would exempt the proceeds from the sales tax requirements as well.

Given that the Department has concluded, as discussed in Issue I above, that the operation of Golf course is a proprietary activity, 45 IAC 2.2-4-20 does require the collection of sales tax.

FINDINGS

Taxpayer's appeal is respectfully denied.

III. Tax Administration – Waiver of Penalty

DISCUSSION

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10. The Indiana Administrative Code further provides in 45 IAC 15-11-2:

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

(c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

(1) the nature of the tax involved;
(2) judicial precedents set by Indiana courts;
(3) judicial precedents established in jurisdictions outside Indiana;
(4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case. Taxpayer has established that it exercised reasonable care in its analysis of this issue. While taxpayer's arguments are not dispositive, they are factors which are indicative of the taxpayer's reasonable care, caution, or diligence in this matter.

FINDINGS

Taxpayer's appeal sustained.

DEPARTMENT OF STATE REVENUE

0420020449. LOF

LETTER OF FINDINGS NUMBER: 02-0449
Sales 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. 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, 2000, and 2001. 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 a supplemental audit was prepared 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.

At hearing, taxpayer states that forty vehicles had been stolen and the defendant admitted to the theft in the Marion Superior Court. A letter from the Marion County Prosecuting Attorney, dated October 6, 1999 states that the defendant was charged with "Theft". On July 9, 2001, the taxpayer filed an "Impact Statement & Restitution Information" indicating the total value of property stolen was approximately $30,000.

Taxpayer states that he owes no more than $400 in tax.

The hearing officer has reviewed the original and supplemental audits and found that the original was based upon a Dealer List obtained from the Bureau of Motor Vehicles. The supplemental audit addressed taxpayer's concerns and adjustments were made. Taxpayer, however, was unhappy with the supplemental audit results because he felt it should be "zero" dollars due and filed a protest with the Legal Division.

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. Taxpayer had a supplemental audit prepared before he protested to the Legal Division. At hearing, the taxpayer states that 40 vehicles were stolen, four different dealers utilized his Dealer License Number and he was not responsible. Taxpayer feels he owes nothing or a maximum of $400.

Taxpayer, however, has not provided proof that the assessment is in error. Taxpayer argues that he owes nothing because of the theft of vehicles. It is noted, that audit adjusted for the theft of vehicles at an estimated retail cost instead of the $30,000 actually reported to the Marion county Prosecuting Attorney. Taxpayer provided nothing to aid in further reduction of the assessment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030106P.LOF

LETTER OF FINDINGS NUMBER: 03-0106P
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.

II. Tax Administration – Interest
Authority: IC 6-8.1-10-1

Taxpayer protests the interest assessed.

STATEMENT OF FACTS

Upon audit, Taxpayer was assessed a penalty for failing to self assess use tax on distributed samples and display merchandise which was an issue in the prior audit. The audit determined that the taxpayer did not begin accruing and remitting use tax on display materials placed into service in Indiana until more than one year after the prior audit was completed. The assessment amounted to 46%, 25%, and 0% of use tax due for calendar years 1999, 2000, and 2001.

Taxpayer, in a letter dated February 25, 2003 requests that the department waive the penalty and interest because the total underpayment was due to an administrative error resulting in less than 1% of the total samples reported during 1999 and taxpayer did not begin reporting use tax on displays until the fourth quarter of 1999 due to reporting difficulties.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a ten percent (10%) penalty because it failed to report its use tax due on samples and display materials used in Indiana.

Taxpayer states that the underpayment of samples was an administrative error and it did not begin reporting the use tax on displays until the fourth quarter in 1999 because of reporting difficulties. Taxpayer further states that since 1999, all payments were complete and accurate and all returns were filed and paid timely.

Department records indicate the taxpayer was previously audited and failed to make the corrections timely. The prior audit was completed on September 24, 1997.

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

0220030124P.LOF

LETTER OF FINDINGS NUMBER: 03-0124P
Adjusted 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 protests the proposed assessment for the late penalty and the underpayment of estimated income taxes that it paid with the filing of the return. Taxpayer states that it was not aware that it would need to recognize $6,704,746 of discharge of indebtedness income generated by its parent corporation until after April 15, 2001.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalties assessed for the underpayment of estimated income taxes and the late payment of taxes. Taxpayer states that it was unaware that the parent company generated additional income until after the due date of the return.

Taxpayer failed to pay one hundred percent of its prior year's estimated taxes by the due date of the return and did not pay ninety percent (90%) of its tax liability by the original due date which generated a late payment penalty.

Although the taxpayer timely remitted quarterly estimated payments, it failed to remit one-hundred percent of the prior year's tax by the due date of the return. Taxpayer remitted the estimated payment penalty with its tax return and has not provided cause to allow the Department to refund the payment.

IC 6-8.1-6-1 (a) states:

"If a person responsible for filing a tax return is unable to file the return by the appropriate due date, he may petition the department, before that due date, for a filing extension. The person must include with the petition a payment of at least ninety percent (90%) of the tax that is reasonably expected to be due on the due date."

IC 6-8.1-6-1(d) states:

"Any tax that remains unpaid during an extension period accrues interest at a rate established under IC 6-8.1-10-1 from the original due date, but that tax will not accrue any late payment penalties until the extension period has ended."

Taxpayer remitted sixty-eight percent (68%) of the tax that it reasonably expected to be due by the due date which amounted to only fifty-five (55%) of the prior year's tax.

Taxpayer has not provided reasonable cause to allow penalty waivers. Procedures should have been in place to assure that taxes were timely paid.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220030125P.LOF

LETTER OF FINDINGS NUMBER: 03-0125P
Adjusted Gross Income Tax
For the Fiscal Year Ended 01/31/2001

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalties assessed.

STATEMENT OF FACTS

Taxpayer protests the proposed late payment penalty. Taxpayer states that the late filing was not due to any willful neglect or with the intention to avoid the payment of the taxes due on or before the extended due date of the tax return. Taxpayer further states it was prevented from filing its return and full payment by the extended due date due to extenuating circumstances. It was required to restate its financial statements with the Securities Exchange Commission for the fiscal years 1999, 2000, and 2001. In order to accurately file its return, Taxpayer states it had to await the finalization of the financial restatement. During the restatement process, its resources were limited to the restatement and its tax filings were severely delayed. The return was filed October 9, 2002.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed for the late filing and payment of taxes. Taxpayer states that it had unforeseen circumstances that were unintentional.

Taxpayer did not pay ninety percent (90%) of its tax liability by the original due date which generated a late payment penalty. Taxpayer paid one hundred percent (100%) of its tax liability one year after the extended due date of the return.

Taxpayer failed to remit one hundred percent of the prior year's tax by the due date of the return.

IC 6-8.1-6-1 (a) states:

"If a person responsible for filing a tax return is unable to file the return by the appropriate due date, he may petition the department, before that due date, for a filing extension. The person must include with the petition a payment of at least ninety percent (90%) of the tax that is reasonably expected to be due on the due date."

IC 6-8.1-6-1(d) states:

"Any tax that remains unpaid during an extension period accrues interest at a rate established under IC 6-8.1-10-1 from the original due date, but that tax will not accrue any late payment penalties until the extension period has ended."

Taxpayer remitted one hundred percent (100%) of its tax one year after the extended due date.

Taxpayer has not provided reasonable cause to allow a penalty waiver. Procedures should have been in place to assure that taxes were timely paid.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220030132P.L0F

LETTER OF FINDINGS NUMBER: 03-0132P
Gross Income Tax
Calendar Year 1999

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was assessed a penalty for failing to remit estimated taxes. Taxpayer had a tax liability balance of $106,744 at the time of filing its return. Taxpayer requests an abatement of the penalties.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests Liability No. 1998-91795564 for the underpayment of estimated income taxes. Taxpayer states that it began operations in April 1998 and paid a total of $330,000 in estimated 1998 Indiana tax which included an overpayment of $48,614 that was applied to its 1999 Indiana tax liability.

In April 1999, taxpayer liquidated its business and sold its operating assets to a third party. The proceeds from the liquidation sale were used to payoff its existing debts. The accounting department was unable to estimate the amount of Indiana tax it would be required to pay for the tax year ending December 31, 1999.

Taxpayer paid forty-six percent (46%) of its tax liability, with the filing of its return, on October 16, 2000 and paid the interest and late payment penalty on July 16, 2002.

Taxpayer was assessed a penalty for the underpayment of quarterly estimated taxes. Taxpayer did not make quarterly estimated payments as required under IC 6-2.1-5-1.1 and remitted only fifty-four percent (54%) of its tax by the due date of the return.

Taxpayer has not provided reasonable cause to allow penalty waivers.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120030133P.LOF

LETTER OF FINDINGS NUMBER: 03-0133P
Individual Income Tax
For Calendar Year 1998

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer protests the proposed penalty assessment for failing to report Federal RAR adjustments. Taxpayer's additional income tax amounted to $8,781.53. It was determined that final resolution with the Internal Revenue Service was on June 10, 2002 but the taxpayer failed to report the RAR adjustments to the Indiana Department of Revenue.

Taxpayer's CPA filed a penalty protest letter dated March 13, 2003 that merely requests a penalty waiver.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer merely requests a penalty and interest waiver because he was not aware that he should have considered amending the Indiana returns as a result of the federal adjustment. Taxpayer further states that the examination by the IRS for the year involved was stretched beyond an excessive amount of time and incurred additional interest charges.

Taxpayer did not notify the Department as required under 45 IAC 3.1-1-94 and IC 6-3-4-6 which state that the taxpayer file a notice, on a form prescribed by the department, within one hundred twenty (120) days after the modification is made.

Taxpayer has not provided reasonable cause to allow the Department to waive the penalty and has no authority to waive interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320030134P.LOF

LETTER OF FINDINGS NUMBER: 03-0134P
Withholding Taxes
For the Period April 2002 through December 2002

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer filed and paid several of its WH-1's late and was assessed a late payment penalty. In a letter dated March 13, 2003, taxpayer protests the penalty assessed because it did not know where to send its State Withholding Taxes or when they were due.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a ten percent (10%) penalty for each of its Withholding Tax returns because they were paid after the due date.

Taxpayer remitted its tax late for eight months after opening its business. Taxpayer failed to register with the Department prior to opening her business and remitted eight months of withholding taxes in January 2003. Taxpayer was assessed a late payment penalty for each of the eight late filed returns plus interest.

Taxpayer argues that she was not advised regarding the forms, where to send the taxes, when they were due, and did not know about a district office in their area. Taxpayer states it filed its returns with that office and was told it would owe penalties and interest for filing and paying late.

Taxpayer apparently had not attempted to register before opening its business nor pay its taxes timely. Taxpayer should have had procedures in place to assure that its taxes were filed and paid timely and has not provided reasonable cause to allow a waiver of the penalties assessed.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030135P.LOF

LETTER OF FINDINGS NUMBER: 03-0135P
Sales and Use Taxes
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 is a small business corporation that owns and manages a hotel. Upon audit it was discovered that the taxpayer had no use tax accrual system in place and failed to report sales tax from its vending machine sales, for meeting room rentals, movie rentals, and telephone charges.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer requests that the penalty assessed be waived because it was not aware of all the services that were taxable. Taxpayer states it now understands the requirements and agrees to the tax assessment.

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

The taxpayer failed to self-assess and remit tax on 100% of its untaxed taxable purchases for all years at audit and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030139P.LOF

LETTER OF FINDINGS NUMBER: 03-0139P
Sales and Withholding Taxes
Various Periods for the Years 2000, 2001, and 2002

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

ISSUE(S)

I. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer filed and paid several of its ST103's and WH-1's late and was assessed a late payment penalty. In a letter dated March 24, 2003, taxpayer protests the penalty assessed because it had corporate policies and internal control procedures that met the standards required for approval of its financial statements. Taxpayer's representative states that it would have discovered the noncompliance prior to its periodic financial review, had it not been for the taxpayer's mandatory vacation policy. Taxpayer requests a penalty waiver because it was not careless in its duty to file and remit tax to the state.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer was assessed a ten percent (10%) penalty for each of its Sales and Withholding Tax returns because it paid its tax after the due date.

Taxpayer's representative states that its client not only has the controls normally used by most businesses, but also has implemented a level of control not normally found in this type of business. Possibly due to employee turnover in 2001, compliance deteriorated and taxpayer's representative believes it would have discovered this failure in the process of the next periodic financial review. Taxpayer's mandatory vacation policy exposed this noncompliance prior to the representative's periodic financial review.

Taxpayer's records indicate it currently has outstanding liabilities for the late filing of sales tax returns that includes 8/31/2001, 10/31/2001, 11/30/2001, 12/31/2001, 1/31/2002, 2/28/2002, 3/21/2002, 4/30/2002, 5/31/2002, 6/30/2002, and 9/30/2002. Withholding Tax Late Liabilities include 8/31/2001, 10/31/2001, 11/30/2001, 2/28/2002, 3/31/2002, 4/30/2002, 5/31/2002, 6/30/2002, and 9/30/2002.

Taxpayer apparently has no procedures in place to assure that its taxes are filed and paid timely and has not provided reasonable cause to allow a waiver of the penalties assessed.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120030140P.LOF

LETTER OF FINDINGS NUMBER: 03-0140P
Individual 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 protests the proposed penalty assessment for late payment and underpayment of estimated taxes. Taxpayer remitted its return and payment timely. However, upon review by the Department it was noted that the taxpayer had included an erroneous amount on line 21. The Department advised the taxpayer and the taxpayer remitted $2,087.10 on December 12/27/02. $140.10 of the $2,087.10 was applied to the underpayment penalty. Taxpayer was assessed a penalty for late payment in the amount of $194.70, a portion of which was also paid with the $2,087.10.

Taxpayer filed a penalty protest letter dated March 20, 2003 that requests a penalty waiver for the underpayment penalty and the ten-percent standard penalty.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer believes it has reasonable cause that all penalties and interest be abated. Taxpayer specifically states that the problem with the estimated tax payments for the year 2001 was that it stemmed from a refund it applied from its 2000 return to the 2001 return. Taxpayer states that that discrepancy has been cleared. Taxpayer states it did not intentionally underpay nor disregard the rules.

Taxpayer made an error on its return that caused the tax to be underpaid. Human error is not considered reasonable cause.

Taxpayer has not provided reasonable cause to allow the Department to waive the penalty. The Department has no authority to waive interest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030151P.LOF

LETTER OF FINDINGS NUMBER: 03-0151P
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. Tax Administration – Penalty

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

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer is a multinational company headquartered out of state with a manufacturing plant and distribution center in Indiana. At audit, it was determined that the taxpayer failed to self assess and remit use tax for approximately eight percent (8%) of its previously untaxed taxable purchases such as magazines and subscriptions, computer software, mats, office cabinets, maintenance equipment, laptop computers, electrical supplies, office supplies, and various other miscellaneous items.

The taxpayer was previously audited in 1996 and 1999.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer requests that the penalty assessed be waived because it made a good faith effort to comply with all of the sales and use tax laws in the state. In the future, it will make every effort to pay all the sales and use taxes that are due.

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

The taxpayer failed to self-assess and remit tax on approximately eight percent (8%) of its untaxed taxable purchases, some of which were issues in the prior audits, and has not provided reasonable cause to allow the department to waive the penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220030152P.LOF

LETTER OF FINDINGS NUMBER: 03-0152P
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.

STATEMENT OF FACTS

Taxpayer was assessed a penalty at audit for failing to report gross income to the state of Indiana and a penalty for the underpayment of estimated income taxes. Taxpayer protests the proposed penalty assessments for the underpayment of estimated tax and the audit penalty. Taxpayer, in letters dated March 14, 2003 and March 21, 2003, states that it relied on its Certified Accountants to properly prepare its returns.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalties assessed. Taxpayer states that it relied upon its Certified Accountants to properly prepare its returns, therefore, it has reasonable cause to allow the Department to waive the penalties assessed. The Certified Public Accountant provided a letter dated April 14, 2003 that indicates there was either a program error or an oversight for the failure to subject receipts to the gross income tax.

Taxpayer failed to report gross income subject to the gross income tax. Receipts, which are derived from providing services of any character within Indiana, are subject to the Gross Income Tax at the high rate. The taxpayer provides engineering consultant services that are performed within Indiana.

Neither taxpayer nor its CPA has provided reasonable cause to allow a penalty waiver for the untaxed gross receipts.

Taxpayer also failed to file and remit quarterly estimated income taxes for almost all of its quarterly returns.

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 and has not provided reasonable cause to allow a penalty waiver. Procedures should have been in effect to assure that taxes were timely paid. Taxpayer had Certified Public Accountants that should have been aware of Indiana Tax Law and its consequences.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220030160P.LOF

LETTER OF FINDINGS NUMBER: 03-0160P
Partnership IT-65
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 6-8.1-10-6

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer was assessed $10 per day for a total of $250 for filing its return late.

Taxpayer filed a penalty protest dated March 28, 2003 stating that it is not subject to a penalty under IRC Rev. Proc. 84-35.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer protests the penalty assessed and states that the Federal Government does not assess a penalty if all its partners have fully reported their shares of income, deductions, and credits of the partnership on their timely filed tax returns and each of the four members have reported their income reflected on Form K-1.

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 has not provided reasonable cause to allow a penalty waiver.

FINDING

Taxpayer's protest is denied.
