INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Guidance for Interpretation of the Term "Emission Data"
Identification Number: Air-031-NPD
Date Originally Effective: January 2, 2004
Dates Revised: none
Other Policies Repealed or Amended: none
Brief Description of Subject Matter: Definition of the term "emission data" as used for purposes relating to the Clean Air Act and the Indiana Code.
Citations Affected: IC 13-14-11-1

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 (NPD) shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. This NPD will be made available to the public forty-five (45) days prior to presentation to the air pollution control board. Then, this NPD may be put into effect by IDEM thirty days after presentation to the air pollution control board, pursuant to IC 13-14-1-11.5. After such period, IDEM will submit the policy to the Indiana Register for publication. Revisions to the policy will follow the same procedure of notice, presentation to the board and publication.

PURPOSE

The purpose of this nonrule policy is to describe the policy that IDEM will use to define the term "emission data", as it relates to the trade secret exemption in public records found in Indiana Code 5-14-3-4 for purposes of permitting, data collection, modeling and compliance and related activities. IDEM's interpretation of "emission data", as it relates to data collection, permitting, air quality modeling and compliance is set forth in this NPD.

BACKGROUND

Both the Clean Air Act, Sections 114, 208 and 307(a), and Indiana's public records' statutes, IC 5-14-3-4 and IC 13-14-11-1(b), provide for the confidential treatment of "trade secrets" or "proprietary data" submitted to U.S. EPA or IDEM, respectively, with the exception of "emission data".

The Clean Air Act, in section 114(c), specifically states that "emission data" are public records that are not eligible for the trade secret disclosure exemption. This exclusion states,

> Any records, reports or information obtained under subsection (a) of this section shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets...
>
> (42 USC Section 7414(c) (CAA 114(c))).

In order to define the term "emission data", EPA promulgated 40 CFR 2.301(a)(2). It also issued a guidance document at 56 FR 7042 and further enacted part of that guidance in the Consolidated Emission Reporting Rule (CERR) found at 40 CFR 51.

Indiana has similar language to the Clean Air Act in its public record statute found at IC 13-14-11-1(b). Indiana does not, however, have an Indiana statute or rule that defines "emission data", so IDEM has used EPA's rules, guidance and interpretations in making "emission data" confidentiality determinations under 326 IAC 17.1.

IDEM has the authority to interpret rules and statutes through guidance documents under IC 13-14-1-11.5. Specifically, IDEM may use for guidance, "a policy or statement that:

(1) Interprets, supplements, or implements a statute or rule;
(2) has not been adopted in compliance with IC 4-22-2;
(3) is not intended by the department to have the effect of law; and
(4) is not related solely to internal department organization."

This NPD interprets IC 13-14-11-1(b), has not been promulgated as a rule using IC 4-22-2, is not intended to have the effect of law and is not related solely to internal department organization and therefore falls into the policy requirements of IC 13-14-1-11.5.

POLICY

When required to apply or interpret the term "emission data", IDEM intends to use the following definition:

"Emission data", for purposes of IC 13-14-11, means any of the following:

(1) The identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any contaminant that:

(A) has been emitted from; or
(B) results from any emission by;

an emission unit authorized to emit under an applicable standard or limitation.

(2) The name, address, or other description of the location and the nature of the emission unit necessary to identify the emission unit, including a description of the device, equipment, or operation constituting the emission unit.

(3) Information necessary to:

(A) determine a permit condition that assures compliance with an applicable requirement; or

(B) determine or calculate an enforceable emission limitation, including:

(i) rate of operation;

(ii) rate of production;

(iii) rate of raw material usage;

(iv) material balance; or

(v) equipment capacity;

if the information is contained in a permit or the technical support document to ensure that the permit is practically enforceable under state or federal law.

IDEM will consider data and information meeting the above definition as "emission data" within the meaning of state and federal law, which must be disclosed to the public upon request. This information is not eligible for the trade secret exclusion. This definition applies to data currently held by IDEM upon public request as well as information submitted in the future. This definition applies only to the data listed above. However, this NPD does not affect a permittee's right to request confidential treatment of information submitted to IDEM if such information is submitted in accordance with 326 IAC 17.1, to IDEM as a trade secret. IDEM will then make a determination whether the information constitutes "emission data" based on this NPD. Permittees who have previously made a claim of confidentiality under 326 IAC 17.1, or its predecessor rules, or who make a confidentiality claim in the future, will continue to receive notice and an opportunity to appropriately respond to a determination as set forth in 326 IAC 17.1-5. Determinations will continue to be made on a case-by-case basis for data not specified in this NPD.

POLICY INTERPRETATION AND EXAMPLES

IDEM uses "emission data" for a variety of regulatory purposes, including permits, emission statements, air quality modeling and compliance activities. Following is a discussion of how IDEM will apply the definition of "emission data" stated above in these contexts.

PERMITS

The permitting program uses "emission data" when determining applicable requirements for construction and operating permits. The following are examples of "emission data" in permits: applicability determinations based on potential to emit, process weight rate information in 326 IAC 6-3, process flow diagrams and Best Achievable Control Technology (BACT) determinations.

Applicability of the permit program is based on a source's potential to emit. Potential to emit is generally determined using the maximum capacity of a unit. This information is "emission data" under paragraph (3) of the definition of "emission data" set forth above. However, actual maximum capacity is not needed if the permittee agrees to an enforceable limit on its potential to emit (PTE). An enforceable limit is created when the permittee stipulates that the permittee's capacity is greater than the highest relevant capacity for PTE purposes and over the PTE threshold. In these cases only the enforceable limit is needed to determine PTE and the actual maximum capacity would not constitute "emission data".

The process weight rate rule, found at 326 IAC 6-3, requires throughput information to calculate the correct particulate limit. This process weight rate information is "emission data" under paragraph (3) of the definition of "emission data" set forth above. However, if a permittee agrees to comply with an emission limit for 326 IAC 6-3 and stipulates that the capacity is above the corresponding process weight rate, then maximum throughput information would not be needed to determine the particulate limit and therefore would not constitute "emission data".

Process flow diagrams included in permit applications, at the request of IDEM, that contain "emission data" and are claimed as confidential because they graphically depict a manufacturing process that is itself confidential trade secret information, shall not constitute "emission data" under the definition of "emission data" set forth above, provided the "emission data" of interest on the process flow diagram appears elsewhere in the permit application.

When IDEM performs a BACT analysis pursuant to 326 IAC 2-2 and 326 IAC 8-1-6, information needed to determine that limit constitutes "emission data". This includes, but is not limited to, information that explains why control technology is or is not practical or cost- effective; and why a source is or is not comparable to other sources. For example, if maximum capacity is needed in these instances, then the maximum capacity would constitute "emission data" under the definition of "emission data" set forth above. However, if this information is not needed to make a BACT determination, then it would not constitute "emission data".

Another example of "emission data" in the permitting context is expected pollutant emission rates for pollutants, which may not be subject to specific requirements under state or federal law. NOx is an example of a pollutant that, for many types of emission units, is not regulated under state or federal law, so it would not be necessary in the course of new source review to determine a permit condition or emission limit. In this example, the expected emission rate would be considered "emission data" and be made publicly available in a Technical Support Document prior to issuance of the new source review permit, even if some of the information used to arrive at that rate continues to qualify for confidential treatment, pursuant to 326 IAC 17.1, as a trade secret.

In addition to the above examples, if information normally given to IDEM is not needed to make a permitting determination and the permittee does not wish to disclose that information, then the permittee should not submit it as part of their application or

correspondence. The permittee is then assured that the information is kept confidential. IDEM will revise its permit application form instructions to be consistent with this NPD.

EMISSION STATEMENTS

Many air emitting source permittees are required to submit an emission statement on an annual basis according to 326 IAC 2-6. IDEM uses this information for a variety of planning and compliance purposes and makes it available to the public. IDEM also must report much of the emission statement information to EPA, pursuant to 40 CFR 51, the Consolidated Emission Reporting Rule (CERR). IDEM will consider information that is necessary to determine actual air emissions to be "emission data" reportable under 40 CFR 51, CERR (see attachment A). Pursuant to 40 CFR 51.15(d), EPA considers all information supplied under the CERR to be "in the public domain and cannot be treated as confidential". EPA recognizes that state and federal confidentiality requirements may be different and a final reconciliation can be made prior to submission of confidential state information. It is IDEM's intent to treat any confidential trade secret information, which is not "emission data", reported pursuant to 326 IAC 2-6 as confidential.

It is important to note, that if a permittee takes an enforceable limit to avoid a permitting program or other regulation (and depending on how the source monitors compliance), certain information would not constitute "emission data." For example, a source's actual maximum capacity or design capacity would not constitute "emission data" if the permittee took an enforceable limit to avoid a permitting program or other regulation, unless the unit emits other pollutants for which a maximum limit has not been set and the limit is not expressed in lbs/hour. Additionally, if annual emissions can be determined through data other than actual throughput of raw material or capacity (for example, Continuous Emissions Monitoring Systems [CEMS] data or airflow and grain loading), then throughput of raw material information, maximum capacity, or design capacity would not constitute "emission data."

With the above qualifications, the following constitutes "emission data" heat content (fuel, annual average), ash content (fuel, annual average), sulfur content (fuel, annual average), pollutant code, activity/throughput (annual), annual emissions, emission factor, winter throughput (%), spring throughput (%), summer throughput (%), fall throughput (%), hours/day in operation, start time (hour), day/week in operation, weeks/year in operation, design capacity, primary control efficiency (%) and secondary control efficiency, facility ID code, Point ID code, process ID code, stack ID code, site name, physical address, 'x' stack coordinate (latitude), 'y' stack coordinate (longitude), stack height, stack diameter, exit gas temperature, exit gas velocity, exit gas flow rate, SIC/NAICS and control device type.

AIR QUALITY MODELING

The modeling program uses certain permitting and emission statement data to perform accurate modeling for air quality planning purposes. Therefore, much of these data is also "emission data". In addition to the "emission data" of emission statements and permitting, modeling uses the following information: property line boundaries and dimensions and location of the building next to the stack. These two provisions constitute "emission data" under the definition of "emission data" set forth above.

COMPLIANCE

IDEM uses a variety of information either submitted by or collected from sources to determine compliance with emission limitations. Information necessary to determine whether a source is in compliance with an enforceable emission limitation established by permit, rule, or law constitutes "emission data" as set forth above. As noted above, however, sources may take permit limits or establish other conditions that render certain data unnecessary to determine compliance with these limits. In that circumstance, data deemed not to constitute "emission data" in the permitting context would also not constitute "emission data" for compliance purposes.

ADDITIONAL INFORMATION

Copies of this policy are available at the Office of Air Quality, Indiana Department of Environmental Management, Indiana Government Center-North, Room N1003, 100 North Senate Avenue, Indianapolis, Indiana 46204.

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
COMMISSIONER'S BULLETIN #14
List of hazardous waste sites scored
using the Indiana Scoring Model (ISM)
Jan-04
http://www.in.gov/idem/land/statecleanup/club.html

County/City Site Name (Type of Facility) Address	*score based on* *potential impact* Score Rescore	Score Date Rescore Date	Contaminant Type	Environment Affected	Status
1. Adams/Berne					

	National Oil Company (Bulk Plant) SR 218 & CR 150W	20.97 -/-	May-92	Fuel	Soil Surface water	Investigation in progress
2.	Delaware/Albany					
	Muncie Race Track (Dump) SR 67 & 700N	27.70 -/-	Feb-91	Metals Solvents PCBs	Soil Groundwater	Waste isolated Landfill capped Ongoing groundwater monitoring
3.	Delaware/Muncie					
	Stout Storage Battery (Industrial) 2505 West 8th	26.22 11.21	Dec-90 May-99	Lead	Soil	Cleanup Complete Delisting evaluation proposed 2004
4.	Elkhart/Elkhart					
	Lusher Avenue (Landfill) CR 18 & 21st Street	31.00 -/-	Feb-91	Solvents	Groundwater	Residential water filters installed
5.	Elkhart/Elkhart					
	Sycamore Street Site (Dry Cleaner) 100 Sycamore	13.13 -/-	May-91	Solvents	Groundwater	Alternate water supplied Delisting evaluation proposed 2004
6.	Elkhart/Middlebury					
	Universal Adhesives/Timminco (Industrial) SR 13 South	25.00 -/-	Dec-90	Solvents	Soil Groundwater	Cleanup completed Delisting evaluation proposed 2004
7.	Fayette/Connersville					
	Connersville Landfill (Landfill) SR 121 & Eastern Avenue	44.60 -/-	Feb-91	Solvents Metals	Soil Surface water Groundwater	Immediate removal actions initiated
8.	Franklin/Laurel					
	Laurel Dump Site #1 (Dump) 24128 Old Highway 52	20.89 -/-	Mar-92	Solvents Metals	Soil Surface water Groundwater	Surface/subsurface waste removed Delisting evaluation proposed 2004
9.	Gibson/Princeton					
	Indiana Refining (Industrial) US 41 and 350 S	30.03 -/-	Dec-90	Fuel	Soil	Surface waste removed Delisting evaluation proposed 2004
10.	Grant/Marion					
	Grant County Landfill (Landfill) 750 E & SR 18	15.48 -/-	Apr-91	Metals	Soil Groundwater	Additional investigation under consider-ation
11.	Hancock/Fortville					
	Meridian Road Landfill (Landfill) CR 1000 N and Meridian	40.16 -/-	Dec-90	Solvents Metals	Soil Groundwater	Investigation complete Risk Assessment complete Cleanup in progress
12.	Hendricks/Clayton					
	Clayton Wells (Commercial) Kentucky Street	27.00 -/-	Dec-90	Solvents	Groundwater	Filters supplied Periodic monitoring
13.	Huntington/Huntington					
	Huntington Terminals	28.90	Dec-90	Fuel	Groundwater	Alternate water supplied

	(Pipeline) Meridian & Erie Stone	-/-				Agreed Order under negotiation
14.	Jackson/Reddington Texas Eastern (Petroleum pipeline) Southwest of Reddington	26.26 -/-	Dec-90	Fuel	Soil Groundwater	Cleanup in progress under Agreed Order Record of Decision finalized
15.	Jackson/Medora United Plastics (Manufacturing) SR235 & 2nd Street	39.00 -/-	Jan-91	Solvents Metals	Soil Groundwater	Waste removal in progress
16.	Kosciusko/Warsaw Warsaw Chemical (Chem-Manufacturing) Argonne & Durban Street	47.45 -/-	Jan-91	Solvents	Soil Groundwater	Cleanup in progress under Agreed Order
17.	Lake/Hammond Calumet Containers (Industrial) 3631 Stateline Road	16.07 -/-	Dec-90	Solvents	Soil	Ongoing removal by USEPA Delisting evaluation proposed 2004
18.	Lake/East Chicago Energy Cooperative Incorpo- rated (Industrial) 3500 Indianapolis Boulevard	19.87 -/-	Dec-90	Fuel Lead	Soil Surface water Groundwater	Cleanup in progress under Agreed Order Consent Decree negotiations underway
19.	Lake/Hammond BP (Refinery) Lake Avenue & 129th Street	18.59 -/-	Mar-91	Fuel Acid/bases Lead	Soil Groundwater	Cleanup under RCRA Corrective Action
20.	Lake/Cedar Lake Schreiber Oil Company (Petroleum Storage) 10601 W 133rd Street	13.48 -/-	Dec-90	Fuel	Soil	Surface waste removed
21.	Lake/Hammond William Powers (Dump) 119th & Stateline	18.88 -/-	Mar-91	Cyanide Sulfide	Soil Surface water	Delisting evaluation proposed 2004
22.	Lawrence/Oolitic Oolitic Dump (Dump) Hoosier & 4th Street	48.87 -/-	Jan-91	Fuel	Soil Groundwater	Cleanup in progress under Leaking Underground Storage Tank Program
23.	Madison/Anderson Prime Battery (Manufacturing) 230 Jackson	29.52 -/-	Dec-91	Lead	Soil Groundwater	Investigation ongoing
24.	Marion/Indianapolis American Lead (Industrial) 2102 Hillside Avenue	21.78	Jun-99	Lead	Soil	USEPA removal proposed
25.	Marion/Indianapolis Avanti Corporation	40.05	May-93	Lead	Soil	USEPA removal completed

	(Industrial)	23.09	Oct-98		Groundwater	Long-term operation and maintenance ongoing
	South Harris Street				Surface Water	
26.	Marion/Indianapolis					
	Marathon Rock Island	15.22	Jan-91	Gasoline	Soil	Voluntary waste cleanup in progress
	(Industrial)	-/-		Metals	Surface water	Ongoing investigation
	500 W 86th Street				Groundwater	Ongoing negotiations for Agreed Order
27.	Marion/Speedway					
	Marathon Terminal	21.04	Apr-91	Fuel	Soil	Cleanup in progress
	(Industrial)	-/-			Surface water	Multiple recovery wells
	1304 Olin Avenue				Groundwater	Soil vapor extraction system in place
						Ongoing investigation
28.	Marshall/Bourbon					
	Bourbon & Quad Streets Contamination	25.86	May-92	Solvents	Soil	Cleanup in progress under Leaking
	(Commercial)	-/-		Fuel	Groundwater	Underground Storage Tank Program
	211 W Center Street					
29.	Montgomery/Crawfordsville					
	Crawfordsville Scrap & Salvage	29.67	Oct-93	PCBs	Soil	Entered Voluntary Remediation Program
	(Dump/Scrap)	-/-		Lead	Sediments	
	419 N Green Street					
30.	Montgomery/Crawfordsville					
	P.R. Mallory	22.23	Sep-91	PCBs	Soil	Some surface waste removed by USEPA
	(Electrical)	-/-			Sediments	Pending further investigation
	SR 32 East					
31.	Montgomery/Crawfordsville					
	Shelly Ditch	24.04	Aug-99	PCBs	Soil	Waste study in progress under Superfund
	(Industrial)	-/-			Sediments	Ongoing removal action
	1204 Darlington Avenue					USEPA lead
32.	Morgan/Monrovia					
	Davenport Dump	28.20	Dec-90	Solvents	Surface water	USEPA removal action completed
	(Dump)	23.20	Jul-00			Delisting evaluation proposed 2004
	6965 Beech Grove Road					
33.	Porter/Wheeler					
	Wheeler Landfill	31.19	Jan-92	Solvents	Groundwater	Long-term monitoring under RCRA
	(Landfill)	-/-		Caustics		Corrective Action
	SR 130 & Jones Road					
34.	Randolph/Union City					
	A.O. Smith (Westinghouse)	44.67	Feb-92	PCBs	Soil	Cleanup in progress under Superfund
	(Industrial)	-/-			Groundwater	Surface waste removed by USEPA
	Frank Miller Road					
35.	Randolph/Union City					
	Little Mississenewa River	31.37	Jul-99	PCBs	Soil	Cleanup in progress under Superfund
	(River)	-/-			Sediments	
	Frank Miller Road at Little Mississenewa					
36.	Randolph/Union City					
	UTA	33.70	Sep-99	PCBs	Soil	Cleanup in progress under TSCA
	(Industrial)	-/-			Groundwater	
	1425 W Oak					

37. St. Joseph/Granger					
Amoco/Granger	54.76	Dec-90	Fuel	Soil	Cleanup in progress
(Industrial)	26.02	Jan-96	Solvents	Groundwater	Agreed Order signed
Adams Road					
38. St. Joseph/South Bend					
Allied Signal Corporation	41.75	May-92	Solvents	Soil	Entered Voluntary Remediation Program
(Industrial)	-/-		Fuel	Groundwater	
717 N Bendix Drive					
39. St. Joseph/South Bend					
ARCO	46.74	Jul-99	Fuel	Soil	Remedial investigation in progress
(Industrial)	-/-			Groundwater	
20630 West Ireland					
40. St. Joseph/South Bend					
Avanti	27.60	Mar-90	Solvents	Soil	Drum removal complete
(Industrial)	28.28	Mar-92		Groundwater	Remedial investigation in progress
765 S Lafayette Road					
41. St. Joseph/South Bend					
Chippewa Avenue Well Field	50.38	Aug-99	Solvents	Groundwater	Remedial investigation in progress
(Industrial)	-/-				Wellfield cleanup system in operation
600 W Chippewa					
42. St. Joseph/South Bend					
Hollywoood Park	12.8	Aug-02	Solvents	Groundwater	Investigation in progress
(Residential)	-/-				Ongoing negotiations for Agreed Order
23768 US 20					
43. St. Joseph/South Bend					
Toro-Wheelhorse	29.89	Mar-93	Solvents	Soil	Entered Voluntary Remediation Program
(Industrial)	-/-		Metals	Groundwater	
515 W Ireland Road					
44. Shelby/Shelbyville					
Knauf Fiberglass	43.86	Mar-91	Solvents	Groundwater	Cleanup Complete
(Industrial)	17.85	Mar-94		Surface water	No further action
240 Elizabeth	12.32	Oct-03			Delisting proposed 2004
45. Shelby/Shelbyville					
IGC/PSI	19.06	Mar-91	Fuel by-products	Soil	Ongoing investigation
(Industrial)	-/-		Cyanide	Groundwater	
Noble Street					
46. Shelby/Shelbyville					
TRW Incorporated	42.83	Dec-90	Solvents	Soil	Risk assessment in progress
(Industrial)	-/-	Mar-94		Groundwater	Cleanup in progress
630 Noble/513 Hendricks					
47. Spencer/Troy					
Freeman Kline Site/Troy Refinery	31.17	Jun-97	Petroleum	Soil	Immediate removal completed
(Refinery)	-/-			Surface water	Investigation in progress
SR 70 East					
48. Sullivan/Dugger					
Dugger Electric	25.82	Feb-91	Petroleum	Groundwater	Monitoring
(Commercial)	-/-		PCBs		
First and Main Streets					

49.	Tippecanoe/Lafayette					
	ALCOA	19.44	Dec-90	PCBs	Soil	Ongoing investigation
	(Industrial)	-/-			Sediments	
	3131 E Main					
50.	Tippecanoe/Otterbein					
	David John Property	43.8	Aug-01	Solvents	Soil	Ongoing Investigation
	(Drum Recycling)				Groundwater	
	Vandalia Street					
51.	Tippecanoe/Lafayette					
	Indiana Gas	44.35	Dec-91	Fuel by-products	Soil	Cleanup complete
	(Industrial)	39.65	Jul-99	Cyanide	Groundwater	Long term monitoring
	600 N 4th Street					
52.	Tippecanoe/Lafayette					
	TRW/Ross Gear	58.54	Dec-90	Solvents	Soil	Cleanup complete under Agreed Order
	(Industrial)	42.60	Jan-96		Groundwater	
	800 Heath Street					
53.	Vigo/Terre Haute					
	J.I. Case	31.77	Dec-90	Solvents	Groundwater	Agreed Order signed
	(Industrial)	-/-				Pilot groundwater cleanup project in place
	4901 N 13th Street					
54.	Wayne/Richmond					
	Dana/Springwood Park	43.17	Jan-91	Solvents	Groundwater	Cleanup in progress under Voluntary Remediation and Solid Waste programs
	(Industrial)	-/-				
	Williamsburg Pike					
55.	Wells/Petroleum	25.26	Feb-92	PCBs	Soil	Pending USEPA Removal Action
	Merrill Meyers Property	-/-				
	(Farm Equipment)					
	SR 1 & CR 900					
56.	White/Monon	28.40	Dec-90	Solvents	Soil	Consent Order signed
	Monon Well Field	13.91	Oct-03		Groundwater	Wellfield relocated
	(Commercial)					Delisting evaluation proposed 2004
	Main Street					

No sites were deleted from the Commissioner's Bulletin in 2003
No sites were added to the Commissioner's Bulletin in 2003
Two (2) sites were rescored in 2003

INDIANA DEPARTMENT OF INSURANCE
December 5, 2003
Bulletin 123
Use of Credit Information by Insurance Companies

This Bulletin is directed to all insurance companies, as defined by IC 27-1-2-3, that write personal lines property and casualty products in this state. IC 27-2-21 as added by Senate Enrolled Act 178 (P.L.201-2003) addresses the use of credit information by these insurance companies for applications submitted and policies issued, delivered, amended or renewed after December 31, 2003. The definitions contained in IC 27-2-21 apply to this bulletin. Bulletin 122 is withdrawn and replaced by this Bulletin 123.

An insurer that uses a credit score to underwrite and rate risks shall file the insurer's scoring models or other scoring processes with the Department of Insurance (Department). This filing is confidential under IC 5-14-3-4(a)(1) and IC 27-2-21-20(d) and not available for public inspection. Companies should identify their filings as made pursuant to IC 27-2-21 and should separate all confidential documents and clearly identify them as confidential as described in Bulletin 111. Pursuant to IC 27-2-21-20 the scoring

model and other scoring processes are confidential.

Insurers that use credit information were required by Bulletin 111 to file their credit scoring methodologies in 2002. If the 2002 filing is compliant with the provisions of IC 27-2-21 then there is no need for the insurer to file in 2003. In these cases, the insurer should notify the Department in writing that they have made no changes to the 2002 filing and certify that it is compliant with the provisions of IC 27-2-21.

An insurer may not deny, cancel or decline to renew a personal insurance policy solely on the basis of credit information. An insurer may not base an insured's renewal rate for a personal insurance policy solely on credit information. The Department interprets this prohibition to mean that an insurer may not deny, cancel, decline to renew or increase a renewal rate due to a credit score unless at least one other rating factor has changed to indicate a denial, cancellation, declination to renew or increase in the premium rate. These actions are considered "adverse actions". Other factors may include, but are not limited to, driver class, driving record, age of home, age of the insured, claim experience, and number of vehicles owned. If no other factor used in underwriting or rating would cause the insurer to deny, cancel, decline to renew or increase a renewal rate and credit information would indicate such an action, the insurer is prohibited from denying, canceling, declining to renew or increasing the premium rate, as this would constitute taking an adverse action solely on the basis of credit information. A base rate change cannot be identified as the second factor to support an adverse action.

If credit is one of the factors leading to an adverse action the insurer must use a credit report issued or a credit score calculated not more than ninety (90) days before the policy is first written or a renewal is issued. In addition, the insurer shall provide notice to the consumer in accordance with the federal Fair Credit Reporting Act and provide notice to the consumer explaining the reason for the adverse action. This notice shall be sufficiently clear and use specific, not general, language to identify the basis for the insurer's adverse action.

An insurer may not use income, gender, address, zip code, ethnic group, religion, marital status or nationality as a factor in determining the credit score. An insurer may not take an adverse action against a consumer solely because the consumer does not have a credit card account. The absence of credit information may not be used in underwriting or rating unless the insurer (1) presents to the Commissioner information that the absence relates to the risk for the insurer and the insurer treats the consumer as approved by the Commissioner; or (2) the insurer treats the consumer as if the consumer had neutral credit information. If an insured requests, the insurer must re-underwrite or re-rate the policy with an updated credit report or score not more often than one time in a twelve (12) month period. Beginning January 1, 2004, an insurer may not use a credit score or credit report that is older than thirty-six (36) months in the issuance or renewal of a policy.

An insurance score cannot consider as a negative factor a credit inquiry that was not initiated by the consumer. A consumer's inquiry as to his/her own credit cannot be used as a negative factor. Credit inquiries relating to insurance coverage or unpaid medical bills cannot be used as negative factors. Multiple lender inquiries related to a home mortgage in a thirty (30) day period can only be counted as one inquiry. Multiple lender inquiries related to automobile financing in a thirty (30) day period can only be counted as one inquiry.

The application of insurance must inform the consumer that credit information is used by the insurer. The insurer must have a policy in place for handling notification of an error in a credit report and also a procedure for a consumer to dispute a credit score.

The Department will review filings to ensure that insurers using credit information are acting appropriately. An insurer that is found to be acting contrary to the provisions of IC 27-2-21 may be subject to enforcement action under IC 27-4-1.

INDIANA DEPARTMENT OF INSURANCE

Sally McCarty, Commissioner

NATURAL RESOURCES COMMISSION

Information Bulletin #40

Methods of Measuring the Amount of Water Withdrawn by a Significant Water Withdrawal Facility

SUBJECT: The purpose of this Information Bulletin is to describe methodologies approved by the natural resources commission to calculate the amount of water withdrawn annually from a "significant water withdrawal facility" as defined at IC 14-8-2-257.

Rate of Flow Metering Devices

Rate of flow meters are used to quantify fluids that pass in a continuous stream rather than in isolated or separately counted quantities. These meters are dependant upon some property of the fluid other than, or in addition to, volume or mass. They are designed to use a change in the property or properties associated with the rate of flow, and they usually include a device that manually or automatically records a measurable change. The rate of flow multiplied by the time of operation equals the amount of water withdrawn for that period of time, so the time of operation must also be tabulated. There are several principles that can be used in recording the rate of flow:

a) Differential (Variable) Pressure Type Meters – These systems involve the pressure differential at two points in full flowing

systems. When flow varies, the pressure difference measured by such devices also varies and both functions can be correlated with reasonable accuracies through various types of accessory instrumentation. *Examples include venturi meters, flow nozzles, orifice meters, pilot tubes, and annubars*.

b) Steady Pressure (i.e., Steady Head) Type Meters – These systems discharge into the atmosphere. *Examples include irrigation nozzles that are available with reasonably accurate flow vs. pressure calibrations*.

*c) O*verflow *(Head Area) Type Meters* – These systems measure variation in levels of gravity flow (i.e., non-pumped) systems. As flow varies in a channel, the depth upstream of a restriction in partially filled conduits varies and these functions can be correlated with reasonable accuracies. The key element needed in this type of system is water depth that can be measured with accessory instrumentation or simply with a depth gage. *Examples of such restrictions are weirs and flumes.*

d) Current Type Meters – These systems utilize a wheel or propeller, which rotates when immersed in flowing water, and a device to determine the number of revolutions of the wheel or propeller. The number of revolutions is then related to fluid velocity. The method can be utilized where water withdrawals travel through a pipe or an open channel.

Time of Pump Operation

Water withdrawals can be measured based upon the time each pump supplying a water withdrawal facility is operated multiplied by the capability of the respective pump. The time of operation can be recorded manually in a written log or by means of an automatic time meter. The cost of installing a time meter on a pump is relatively low, and being aware of the pump design discharge, pump efficiency, and time of pump operation allow for a fairly accurate record of water withdrawals. Pumping rates can also be determined for specified periods of time from a manufacturer's calibration graph by correlating volume flows with electrical loads and with discharge pressures.

Past Performance Comparison

Some industries have a direct relationship between the amount of water withdrawn and the quantity of product manufactured or handled. In order to measure water withdrawals using a past performance comparison, the owner of a significant water withdrawal facility must provide the division of water with adequate supporting data to establish the relationship between water withdrawals and the amount of production.

NPDES Data

Many businesses and industries monitor the amount of water that is discharged to the State's rivers or streams as a part of their NPDES permit. When water use is non-consumptive and no additional inflow occurs, the amount of discharge water closely reflects the amount of water withdrawn. Ascertaining individual water withdrawals for facilities having more than one well or intake can be difficult, but this method may be acceptable in some cases. In order to measure water withdrawals using NPDES data, the owner of a significant water withdrawal facility must provide the division of water with supporting data to verify that the discharge is reflective of the amount of water withdrawal.

Direct Measurement of Amount Applied

A system using "rain gage" type of equipment can be installed to measure the amount of water applied to a given area (typically in agricultural applications). The water applied multiplied by the number of acres irrigated equals the amount of water withdrawn (e.g. 1 acre-inch equals 27,154 gallons). The gaging system must be carefully monitored in order to differentiate between water applied by irrigation and that contributed by precipitation. In order to measure water withdrawals using direct measurement, the owner of a significant water withdrawal facility must obtain prior approval from the division of water.

Quantity Metering Devices

Quantity metering devices function by having water pass in successive and completely isolated amounts, measured either by weight or volume, by alternatively filling or emptying containers of known or fixed quantities. The simplest of these devices is a holding tank or a reservoir with a known volume. When the tank or reservoir is filled from a significant water withdrawal system, the water must be accounted for by a logging method that applies to either partially filled or full flowing systems. *Examples of weighing meters include weighing tanks and tilting traps. Volumetric meters include holding tanks and reservoirs, reciprocating piston, rotary piston, and nutating disk.*

Other Methods

In order to use a method other than those approved in this Information Bulletin to measure the amount of water withdrawn by a significant water withdrawal facility, the owner of the facility must provide the division of water with the following:

1) an explanation or description of the proposed method; and

2) supporting data sufficient to satisfy the division of water that the method provides for an accurate representation of the amount of water withdrawn.

DEPARTMENT OF STATE REVENUE

STATE OF INDIANA	)	
	)	SS: BEFORE THE STATE OF INDIANA
COUNTY OF MARION	)	DEPARTMENT OF STATE REVENUE
	)	
IN THE MATTER OF:	)	
	)	
CRISIS CENTER, INC.,	)	Docket Number: 29-2003-0159
	)	
PETITIONER	)	

FINAL ORDER

The Commissioner of the Indiana Department of State Revenue, having considered (a) the applicable statutes and regulations, (b) the record of the proceedings, (c) the Administrative Law Judge's Findings of Facts, Conclusions of Law and Proposed Order, and (d) the Petitioner's Objections to the Findings of Fact, Conclusions of Law and Proposed Order, now enters the following Final Order:

IT IS NOW HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The Proposed Order issued on September 2, 2003, with respect to the above captioned Petitioner by Administrative Law Judge Bruce R. Kolb is hereby affirmed.
2. The Findings of Fact, Conclusions of Law, and Proposed Order issued on September 2, 2003, with respect to the above captioned Petitioner by Administrative Law Judge Bruce R. Kolb is hereby adopted as the Indiana Department of State Revenue's Final Order on this matter.
3. Appeals to this Order may be made pursuant to IC 4-21.5-3 et seq. and/or IC 4-21.5-5 et seq.

SO ORDERED THIS 6TH DAY OF OCTOBER, 2003

Kenneth L. Miller, Commissioner
Indiana Department of State Revenue

DEPARTMENT OF STATE REVENUE
AUDIT-GRAM NUMBER IR-010
January 1, 2004

[This Audit-Gram replaces the prior issue dated March 1, 1999 published at 22 IR 2092]

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

Nonresident Receipts Attributable to Indiana – Financial Institutions Tax

Authority: IC 6-5.5-2-3; IC 6-5.5-4-1 to 13; 45 IAC 17-3-4; 45 IAC 17-3-10

IC 6-5.5-2-3. Apportioned income of nonresident taxpayer.

For a nonresident taxpayer…apportioned income consists of…adjusted gross income for that year multiplied by the quotient of:

(1) the taxpayer's total receipts attributable to transacting business in Indiana, as determined under IC 6-5.5-4; divided by

(2) the taxpayer's total receipts from transacting business in all taxing jurisdictions, as determined under IC 6-5.5-4. [1989]

IC 6-5.5-2-3. Taxpayer apportioned income.

For a taxpayer…apportioned income consists of…adjusted gross income… [2000]

IC 6-5.5-4-2. Definitions.

(1) "Receipts" means gross income (as defined in IC 6-5.5-1-10, plus the gross income excluded under Section 103 of the Internal Revenue Code. [1989]

I. GENERAL STATEMENT

A. TAXABLE YEARS ENDING PRIOR TO JANUARY 1, 1999

1. Resident – The adjusted gross income of a resident financial institution is subject to Financial Institutions Tax.
2. Nonresident—The apportioned adjusted gross income of a nonresident financial institution is subject to Financial

Institutions Tax.

B. TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1998

The adjusted gross income of a financial institution is subject to Financial Institutions Tax. (There is no distinction between resident and nonresident taxpayers.)

II. NONRESIDENT FINANCIAL INSTITUTION PRIOR TO JANUARY 1, 1999

A. RECEIPTS SPECIFICALLY ATTRIBUTABLE TO INDIANA. IC 6-5.5-4.

Receipts are specifically attributed to Indiana under the conditions established in each of the following sections of IC 6-5.5-4:

IC 6-5.5-4-3. Lease or rental income.

IC 6-5.5-4-4. Secured loan interest.

IC 6-5.5-4-5. Unsecured consumer loan interest

IC 6-5.5-4-6. Unsecured commercial loan and installment loan interest.

IC 6-5.5-4-7. Fee income.

IC 6-5.5-4-8. Credit card interest, merchant discount, service charge...

IC 6-5.5-4-9. Sale of an asset.

IC 6-5.5-4-10. Fiduciary fee.

IC 6-5.5-4-11. Traveler's check, money order, and savings bond fees.

IC 6-5.5-4-12. Investment income from state and local government securities.

IC 6-5.5-4-13.Participation loan interest.

Receipts of a nonresident financial institution "attributable to Indiana" are not limited to those listed. Other receipts from business activity or tangible and intangible assets located in Indiana may be attributed to Indiana.

B. OTHER RECEIPTS OF A NONRESIDENT TAXPAYER ATTRIBUTABLE TO INDIANA.

"Receipts attributable to Indiana" may include the receipt of dividends and interest from stocks, bonds, and other securities issued by an Indiana resident taxpayer.

Income from intangible property which is located in Indiana and is controlled from an Indiana business situs may be attributable to Indiana.

C. RECEIPTS NOT ATTRIBUTABLE TO INDIANA.

Receipts which are not "attributable to Indiana" and, therefore, not included in the numerator of the receipts factor, must be included in the denominator of the receipts factor.

III. RESIDENT AND NONRESIDENT FINANCIAL INSTITUTION AFTER DECEMBER 31, 1998

A. NUMERATOR OF THE APPORTIONMENT FACTOR

Receipts included in the numerator of the apportionment factor are limited to those specifically enumerated in IC 6-5.5-4-3 through IC 6-5.5-4-13 (See II, A). Receipts from non-municipal investments are not enumerated and not includible. The fact that a taxpayer is commercially domiciled in Indiana or manages the non-municipal investments from an Indiana location is not determinative.

B. DENOMINATOR OF APPORTIONMENT FACTOR

The denominator of the apportionment factor should include all gross income (as defined in Section 61 of the Internal Revenue Code) reported for federal income tax purposes. Although not included in the numerator, receipts from non-municipal investments must be included in the denominator if they have been reported for federal income tax purposes. Non-municipal investment receipts received upon the disposition of the asset (such as securities and money market transactions) are limited to the gain recognized upon disposition under IC 6-5.5-4-2(1).

[FN 1] IC 6-5.5-1-13. [1989] "Resident taxpayer" defined

[FN 2] IC 6-5.5-1-12. [1989] "Nonresident taxpayer" defined

[FN 3] IC 6-5.5-1-13. "Resident taxpayer" means a taxpayer transacting business in Indiana and having its commercial domicile in Indiana.

[FN 4] Revenue Rulings 2000-01FIT and 2000-02FIT

[FN 5] Revenue Rulings 2000-01FIT and 2000-02FIT

DEPARTMENT OF STATE REVENUE
COMMISSIONER'S DIRECTIVE #21
January 2004

DISCLAIMER: Commissioner's Directives are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules and court decisions. Any information that is not

consistent with the law, regulations or court decisions is not binding on either the Department or the taxpayer. Therefore the information provided herein should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

SUBJECT: Streamlined Sales Tax Agreement Provisions

I. INTRODUCTION

In March 2000, a collection of states joined forces to sponsor a national sales tax initiative—the Streamlined Sales Tax Project ("SSTP"). The SSTP represents an effort on the part of its member states to "simplify and modernize sales and use tax collection and administration." To that end, the Streamlined Sales Tax Implementing States ("SSTIS") crafted model legislation—i.e., the Streamlined Sales and Use Tax Agreement. Member states were encouraged to adopt legislation conforming to this model. Effective January 1, 2004, Indiana has enacted legislation to bring Indiana's sales and use tax statutes into conformity with this model legislation.

Temporary regulations have been adopted and are available in the Indiana Register for December 2003. The Department has also updated Sales Tax Information Bulletin #29 to reflect the changes to the definitions of food, candy, soft drinks, alcoholic beverages, and dietary supplements and the application of sales tax to these items.

II. SALES TAX AMENDMENTS

IC 6-2.5-1-5 (amended). "Gross retail income" defined.

- Provides that delivery and installation charges are included in gross retail income.
- Provides that coupons or other discounts allowed that are not reimbursed by a third party are not part of gross retail income.

IC 6-2.5-1-11 (added). "Alcoholic beverages" defined.

- Defines an alcoholic beverage as a beverage that contains one-half of one percent (0.5%) or more of alcohol by volume.

IC 6-2.5-1-12 (added). "Candy" defined.

- Defines candy to be a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces.
- The term does not include items containing flour or items requiring refrigeration.

IC 6-2.5-1-13; IC 6-2.5-1-14; AND IC 6-2.5-1-15; (added). "Computer," "Computer software," and "Electronically" defined.

- Defines the terms computer, computer software, and delivered electronically.

IC 6-2.5-1-16 (added). "Dietary supplement" defined.

- Defines a dietary supplement as a product that is intended to supplement the diet, contains a vitamin or other mineral, is intended for oral ingestion, and is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box found on the label as required under 21 CFR 101.36.

IC 6-2.5-1-17 (added). "Drug" defined.

- Defines a drug as a substance recognized in the official United States Pharmacopoeia, intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease.
- The term does not include food and food ingredients, dietary supplements, or alcoholic beverages.

IC 6-2.5-1-18 (added). "Durable medical equipment" defined.

- Defines durable medical equipment to mean equipment including repair and replacement parts for equipment that can stand repeated use, is used to serve a medical purpose, generally is not useful to a person in the absence of illness or injury, and is not worn in or on the body.

IC 6-2.5-1-19 (added). "Electronic" defined.

- Defines electronic as relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

IC 6-2.5-1-20 (added). "Food and food ingredients" defined.

- Defines food and food ingredients as substances sold for ingestion or chewing by humans, that are consumed for their taste or nutritional value.
- The term does not include alcoholic beverages, candy, dietary supplements, or soft drinks.

IC 6-2.5-1-21 (added). "Lease" or "rental" defined.

- Defines the terms "lease" and "rental" as any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration.
- The term does not include any arrangement whereby title to property subject to a security agreement automatically transfers upon the completion of payments or when title can be gained by the payment of an option price of less the $100 or 1% of the total payments.
- The term also does not include providing tangible personal property along with an operator for a fixed or indeterminate period if the operator is necessary for the equipment to perform as designed and the operator does more than maintain, inspect, or set up the tangible personal property.

- How a transaction is characterized by the Internal Revenue Code, the uniform commercial code, or any other federal, state, or local laws is not a consideration in determining whether an arrangement is a lease.

IC 6-2.5-1-22 (added). "Mobility enhancing equipment" defined.

- Defines mobility enhancing equipment as equipment primarily used to provide or increase the ability to move from one place to another and is not generally used by persons with normal mobility. It does not include a motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer.

IC 6-2.5-1-23 (added). "Prescription" defined.

- Defines a prescription as an order or formula issued by a licensed practitioner.

IC 6-2.5-1-24 (added). "Prewritten computer software" defined.

- Defines prewritten computer software to mean computer software that is not designed and developed by the author or other creator to the specifications of a specific purchaser.
- Modifications to prewritten computer software where there is a reasonably separately stated charge for modification or enhancement, the modification or enhancement is not prewritten computer software.
- Consistent with existing Department policy concerning the taxation of "canned" and "customized" software.

IC 6-2.5-1-25 (added). "Prosthetic device" defined.

- Defines a prosthetic device as a replacement, corrective, or supportive device worn on or in the body to artificially replace a missing part of the body, prevent or correct physical deformity, or support a weak or deformed part of the body.

IC 6-2.5-1-26 (added). "Soft drinks" defined.

- Defines soft drinks as nonalcoholic beverages that contain natural or artificial sweeteners.
- The term does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or greater than fifty percent (50%) of vegetable or fruit juice by volume.

IC 6-2.5-1-27 (added). "Tangible personal property" defined.

- Defines tangible personal property as something that can be seen, weighed, measured, felt, or touched or in any other manner is perceptible to the senses. The term includes electricity, gas, water, steam, and prewritten computer software.

IC 6-2.5-4-1 (amended). "Selling at retail" defined.

- Includes delivery charges in gross retail income and charges by the seller for the preparation and delivery of the property to a location designated by the purchaser, including but not limited to transportation, shipping, postage, handling, crating, and packing.

IC 6-2.5-4-10 (amended). "Rental or leasing of personal property."

- Provides that subleasing is not classified as the rental or leasing of tangible personal property.

IC 6-2.5-5-1 (amended). "Agricultural exemption."

- Provides an agricultural exemption for the production of "food and food ingredients."

IC 6-2.5-5-2 (amended). "Agricultural machinery, tools, and equipment" exemption.

- Provides an agricultural machinery, tools, and equipment exemption for the production of "food and food ingredients."

IC 6-2.5-5-18 (amended). "Medical equipment, supplies, and devices" exemption.

- Clarifies that the purchase of durable medical equipment and prosthetic devices are exempt from the sales tax, as well as the rental of durable medical equipment and other medical supplies.

IC 6-2.5-5-19 (amended). "Drug" exemption.

- Provides a technical change to the exemption for legend and non-legend drugs.

IC 6-2.5-5-20 (amended). "Food for human consumption" exemption.

- Provides that food and food items are exempt from the sales tax if items are sold without eating utensils provided by the seller and are sold by a seller whose primary NAICS classification is food manufacturing, except for bakeries.
- Food sold in an unheated state by weight or volume as a single item, or bakery items including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas are also exempt.
- Items that are taxable include, (1) candy, (2) alcoholic beverages, (3) soft drinks, (4) food sold through a vending machine, (5) food sold in a heated state or heated by the seller, (6) two or more food ingredients mixed or combined by the seller for sale as a single item, and (7) food sold with eating utensils provided by the seller.

IC 6-2.5-5-21 (amended). "Food; medically necessary deliveries or purchases" exemption.

- Provides an exemption for transactions involving the sales of "food and food ingredients." See IC 6-2.5-1-20.

IC 6-2.5-5-21.5 (amended). "Medically necessary food" exemption.

- Provides an exemption for transactions involving the sales of "food and food ingredients." See IC 6-2.5-1-20.

IC 6-2.5-5-22 (amended). "School meals" exemption.

- Provides an exemption for transactions involving the sales of "food and food ingredients." See IC 6-2.5-1-20.

IC 6-2.5-5-35 (amended). "Tangible personal property transaction" exemption.

- Provides an exemption for transactions involving the sales of "food and food ingredients." See IC 6-2.5-1-20.

IC 6-2.5-6-9 (amended). "Uncollectible receivables" deduction.

- Makes changes in the bad debt deduction for sales tax so that any deduction taken does not include interest and the amount of the deduction shall be determined in the manner provided in Section 166 of the Internal Revenue Code.
- The deduction excludes financing charges or interest, sales or use taxes charged on the purchase price, uncollectible amounts on property that remain in the possession of the seller until the full purchase price is paid, expenses incurred in attempting to collect any bad debt, and the value of repossessed property.
- The deduction is claimed during the period for which the receivable is written off. A claimant who is not required to file a federal income tax return may deduct an uncollectible receivable on a return filed for the period in which the receivable is written off in the claimant's records.
- Provides that if the amount of the deduction exceeds the retail merchant's tax liability for the reporting period, the merchant may file a refund claim under IC 6-8.1-9.
- For purposes of reporting a payment received on an uncollectible receivable, any payments made shall be applied proportionally to the taxable price of the property and the sales tax thereon, then to interest, service charges, and any other charges.

A NEW chapter, IC 6-2.5-12, "Taxing Situs of Nonmobile Telecommunications Service" is ADDED.

IC 6-2.5-12-10 (added). "Post paid calling service" defined.

- Defines post paid calling service as payment on a call by call basis through the use of a credit card, debit card, or by charge made to a telephone number that is not associated with the origination or termination of the telecommunications service.

IC 6-2.5-12-11 (added). "Prepaid calling service" defined.

- Defines prepaid calling service as the right to access telecommunications services, which must be paid for in advance, and with the use of an access number and that is sold in predetermined units or dollars.

IC 6-2.5-12-14 (added). "Telecommunications sourcing rules."

- Provides that services sold on a call-by-call basis shall be sourced to each level of jurisdiction where the call either originates or terminates, and in which the service address is located.
- Sales of mobile telecommunications are sourced to the customer's primary place of primary use as required by the Mobile Telecommunications Sourcing Act.
- Post paid calling services are sourced to the origination point of the telecommunications signal as first identified by the seller's telecommunications system, or information received by the seller from its service provider, where the system used to transport such signals is not that of the seller.
- Prepaid calling services are sourced in the following manner. When the services are received by the purchaser at a business location of the seller, the sale is sourced to the business location. If it is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser occurs.

IC 6-2.5-4-6 imposes sales tax on "intrastate" telecommunications. With regard to non-mobile telecommunications services, sales tax is not imposed on interstate telecommunications services even though those transactions could be sourced to Indiana pursuant to IC 6-2.5-12. All mobile telecommunications services that are sourced to Indiana pursuant to IC 6-8.1-15 are subject to sales tax.

A NEW chapter, IC 6-2.5-13, "General Sourcing Rules" is ADDED.

IC 6-2.5-13-1 (added). "Definitions; scope, sourcing rules"

- Provides sourcing rules for general personal property and services excluding motor vehicles, trailers, aircraft, watercraft, modular homes, mobile homes, manufactured homes, or telecommunications services.
- The retail sale, except for the lease or rental of a product shall be sourced in the following ways: A sale shall be sourced to the business location of the seller when received by the purchaser at the business location. If the item is received by the purchaser at a location other than that of the seller, the sale is sourced to the location received by the purchaser. If the first two provisions do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller. If none of the previous provisions apply, the location will be determined by the address from which the property was shipped.
- The lease or rental of property other than motor vehicles, trailers, semi-trailers, aircraft, or property used in transportation that requires recurring periodic payments will be sourced in the following manner: The first payment is sourced the same as a retail transaction. Subsequent payments are sourced to the location of the property. The lease or rental of motor vehicles, trailers, semi-trailers, or aircraft is sourced to the primary location of the property. The retail sale or lease or rental of transportation equipment shall be sourced the same as a retail sale.

IC 6-2.5-13-2 (added). "Multiple Points of Use" exemption form.

- Provides for a multiple point of use ("MPU") exemption for a business purchaser that knows at the time of purchase that a digital good, computer software delivered electronically or for service that will concurrently be available for use in more

than one jurisdiction.

- Presentation of the MPU exemption relieves the seller from all obligations to collect the sales tax from the purchaser. The purchaser is allowed to use any consistent and uniform apportionment method.

IC 6-2.5-13-3 (added). "Direct mail purchases."

- Provides that a direct mailer must provide the seller with a direct mail form, or information to show the jurisdictions to which the direct mail is delivered to recipients. Upon the receipt of the direct mail form, the seller is not obligated to collect the applicable tax, and the purchaser is obligated to remit the applicable tax on a direct pay basis. If the purchaser provides information to the seller of the jurisdictions to which the direct mail is delivered, the seller is required to collect the tax according to the delivery information provided by the purchaser.

IC 6-9-12-3; IC 6-9-20-4; IC 6-9-21-4; IC 6-9-23-4; IC 6-9-14-4; IC 6-9-25-4; IC 6-9-26-7; IC 6-9-27-4; IC 6-9-33-4 (amended).

- Amends the Food and Beverage Tax statutes so that the definition of food sold on a "To Go" or "Take Out" basis corresponds to provisions in the new sales tax statutes.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
IN REGARDS TO THE MATTER OF:
MARGOT NEWMAN
DOCKET NO. 29-2002-0142
PROPOSED ORDER

The Criminal Investigation Division of the Indiana Department of Revenue conducted an investigation of the Fraternal Order of Eagles No. 3164 on August 3, 2001. As a result of the investigation, on March 5, 2002, the Petitioner was prohibited from having any involvement with charity gaming in Indiana for a period of three (3) years. The Petitioner protested in a timely manner.

FINDINGS OF FACTS

1) Petitioner protested the Department's proposed actions on March 8, 2002.
2) The Department acknowledged the Petitioner's appeal in a letter dated March 11, 2002.
3) The Department contacted the Petitioner a second time regarding setting a hearing on May 10, 2002.
4) Pursuant to IC 4-21.5-3-1 notice was given to the Petitioner on March 11, 2002 regarding a possible dismissal of her appeal.
5) Petitioner has failed to respond to the Department's correspondence.

STATEMENT OF LAW

1) IC 4-21.5-3-24 states, "(a) At any stage of a proceeding, if a party fails to:

(1) file a responsive pleading required by statute or rule;
(2) attend or participate in a prehearing conference, hearing, or other stage of the proceeding; or
(3) take action on a matter for a period of sixty (60) days, if the party is responsible for taking the action;

the administrative law judge may serve upon all parties written notice of a proposed default or dismissal order, including a statement of the grounds.

(b) Within seven (7) days after service of a proposed default or dismissal order, the party against whom it was issued may file a written motion requesting that the proposed default order not be imposed and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the administrative law judge may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.

(c) If the party has failed to file a written motion under subsection (b), the administrative law judge shall issue the default or dismissal order. If the party has filed a written motion under subsection (b), the administrative law judge may either enter the order or refuse to enter the order.

(d) After issuing a default order, the administrative law judge shall conduct any further proceedings necessary to complete the proceeding without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party. The administrative law judge may conduct proceedings in accordance with section 23 of this chapter to resolve any issue of fact.

CONCLUSIONS OF LAW

1) IC 4-21.5-3-24 states, "(a) At any stage of a proceeding, if a party fails to: (1) file a responsive pleading required by statute or rule; (2) attend or participate in a prehearing conference, hearing, or other stage of the proceeding; or (3) take action on a matter for a period of sixty (60) days, if the party is responsible for taking the action; the administrative law judge may serve

upon all parties written notice of a proposed default or dismissal order, including a statement of the grounds.

2) The Petitioner's failure to respond to the Department's numerous letters is grounds for a proposed dismissal order pursuant to IC 4-21.5-3-24.

The Administrative Law Judge orders the following:

Petitioner's appeal is dismissed.

1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue, a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).

2) Judicial review of a final order may be sought under IC 4-21.5-5.

THIS PROPOSED ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.

Dated: _____

_____

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #29
SALES TAX
JANUARY 2004

(Replaces Information Bulletin #29 dated December 2002)

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

SUBJECT: Sales of Food

REFERENCES: IC 6-2.5-1-11, IC 6-2.5-1-12, IC 6-2.5-1-16, IC 6-2.5-1-20, IC 6-2.5-1-26, IC 6-2.5-5-20, IC 6-2.5-5-21, IC 6-2.5-5-21.5, IC 6-2.5-5-22, IC 6-2.5-5-35

INTRODUCTION:

Generally, the sale of food and food ingredients for human consumption is exempt from Indiana sales tax. Primarily, the exemption is limited to the sale of food and food ingredients commonly referred to as "grocery" food. The purpose of this bulletin is to assist Indiana retailers in the proper application of this exemption.

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

I. Non-taxable Food Items:

Food is defined as substances whether in liquid, concentrated, solid, frozen, dried or dehydrated form, that are sold for ingestion or chewing by humans and that are consumed for their taste or nutritional value. The term does not include tobacco, alcoholic beverages, candy, dietary supplements or soft drinks.

The Indiana sales tax does not apply to the sale of food and food ingredients listed below if sold unheated and without eating utensils provided by the seller.

Baby food

Bakery items (including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas)

Baking chocolate (whether liquid, powder, or solid)

Baking soda or other forms of leavening agents

Beverages containing 50% fruit or vegetable juice or containing milk, milk products or milk substitutes

Broths and bouillons (whether liquid, instant, freeze dried, or cubes)

Cereal and cereal products

Cocoa

Coconut (whether whole, shredded, sweetened, processed or raw)

Coffee and coffee substitutes (beans, grounds, freeze dried, bags and instant only)

Condiments

Deli items when sold unheated by weight or volume as a single item
Deli trays that only contain otherwise exempt items
Eggs and egg products or substitutes
Extracts and flavorings intended as a cooking ingredient
Fish and fish products (including all other forms of seafood)
Flour (including wheat, whole wheat, rye, corn, rice, barley, buckwheat, soy or other forms of milled grains or nuts)
Food coloring
Food sold by a seller whose primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries)
Food sold by weight or volume as a single item
Fruit and fruit products (whether fresh, frozen, canned or dehydrated, excludes items on salad bars)
Gelatins (whether powdered or prepared)
Honey
Ice
Ice cream (including toppings and novelties)
Jams and jellies (including marmalades and preserves)
Ketchup
Lard
Marshmallows (including marshmallow crème)
Meat and meat products (whether fresh, frozen, cured, canned, or dehydrated)
Milk and milk products
Mustard
Nuts (including salted, but not chocolate or candy coated nuts)
Oleomargarine
Olive oil
Peanut butter
Pepper
Pickles
Powdered drink mixes (including sweetened)
Relishes
Salad dressings and mixes
Salt
Sauces
Sherbets and sorbets
Shortenings
Soups
Snack chips and pieces (includes potato chips, corn chips, pig skins, pretzels and trail mixes.)
Spices
Sandwich spreads
Sugar, sugar products and sugar substitutes
Syrups (including molasses and dietetic syrups and similar products)
Tea (bags, leaves, or instant only)
Vegetables and vegetable products (whether fresh, frozen, canned or dehydrated, excludes items on salad bars)
Vegetable oils
Water

II. Taxable Grocery Items:

The following grocery items are subject to Indiana sales tax:
Alcoholic beverages
Candy and confections
Chewing gum
Chocolate covered nuts
Cocktail mixes (dry or liquid)
Cooking utensils
Dietary supplements
Liver oils
Lozenges

Over the counter medicines
Paper products
Pet food and supplies
Soap and soap products
Soft drinks
Tobacco and tobacco products
Tonics
Toothpaste and mouthwash
Vending machine sales
Vitamins

Food sold in a heated state or heated by the seller is taxable.

Two (2) or more food ingredients mixed or combined by the seller for sale as a single item are taxable (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer so as to prevent food borne illness).

Food that is sold with eating utensils, provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws is taxable.

A. Candy

Candy is defined as preparations of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces. The fact that these preparations contain ingredients, which if purchased separately, are considered exempt, does not exempt these preparations. The term does not include any preparation that contains flour as one of the first three (3) ingredients listed on the label or any preparation that requires refrigeration.

Baking chocolate and similar products, which are intended for use in cooking, will be considered exempt food within the meaning of this information bulletin. The method used in packaging, distributing and displaying the product, including the kind and size of container used, will be considered in determining the primary use for which it is sold.

B. Soft Drinks

Soft drinks are defined as nonalcoholic beverages that contain natural or artificial sweeteners. The term does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or greater than fifty percent (50%) vegetable or fruit juice by volume.

C. Dietary Supplements

Sales of dietary supplements are subject to Indiana sales tax. The term "dietary supplements" means any product other than tobacco that:

(1) is intended to supplement the diet;

(2) contains one or more of the following ingredients:

(a) vitamins,
(b) minerals,
(c) herbs or other botanicals,
(d) amino acids,
(e) a dietary substance for use by humans to increase the total dietary intake,
(f) concentrates, metabolites, constituents, extracts or a combination of any of the above ingredients;

(3) is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in the above form, is not represented as a conventional food and is not represented for use as a sole item of a meal or of the diet;

(4) is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box found on the label and as required under 21CFR 101.36.

Dietary supplements include products such as Figurines, Carnation Diet Drinks, Slimfast, Slender, and Ensure.

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

D. Prepared Food

(1) All food sold through a vending machine is subject to sales tax regardless of the type of food sold. The fact that the item qualifies as exempt food if sold in another manner does not make the purchase exempt if sold through a vending machine.

(2) All food items sold with eating utensils provided by the seller are taxable. Food shall be considered to be sold with eating utensils provided by the seller when the food is intended for consumption with the utensils provided. Taxable food therefore includes all food sold by an eating establishment that sells meals, sandwiches, or other food for consumption on or off the premises. Additionally, taxable food includes self-service food such as salad bars or drink islands. The presence of self-service

utensils in a facility does not make otherwise exempt food taxable unless it is intended that the food be consumed with those utensils. Further, items provided solely pursuant to sanitary statutes or regulations and not for purposes of consumption do not qualify as utensils.

(3) All food items sold in a heated state are taxable. Food is also taxable if it was heated by the seller and is ready to eat without further cooking by the purchaser.

(4) Where 2 or more food ingredients are mixed or combined by the seller and then sold as a single food item, this item is taxable unless:

(a) the item is both sold in an unheated state by weight or volume as a single item and is sold without eating utensils, e.g., potato salad; or

(b) the item sold represents food that is only cut, repackaged, or pasteurized by the seller, e.g., vegetable trays; or

(c) the item sold contains raw animal foods that require cooking.

(5) Bakery items are not taxable unless they are:

(a) sold through a vending machine; or

(b) sold with eating utensils provided by the seller; or

(c) sold in a heated state.

(6) Food items sold by a seller whose proper primary NAICS classification is 311 food manufacturing (except subsector 3118, bakeries) are not taxable unless they are:

(a) sold through a vending machine; or

(b) sold with eating utensils provided by the seller; or

(c) sold in a heated state.

E. Unitary Transactions

When a taxable item is sold with a non-taxable item for a single price the entire purchase amount is subject to sales tax. If such items are separately priced and charged on the receipt, then only the amount charged for the taxable item is subject to sales tax.

III. Coupons, Redemption Certificates, and Bottle Deposits

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

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

IV. Purchases by Retailers

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

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

V. Registration and Record Keeping Requirements

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

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

Kenneth L. Miller

Commissioner

DEPARTMENT OF STATE REVENUE

03970448.LOF

LETTER OF FINDINGS NUMBER: 97-0448
WITHHOLDING TAX
For The Tax Periods: 1989 through 1993

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

ISSUES

I. Withholding Tax – Dividends

Authority: IC 6-3-4-13, IC 6-3-2-2.8, 45 IAC 1.1-1-9, I.R.C. § 1363, I.R.C. § 1368, I.R.C § 316.

The Taxpayer protests the Department's assessment of withholding tax on distributions made to non-resident shareholders.

STATEMENT OF FACTS

Taxpayer incorporated out-of-state but maintains an Indiana commercial domicile and has elected to be taxed as an S Corporation. Taxpayer's primary source of revenue came from the flow through of income from its various partnership interests.

Taxpayer was audited for the periods of 1989 through 1993. During 1989 through 1992, Taxpayer was owned by six individual shareholders that were non-residents. In 1993, Taxpayer was owned by fifteen shareholders composed of family and trusts of the original six shareholders.

Taxpayer held a limited and general partnership interest in Company A. During the audit period Company A operated numerous Indiana nursing homes and later added three out-of-state locations. Company A was organized out-of-state and has its commercial domicile in Indiana. The bulk of Taxpayer's revenue came from the flow through of income from Company A. Taxpayer also owned a majority interest in Company A.

Taxpayer also held a general partnership interest in Company B which operated a pharmacy in Indiana. Company B was organized out-of-state and has Indiana domicile. Taxpayer owned an 85% interest in Company B.

Finally, Taxpayer held a limited partnership interest in Company C beginning in 1992. Company C was a partnership of investors. Company C's primary investment was a limited partnership interest in Company A and Company B and was organized out-of-state and held an Indiana domicile.

Taxpayer had no property, payroll or sales and operated merely as a conduit between its shareholders and the partnerships it owned. More facts supplied as necessary.

I. Withholding Tax: Dividends

In 1989 and 1990, Taxpayer sustained large losses that were filtered down from the operations of Company A. Although there were losses being shown, Taxpayer paid distributions to its shareholders. The auditor determined these distributions were subject to tax since Taxpayer had a negative capital account and the distributions were made in excess of basis. Taxpayer argues that these distributions represent a return of capital in excess of basis, thus, are not subject to tax.

IC 6-3-4-13 (a) states: "[e]very corporation which is exempt from tax under IC 6-3 pursuant to IC 6-3-2-2.8(2) shall, at the time that it pays or credits amounts to any of its nonresident shareholders as dividends or as their share of the corporation's undistributed taxable income, withhold the amount prescribed by the department." An S-Corporation as described by I.R.C. § 1363 is an exempt organization for adjusted gross income tax purposes. IC 6-3-2-2.8(2).

I.R.C. § 1368 states in part:

(a) GENERAL RULE.-A distribution of property made by an S corporation with respect to its stock to which (but for this subsection) section 301(c) would apply shall be treated in the manner provided in subsection (b) or (c), whichever applies.

(b) S CORPORATION HAVING NO EARNINGS AND PROFITS.-In the case of a distribution described in subsection (a) by an S corporation which has no accumulated earnings and profits-

(1) AMOUNT APPLIED AGAINST BASIS. – The distribution shall not be included in gross income to the extent that it does not exceed the adjusted basis of the stock.

(2) AMOUNT IN EXCESS OF BASIS.- If the amount of the distribution exceeds the adjusted basis of the stock, such excess shall be treated as gain from the sale or exchange of property.

(c) S CORPORATION HAVING EARNINGS AND PROFITS. – In the case of a distribution described in subsection (a) by an S corporation which has accumulated earnings and profits.-

(1) ACCUMULATED ADJUSTMENTS ACCOUNT.- That portion of the distribution which does not exceed the accumulated adjustments account shall be treated in the manner provided by subsection (b).

(2) DIVIDEND.-That portion of the distribution which remains after the application of paragraph (a) shall be treated as a dividend to the extent it does not exceed the accumulated earnings and profits of the S Corporation.

(3) TREATMENT OF REMAINDER.- Any portion of the distribution remaining after the application of paragraph (2) of this subsection shall be treated in the manner provided by subsection (b).

Except to the extent provided in regulations, if the distributions during the taxable year exceed the amount in the accumulated adjustments account at the close of the taxable year, for purposes of this subsection, the balance of such account shall be allocated among such distributions in proportion to their respective sizes…

Here, the auditor states that the distributions did exceed the basis of stock. Taxpayer concurs. However, Taxpayer contends that IC 6-3-4-13(a) does not require withholding where the distributions represent a return of capital in excess of basis. They argue that IC 6-3-4-13(a) only requires withholding where the distribution represents a dividend or undistributed taxable income.

I.R.C § 316 defines a dividend as follows:

(a) GENERAL RULE.- For purposes of this subtitle, the term "dividend" means any distribution of property made by a

corporation to its shareholders'

(1) out of its earnings and profits accumulated after February 28, 1913, or

(2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made….

Also, 45 IAC 1.1-1-9 defines a dividend as "a distribution payable by a corporation out of its earnings, profits, or some other source not impairing capital."

Taxpayer sustained losses and had a negative capital account. Consequently, pursuant to I.R.C. § 1368(b)(2) the distributions should be characterized as the gain from the sale or exchange of property and are not subject to Indiana's withholding tax.

FINDING

The Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

01-20000268.LOF
04-20000269.LOF

LETTERS OF FINDINGS NUMBERS: 00-0268 & 00-0269
ADJUSTED GROSS INCOME AND STATE GROSS RETAIL TAX
For Years 1996, 1997, AND 1998

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. Tax Administration —Validity of Audit Assessment

Authority: IC § 6-8.1-5-4

Taxpayer protests an Audit assessment based on the best available information.

STATEMENT OF FACTS

Taxpayer is an individual who buys and sells antiques. Due to a lack of reliable records, the audit was based on the best information available, which was the taxpayer's bank statements, canceled checks, and tax returns. The canceled checks showed that the taxpayer purchased several thousand dollars worth of antiques from individuals and antique auctions. The bank statements showed deposits far in excess of amounts available per individual income tax returns. The auditor was provided no evidence that all income from various sources was in fact deposited in the checking account and took the position that the deposits were the result of business activities. The total deposited in the checking account, with adjustments for cost of goods sold and other expenses, was considered gross receipts and inasmuch as no invoices were available for any sales or purchases, sales and use tax was calculated for all nonexempt transactions that could be identified. Taxpayer disagreed with the assessment total and protested, maintaining that additional documentation would be provided to reduce the assessment. As part of the hearing on this protest, taxpayer provided prepared summaries purporting to show taxpayer's actual income and transactions.

I. Tax Administration—Validity of Assessment

DISCUSSION

The overlying issue for the taxpayer's protest is the audit's assessment of tax based on inferences drawn from taxpayer records related to bank deposits. Taxpayer contends that the inferences resulting in assessment were not properly drawn and provided documentation refuting the audit finding and reducing the assessment. This issue revolves around the burden of proof in an audit situation, which IC § 6-8.1-5-4 defines as:

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

Taxpayer does not cite any statute, regulation, or case law for the proposition that the auditor was required to accept assertions as to the nature of the transactions based solely on the summary documentation prepared by the taxpayer. The statute requires taxpayer to keep source documentation and have it available to support taxpayer's claims as to the nature of the transactions. During the audit taxpayer presented contradictory information and documentation as to his activities. The taxpayer, having signed an exemption certificate reporting that he was an out of state retailer and wholesaler of antiques to obtain a retail sales tax exemption, later denied having any out of state activity, or that he was a retailer or wholesaler, when questioned regarding sales and use tax obligations. Taxpayer's current assertion that the Department is now required to accept taxpayer's selective and unsupported

assertions absent statutorily required documentation is not sustainable.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20000444.LOF

LETTER OF FINDINGS NUMBER: 00-0444
Sales/Use Tax
For Years 1997 and 1998

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. Sales/Use Tax – Interstate commerce

Authority: IC 6-2.5-4-1; IC 6-2.5-2-1; 45 IAC 2.2-2-2; IC 6-2.5-8-8, 45 IAC 2.2-5-53(b); 45 IAC 2.2-5-53(a); IC 6-2.1-3-3; 45 IAC 1-1-119(2)(b); 45 IAC 2.2-5-54; IC 6-2.5-5 et al.

Taxpayer protests the imposition of sales tax on transactions where an item purchased in Indiana is subsequently and immediately moved out of state via interstate commerce.

STATEMENT OF FACTS

Taxpayer makes custom decals for its customers. The decals are primarily used on semi-trailers. Taxpayer also installs the decals on the semi-trailers at several locations. The sales of the decals is done only through one of taxpayer's Indiana locations.

Several out-of-state customers made use of the taxpayer's products and services. The customers drove their trucks to one of the taxpayer's Indiana locations to purchase the decals. The decals may or may not have been installed in Indiana. However, in all cases, the sales of the decals took place in Indiana. Sales tax was not collected for any of the transactions in question.

DISCUSSION

I. Sales/Use Tax – Interstate commerce

Taxpayer, in the ordinary course of its regularly conducted business, acquires tangible personal property for the purpose of resale and transfers that property to another person for consideration. These activities qualify taxpayer as a retail merchant. IC 6-2.5-4-1. As such, the retail merchant, acting as an agent for the state, must collect sales tax from its customers against whom the tax is levied under IC 6-2.5-2-1. 45 IAC 2.2-2-2. However, certain exemptions apply to the assessment of sales tax.

One such instance of exemption from sales tax comes from the issuance of exemption certificates. IC 6-2.5-8-8 speaks to the matter:

> (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the Department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
>
> (b) The following are the only persons authorized to issue exemption certificates:
>
> (1) Retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
>
> (2) Organizations which are exempt from the state gross retail tax under IC 6-2.5-5-21, IC 6-2.5-5-25, or IC 6-2.5-5-26 and which are registered with the department under this chapter; and
>
> (3) Other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

Several of taxpayer's customers validly and legally submitted exemption certificates at the time of their purchase of taxpayer's products. For those transactions, there is no controversy. Other of taxpayer's customers did not submit exemption certificates. It is for these transactions that the controversy exists.

Taxpayer claims that these customers were not able to obtain exemption certificates, for various reasons, from the State of Indiana. The Department has no reason to doubt this assertion.

Taxpayer was able to obtain from these customers a form, an ST-136A Indiana Out-of-State Purchasers Sales Tax Exemption Affidavit, that can serve as an alternative to the exemption certificate for those businesses unable to obtain them. The issue surrounding the use of these forms is: Does the information on the forms establish an exempt nature for the transactions at issue?

The problem lies in the fact that these forms indicate no valid reason to grant exempt status to the transactions they cover. The probative notation on these forms comes under the following query: "I hereby certify under penalty of perjury that the property described above is purchased exempt from Indiana sales tax for the following reasons:". For each of the forms submitted, the entry

is the same: "Property being transported out of state."

It therefore follows that taxpayer's argument can be summed up as such: Because taxpayer's customers take the products they purchase from taxpayer and transport them out of state, these transactions are exempt from sales tax consideration. Nothing in the law supports this argument.

The state gross retail tax does not apply to sales from transactions constituting retail transactions that are in interstate commerce and which the state of Indiana is prohibited from taxing by the Constitution of the United States of America. 45 IAC 2.2-5-53(b). 45 IAC 2.2-5-53(a) leads to the conclusion that the gross income tax and its provisions as guiding, specifically pointing to IC 6-2.1-3-3:

> The state gross retail tax shall not apply to such part of the gross income from transactions constituting selling at retail as is exempt from the gross income tax under the provisions of IC 6-2.1-3-3.

IC 6-2.1-3-3 reads:

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

Taking 45 IAC 2.2-5-53(a) and IC 6-2.1-3-3 together, this means one must look to the gross income tax regulations to determine when gross retail tax regulations apply.

The situation found here, where an out-of-state customer purchases tangible personal property in Indiana and then transports that property out of state, is classified as a taxable outshipment. For gross income tax purposes, taxable outshipments are defined in 45 IAC 1-1-119(2)(b), which defines one particular type of taxable outshipment as:

> Sales to nonresidents where the goods are accepted by the buyer or he takes *actual delivery* within the State. Sales will also be taxable if the goods are shipped out of state on bills of lading showing the seller, buyer or a third party as shipper if the goods were inspected and accepted, or when the sales were completed prior to shipment in interstate commerce. (Emphasis added.)

Because taxpayer's customers take actual delivery of taxpayer's products in Indiana, they would be subject to gross income tax for these transactions, and are therefore subsequently subject to gross retail tax.

45 IAC 2.2-5-54 also directly speaks to this point:

> (a) Delivery to purchaser in Indiana. Sales of tangible personal property which are delivered to the purchaser in Indiana are subject to gross retail tax or use tax, except (see Regs. 6-2.5-5-15(020) [45 IAC 2.2-5-22]) for certain sales of motor vehicles and aircraft.

As taxpayer delivers its products to its customers in Indiana, and because the sales in question do not qualify for any of the aforementioned exceptions, this section applies.

Finally, in IC 6-2.5-5 et. al., several exemptions to the gross retail tax are listed under the heading "Exempt Transactions of a Retail Merchant." This list is extensive and presumably exhaustive. A thorough reading of these exemptions lists nothing that could possibly encompass the transactions in question.

FINDINGS

The taxpayer is respectfully denied.

DEPARTMENT OF STATE REVENUE

0220000456.LOF

LETTER OF FINDINGS NUMBER: 00-0456
Income Tax
For Tax Periods 1995-1997

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

ISSUE

I. Income—Partnership Distributions

Authority: IC 6-2.1-2-2; IC 23-4-1-25; 45 IAC 1-1-49; 45 IAC 1-1-51; 45 IAC 1-1-159.1

Taxpayer protests imposition of Gross Income tax on distributions from a partnership.

II. Adjusted Gross Income—Partnership Distributions

Authority: IC 6-3-2-2; 45 IAC 3.1-1-153

Taxpayer protests imposition of Adjusted Gross Income tax on distributions from a partnership.

III. Supplemental Net Income—Partnership Distributions

Authority: IC 6-3-8-1; IC 6-3-8-2

Taxpayer protests imposition of Supplemental Net Income tax on distributions from a partnership.

IV. Tax Administration—Negligence Penalty

Authority: 45 IAC 15-11-2

Taxpayer protests imposition of a ten percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer was a minority shareholder in four limited partnerships that are non-unitary Real Estate Investment Trusts (REITS). As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments imposing gross income tax, adjusted gross income tax, and supplemental net income tax on taxpayer's income from partnership distributions from the REITS. Taxpayer protests the assessments. Further facts will be provided as necessary.

I. Gross Income—Partnership Distributions

DISCUSSION

Taxpayer was a non-resident minority shareholder in four limited partnerships that were Real Estate Investment Trusts (REITs). The partnerships, via the REITs, held real property in four Indiana shopping malls. The partnerships were not domiciled in Indiana. As the result of an audit, the Department issued proposed assessments for Gross Income tax on the partnerships' distributions to taxpayer for the tax years involved. The Department based its decision on the fact that the partnerships owned and rented real property in Indiana, which the Department determined gave taxpayer an Indiana business situs.

The Department refers to IC 6-2.1-2-2, which states in relevant part:

(a) An income tax, known as the gross income tax, is imposed upon the receipt of:

(1) the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana; and

(2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

The Department proceeded on the grounds that taxpayer's partnership interests in the REITs, which own and rent Indiana real property, constituted business activities within Indiana for taxpayer.

Taxpayer's position is that its partnership interests were intangible property and that it had insufficient nexus with Indiana to subject it to taxation here. Taxpayer had no other contacts with Indiana. Taxpayer makes a general reference to several Federal nexus cases, but does not provide additional analysis.

Taxpayer claims that its partnership interests are similar to intangibles and refers to 45 IAC 1-1-51, which states in part:

Situs of Intangibles. The Department applies two tests in determining the taxability of income from intangibles. The term "intangible" or "intangible property," as used in IC 6-2-1-1(m) *[Repealed by P.L. 77-1981, SECTION 22.]*, means and includes notes, stocks in either foreign or domestic corporations, bonds, debentures, certificates of deposit, accounts receivable, brokerage and trading accounts, bills of sale, conditional sales contracts, chattel mortgages, "trading stamps", final judgments, leases, royalties, certificates of sale, choses in action and any and all other evidences of similar rights capable of being transferred, acquired or sold.

Taxpayer believes that, as an "intangible", the partnership interests should be considered to have taxpayer's headquarters as its situs. 45 IAC 1-1-51 also explains that the two tests applied in determining the taxability of income from intangibles are the "business situs" test and the "commercial domicile" test. Since taxpayer is not commercially domiciled in Indiana, the "business situs" test is relevant here. 45 IAC 1-1-51 explains the "business situs" test as:

The first test is what may be termed the "business situs" of the taxpayer or the relationship of the income from the intangible to the business activity of the taxpayer in Indiana. If the intangible or the income derived therefrom forms an integral part of a business regularly conducted at a situs in Indiana, the total gross income derived from the sale, assignment, transfer or exchange of the rights comprising the intangible property, or from interest, finance charges, dividends or other earnings upon the intangibles of any kind, or from any other source arising from the ownership of intangible property, or from the transfer of ownership to another will be required to be reported for taxation under IC 6-2-1-1(m) *[Repealed by P.L. 77-1981, SECTION 22.]* at the higher rate under IC 6-2-1-3(g) *Repealed by P.L. 77-1981, SECTION 22]*.

Taxpayer believes that its partnership interests in the REITs qualify as intangible property in corporations. Taxpayer points to the sale of its partnership interest in one of the REITs to another partner in 1995 as evidence of the transferability of the interests.

The basic entity being dealt with here is a partnership. The fact that the partnership is a real estate investment trust does not alter the fact that the partners are in a partnership. Taxpayer's income at issue is in the form of partnership distributions. The Department refers to 45 IAC 1-1-159.1, which states:

(a) As used in this section, "partner's distributive share" means the amount determined under Section 704 of the Internal Revenue Code and its prescribed regulations before any modifications required by Indiana tax statutes.

(b) An amount credited to a corporate partner as its distributive share of partnership income, which is derived from sources within Indiana is subject to the gross income tax. An amount previously subjected to the gross income tax because it was

included in the partner's distributive share but not actually distributed is not subject to the gross income tax again when it is actually distributed.

(c) For purposes of this subsection, all income of the partnership shall be considered business income. If a partnership does business in a state besides Indiana, a partner's distributive share of partnership income which is derived from sources within Indiana, for gross income tax purposes, shall be determined by multiplying the partner's distributive share by a fraction. The numerator of the fraction shall be the sum of:

(1) the property factor;

(2) the payroll factor; and

(3) the sales factor;

of the partnership. The denominator of the fraction shall be determined by the number of factors used. The property factor shall be determined under IC 6-3-2-2(c). The payroll factor shall be determined under IC 6-3-2-2(d). the sales factor shall be determined under IC 6-3-2-2(e) and IC 6-3-2-2(f).

(d) The amount credited to a corporate partner as its distributive share of partnership income which is derived from sources within Indiana is taxable at the high rate.

45 IAC 1-1-159.1 specifically deals with partnership distributions, and subjects them to gross income tax. 45 IAC 1-1-51 makes general provisions, and does not mention partnership interests. Since 45 IAC 1-1-159.1 specifically deals with distributions on partnership interests, 45 IAC 1-1-51 is not applicable here.

The Department's position that taxpayer had nexus with Indiana is supported by IC 23-4-1-25(1), which states:

A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

Also, 45 IAC 1-1-49 provides in relevant part:

For purposes of these regulations *[45 IAC 1-1]*, a taxpayer may establish a "business situs" in ways including, but not limited to, the following:

…

(6) Ownership, leasing, rental or other operation of income-producing property (real or personal);

Therefore, taxpayer was co-owner of income-producing real property in Indiana. This gave taxpayer a business situs in Indiana.

In conclusion, taxpayer had nexus with Indiana through its ownership interests in partnerships which held Indiana real property. The partnership interests do not qualify as intangibles. 45 IAC 1-1-159.1 provides the proper method for determining taxpayer's gross income liability.

FINDING

Taxpayer's protest is denied.

II. Adjusted Gross Income—Partnership Distributions

DISCUSSION

The Department issued an assessment for Adjusted Gross Income tax on partnership distributions for the tax years in question. The Department determined that taxpayer and the partnership were not a unitary business, and therefore based its decision on 45 IAC 3.1-1-153, which states in relevant part:

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

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

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

(d) A partner's distributive share of income will be adjusted by the partner's proportionate share of the partnership's income that is exempt from taxation under the Constitution and statutes of the United States and by the partner's proportionate share of the partnership's deductions allowed or allowable under Section 63 of the Internal Revenue Code for taxes based on or measured by income and levied at the state level by any state of the United States or for taxes on property levied by any subdivision of any state of the United States.

Also of relevance is IC 6-3-2-2, which states in part:

(a) With regard to corporations and nonresident persons, "adjusted gross income derived from sources within Indiana", for the purposes of this article, shall mean and include:

(1) income from real or tangible personal property located in this state;

(2) income from doing business in this state;

(3) income from a trade or profession conducted in this state;

(4) compensation for labor or services rendered within this state; and

(5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property if the receipt from the intangible is attributable to Indiana under section 2.2 of this chapter.

As explained in Issue I, taxpayer received income from the rental of real property located in this state. IC 6-3-2-2(a)(1) provides that this income is "adjusted gross income derived from sources within Indiana".

In 1995, taxpayer sold its interest in one of the partnerships. The relevant statute is IC 6-3-2-2(i), which states:

(1) Capital gains and losses from sales of real property are allocable to this state.

(2) Capital gains and losses from sales of tangible personal property are allocable to this state if:

(i) the property had a situs in this state at the time of the sale; or

(ii) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(3) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

As previously explained, taxpayer owned real property via the partnerships. When taxpayer sold its interest in one of the partnerships, it sold the real property it owned in Indiana via the partnership.

In conclusion, taxpayer had nexus with Indiana through its ownership of partnership real property in Indiana. The Department properly assessed adjusted gross income tax on the partnership distributions according to 45 IAC 3.1-1-153. Also, the Department properly assessed adjusted gross income tax on the capital gain from the sale of real property in Indiana, as provided in IC 6-3-2-2(i).

FINDING

Taxpayer's protest is denied.

III. Supplemental Net Income—Partnership Distributions

Taxpayer protests imposition of Supplemental Net Income tax. IC 6-3-8-1 states:

A tax to be called the "supplemental net income tax" is hereby imposed on the net income of every corporation, except corporations subject to taxation under the financial institutions tax (IC 6-5.5).

Also, IC 6-3-8-2(b) explains:

The term "net income" shall mean adjusted gross income derived from sources within the state of Indiana, as determined in accordance with the provisions of IC 6-3-2-2, adjusted as follows: Subtract an amount equal to the greater of:

(1) the amount of tax imposed by IC 6-3-2 on the taxpayer's adjusted gross income for the same taxable year (before the allowance of credits provided for in IC 6-3);

(2) the amount of tax imposed on the gross income of the taxpayer for such taxable year by IC 6-2.1; or

(3) the amount of tax imposed on premiums received on policies of insurance by IC 27-1-18-2.

Since taxpayer had an Indiana business situs, as explained in Issue I, taxpayer had nexus with Indiana. Taxpayer had gross income and adjusted gross income for the years at issue. The Department properly assessed supplemental net income tax.

FINDING

Taxpayer's protest is denied.

IV. Tax Administration—Negligence Penalty

DISCUSSION

Taxpayer protests the imposition of a ten percent (10%) negligence penalty. 45 IAC 15-11-2(c) states in part:

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

Although taxpayer has been denied in the previous issued, it has provided reasonable explanations for its interpretations and actions. Taxpayer has demonstrated that it exercised ordinary business care in carrying out its duty. The negligence penalty will be waived.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0220010066.LOF

LETTER OF FINDINGS NUMBER: 01-0066
Corporate Income Tax
For the Years 1993-1995

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

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

ISSUES

I. Gross Income Tax-Imposition of Tax

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

The taxpayer protests the imposition of tax on certain income.

II. Gross Income Tax-Sales to U.S. Government

Authority: IC 6-2.1-2-2, IC 6-2.1-3-3, 45 IAC 1-1-119 (2)(b).

The taxpayer protests the imposition of tax on certain sales to the U.S. government.

III. Adjusted Gross Income Tax- Research Expenses

Authority: IC 6-8.1-9-1 (a).

The taxpayer requests a refund of taxes paid despite certain possibly deductible research expenses.

IV. Tax Administration- Penalty

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

The taxpayer protests the imposition of penalty.

STATEMENT OF FACTS

The taxpayer researches, develops, and manufactures products in the automotive, defense, and electronics and fluid technology fields. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional income tax, interest, and penalty for the tax period 1993-1995. The taxpayer protested a portion of the assessment and a hearing was held.

I. Gross Income Tax-Imposition of Tax

The department determined a ratio of Indiana assets and business activity to total assets and business activity everywhere. It then applied this ratio to the taxpayer's reimbursement of business expenses as reported in deductions of the federal tax return to allocate the appropriate amount subject to Indiana gross income tax. The taxpayer argued that there were no taxable reimbursements received in the Indiana operations. The taxpayer submitted its "Schedule of General & Administrative Expenses" to support this contention.

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b). A taxpayer generated schedule without underlying documentation is inadequate to sustain a taxpayer's burden of proof that an assessment is inappropriate.

FINDING

The taxpayer's protest is denied.

II. Gross Income Tax-Sales to U.S. Government

The department assessed gross income tax on certain sales to the U.S. government. The taxpayer protested this assessment, contending that the sales were exempt from the Indiana gross income tax since they were sales in interstate commerce. The department examined one month's sales invoices on location at the taxpayer's Ft. Wayne premises. The sales that were taxed had U.S. Government Form DD250 attached. This government form was used to record the results of a federal inspection of the items mentioned on the invoice which was performed in Indiana. The sales considered taxable also had copies of bills of lading issued by a private carrier to transport the goods to the government locations in other states. The taxpayer argues that these actions in Indiana were not enough to complete the sale within the state and subject them to the imposition of the Indiana gross income tax.

Indiana imposes a tax on "the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana." IC 6-2.1-2-2. However, not all income is subject to the tax. IC 6-2.1-3-3 provides that, "Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution."

The department has clarified the gross income tax consequences of sales to nonresidents at 45 IAC 1-1-119 (2)(b) as follows: Sales to nonresidents where the goods are accepted by the buyer or he takes actual delivery within the state. Sales will also be taxable if the goods are shipped out of state on bills of lading showing the seller, buyer or a third party as shipper if the goods were inspected and accepted, or when any other evidence shows that the sales were completed prior to shipment in interstate commerce.

The taxpayer submitted several bills of lading and contracts indicating that the products were shipped FOB destination. The taxpayer argued that this method of shipment delayed the transfer of title to the products until they arrived at their final destination. The cited regulation, however, indicates that inspection and acceptance of the product in Indiana determines whether or not the sale is subject to the Indiana gross income tax. In the instant case, the sales considered taxable were of products that were inspected and accepted within Indiana by the U.S. government prior to their shipment to out of state destinations. These were intrastate sales subject to the Indiana gross income tax.

DISCUSSION

The taxpayer's protest is denied.

III. Adjusted Gross Income Tax- Research Expenses

DISCUSSION

In addition to its protests, the taxpayer also claimed a refund of certain research expenses based on the Federal Research & Development Credit as determined on Internal Revenue Service audit. With its protest, the taxpayer enclosed Forms IT-20REC for tax year ending 12/31/93 and 12/31/94 reflecting a claim of refund based upon a tax credit of $101,593 and $131,990, respectively. The taxpayer also enclosed its IRS Notice of Proposed Adjustment with respect to the tax credit and supporting workpapers for the calculations.

The law governing claims for refund is found at IC 6-8.1-9-1 (a) as follows:

If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department. Except as provided in subsections (f) and (g), in order to obtain the refund, the person must file the claim with the department within three (3) years after the latter of the following:

(1) The due date of the return.

(2) The date of payment.

The taxpayer's claim for the refund of taxes paid due to a Federal Research & Development Credit was filed with the department on January 22, 2001 for the tax periods 1993 and 1994. The due dates of these returns were April 15, 1994 and 1995 respectively. That is more than three years prior to the taxpayer's claim for refund. The taxpayer contends that the three year limit does not apply in this instance due to the Agreements to Extension of Time executed by the taxpayer and the department. These extensions refer to issues of the audit, not other claims for refund the taxpayer desires to file. The Agreements specifically state that, "The time limitation prescribed by I.C. 6-8.1-9-1 to file refund claims is not, and can not be, extended by this agreement." That language is clear and dispositive of the issue. This claim for refund was filed too late to be considered by the department.

FINDING

The taxpayer's claims for refund are denied.

IV. Tax Administration- Penalty

DISCUSSION

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

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach 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 underreported its gross receipts despite the easily accessible department's instructions requiring the reporting of all gross receipts. This failure to follow department's instructions constitutes negligence.

FINDING

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

DEPARTMENT OF STATE REVENUE

0420010083.LOF

LETTER OF FINDINGS NUMBER: 01-0083
Use Tax
Penalty
For Years 1997 & 1998

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. Gross Retail and Use Taxes—Business Assets

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-4; IC § 6-2.5-3-6; IC § 6-2.5-3-7; 45 IAC 15-5-3(8); 45 IAC 2.2-2-1; 45 IAC 2.2-3-4

Taxpayer protests the assessment of use tax on assets purchased for the business where allegedly no gross retail tax was paid at the point of purchase.

II. Penalty—Request for Waiver

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

Taxpayer protests the imposition of the 10% negligence penalty and requests a waiver.

STATEMENT OF FACTS

Taxpayer sells and installs mail boxes at retail. The mail box installations can include a post, mounting board, and newspaper holder, in addition to the mail box itself. During the audit, taxpayer was given ample opportunities to provide documentation to support its claim that no use tax was owed to the Department of Revenue. Taxpayer did not comply. The audit was therefore based on the best information available to the auditor. The Department issued its proposed assessment of use tax liability for the years at issue, and taxpayer protested. The Hearing Officer assigned to the protest also gave taxpayer's representative ample opportunity to provide documents supporting its protest of the proposed assessment of Indiana use tax. Taxpayer's representative did not provide such documentation and has had no further contact since a series of phone calls in the fall of 2002. Taxpayer's representative has not responded to the Department's repeated requests for documents. Additional facts will be added as necessary.

I. Gross Retail and Use Tax—Business assets

DISCUSSION

Taxpayer protests the use tax assessment on assets purchased in order to carry out its mail box sales and installation business. As discussed in the Statement of Facts *supra*, taxpayer and its representative have had ample opportunities to provide the necessary documentation supporting the protest of the proposed assessment of Indiana use tax. They have not done so.

Pursuant to IC § 6-8.1-5-1(b) and 45 IAC 15-5-3(8), a "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made." Pursuant to IC § 6-2.5-2-1, a "person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state." *See also*, 45 IAC 2.2-2-1. Pursuant to IC §§ 6-2.5-3-1 through 6-2.5-3-7, an "excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction." An exemption is provided in IC § 6-2.5-3-4 if "the property was acquired in a retail transaction and the state gross retail tax" was paid at the time of purchase. Taxpayers are personally liable for the tax. IC § 6-2.5-3-6. IC § 6-2.5-3-7 provides that a "person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana;" therefore, the presumption of taxability exists until rebutted. *See also*, 45 IAC 2.2-3-4. In this case, taxpayer has not rebutted the presumption that it owes the state of Indiana the assessed use tax.

FINDING

Taxpayer's protest concerning the assessment of use tax on assets purchased for the business is denied.

II. Penalty—Request for waiver

DISCUSSION

Taxpayer protests the imposition of the 10% negligence penalty on the assessment.

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

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

Taxpayer has not set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Therefore, given the totality of all the circumstances, waiver of the 10% negligence penalty on the entire assessment is inappropriate in this particular instance.

FINDING

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

DEPARTMENT OF STATE REVENUE

04-20010102.LOF

LETTER OF FINDINGS NUMBER: 01-0102
State Gross Retail and Use Taxes: Production Exemptions
For Tax Years 1997-1999

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

ISSUE

I. State Gross Retail and Use Taxes—Exempt Items

Authority: IC § 6-2.5-2-1, IC § 6-2.5-3-2, IC § 6-2.5-3-4, IC § 6-2.5-3-6, IC § 6-2.5-3-7, IC § 6-2.5-5-3(b), IC § 6-2.5-5-4, IC § 6-2.5-5-5.1, IC § 6-2.5.5-6, IC § 6-2.5-5-8, IC § 6-8.1-1(b), 45 IAC 2.2-2-1, 45 IAC 2.2-2-2, 45 IAC 2.2-3-4, 45 IAC 2.2-5-8, 45 IAC 2.2-5-11, 45 IAC 2.2-5-14, 45 IAC 2.2-5-15, 45 IAC 2.2-5-16

Taxpayer protests the refund amount the Department has calculated, arguing that it is entitled to further exemptions based on its production processes.

STATEMENT OF FACTS

Taxpayer, a wholly owned subsidiary of X Corporation, is a manufacturer and distributor of various copper, brass, aluminum, nickel, and stainless steel fittings and valves for the plumbing, air conditioning, and other industrial markets. Taxpayer's protest originally began as a refund claim investigation where taxpayer requested a refund of overpayment of sales tax paid to vendors and use tax paid to the Department. Taxpayer currently argues that it is entitled to more production exemptions on purchases of materials used in its business. Further facts will be added as necessary

I. State Gross Retail and Use Taxes—Exempt Items

Taxpayer protests the refund amount the Department has calculated, arguing that it is entitled to further exemptions based on its production processes.

Under IC § 6-8.1-5-1(b), a "notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." In the course of auditing taxpayer for the tax years at issue, it became apparent that taxpayer had overpaid the Department, and the appropriate notice was sent. The only disagreement on the proposed refund concerns the amount, which turns on taxpayer's arguments concerning exemptions.

First, IC § 6-2.5-2-1 imposes an "excise tax, known as the state gross retail tax... on retail transactions made in Indiana." Second, IC § 6-2.5-3-2 also imposes an excise tax, "known as the use tax," "on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction." Further, IC § 6-2.5-3-4 sets forth an exemption from the use tax:

(a) The storage, use, and consumption of tangible personal property in Indiana is exempt from the use tax if:

(1) the property was acquired in a retail transaction in Indiana and the state gross retail tax has been paid on the acquisition of that property; or

(2) the property was acquired in a transaction that is wholly or partially exempt from the state gross retail tax under any part of IC 6-2.5-5, except IC 6-2.5-5-24(b), and the property is being used, stored, or consumed for the purpose for which it was exempted.

Under IC § 6-2.5-3-6, the individual—in this case, taxpayer—"who uses, stores, or consumes the tangible personal property acquired in a retail transaction is personally liable for the use tax." IC § 6-2.5-3-7 establishes the presumption of taxability:

(a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.

(b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

See also, 45 IAC 2.2-2-1, 45 IAC 2.2-2-2, and 45 IAC 2.2-3-4, regulations defining terms in the statute imposing the state gross retail tax, and setting forth the retail merchant's duty to collect the tax.

There are numerous exemptions from the state's gross retail tax. IC § 6-2.5-5-3(b) provides in pertinent part:

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.

IC § 6-2.5-5-4 states that transactions involving tangible personal property "are exempt from the state gross retail tax if the

person acquiring the property acquires it for his direct use in the direct production of the machinery, tools, or equipment described in section 2 or 3 of this chapter." IC § 6-2.5-5-5.1 exempts tangible personal property from the state gross retail tax if it was acquired "for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing," etc.

The relevant regulation, 45 IAC 2.2-5-8, provides generally that "all purchases of tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property are taxable." (45 IAC 2.2-5-8(a)). This is the general rule: purchases are taxable. Subsection (b) states that the state's gross retail tax does not apply to "sales of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property." Subsection (c) defines "direct use" as having "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." Subsection (d) draws the critical distinction between pre-production and post-production:

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

The additional items for which taxpayer is requesting exemptions under the above statutes and regulation are ones taxpayer claims are part of its process of producing fittings and valves for industrial markets. However, many of the items taxpayer argues fall within the statutory and regulatory exemptions do not meet the strictures of 45 IAC 2.2-5-14, cited by taxpayer in the Letter of Protest. This regulation exempts from the imposition of the state's gross retail tax "sales of any tangible personal property which is to be incorporated by the purchaser as a material or an integral part into tangible personal property produced for sale by such purchaser in the business of manufacturing...." Subsections (d) and (e) severely limit the application of the exemption:

> (d) The purchase of tangible personal property which is to be incorporated by the purchaser as a material or an integral part is exempt from tax. "Incorporated as a material or integral part into tangible personal property for sale by such purchaser" means:
>
> (1) That the material must be physically incorporated into and become a component of the finished product;
>
> (2) The material must constitute a material or an integral part of the finished product;
>
> (3) The tangible personal property must be produced for sale by the purchaser.
>
> (e) Application of the general rule.
>
> (1) Incorporation into the finished product. The material must be physically incorporated into and become a component part of the finished product.
>
> (2) Integral or material part. The material must constitute a material or integral part of the finished product.
>
> (3) The finished product must be produced for sale by the purchaser.

In short, the above strictures require physical incorporation of tangible personal property as a component integral to the produced product. If the tangible personal property for which taxpayer claims exemption does not meet the statutory and regulatory strictures, the production exemption cannot apply.

A. Expense Items

1. Exempt

First, there are two items taxpayer protested based on the mistaken belief taxpayer did not receive exemptions for the purchases. One involves price lists sent to out of state customers directly from the printer. The audit determined they were exempt because they were in interstate commerce: "Purchases where the vendor shipped the materials to out of state locations are considered transactions in interstate commerce and [are] not included in the adjustment." The other item involves taxpayer's purchase of cast iron fittings resold to taxpayer's customers. This purchase does not appear in the audit at all as an adjustment; therefore, taxpayer has already received the exemption pursuant to IC § 6-2.5-5-8 and 45 IAC 2.2-5-15. This statute and regulation exempt from the state gross retail tax "sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling... such tangible personal property in the form in which it is sold to such purchaser."

Taxpayer also received a credit for sales tax paid on non-returnable wrapping materials used as enclosures to add to contents to be sold. Pursuant to 45 IAC 2.2-5-16, such purchases are exempt from sales tax. Taxpayer paid the tax on purchases of boxes, plastic bags, and gummed tape. Therefore, the audit properly awarded a credit to taxpayer for the sales taxes paid.

The following items are presented in the same order as taxpayer presented them in the Letter of Protest accompanying the Request for Refund.

EXPENSE ITEMS

STRATUM	AMOUNT	ITEM	DECISION
10	$10,455.00	Label Adhesive	No
10	$5,444.40	Price Lists	No
10	$15,933.48	Plates & dies	No

4	$22.10	Repair part	No
4	$31.19	Cast iron fittings	No
4	$22.75	Replacement parts	No
5	$208.00	Replacement sensors	No
5	$119.40	Tape dispensers	No
5	$129.60	Replacement parts	No
6	$389.50	Parts for manufacturing equipment	Yes
6	$452.96	Parts for manufacturing equipment	Yes
6	$252.45	Bar code labels	No
6	$252.45	Bar code labels	No
6	$252.45	Bar code labels	No
6	$261.60	Label sheets	No
7	$502.35	Repair parts	No
7	$710.40	Blue label imprint foil	No
7	$575.00	Wax slabs	Yes
8	$798.00	Repair parts	No
8	$990.00	Bar code labels	No
8	$824.36	Copper	No
8	$1215.78	Stapler	No
9	$2920.00	Software	Yes
9	$4243.54	Copper	No
9	$2025.00	Shelving Units	Yes
9	$4100.00	Label adhesive	No
9	$4100.00	Label adhesive	No
9	$2720.00	Repair parts	No
9	$2140.00	Glue applicator unit	No
9	$2385.00	Label applicator unit	No
9	$2164.00	Cleats to repair conveyor for cleaning line	Yes
9	$2106.67	Jib crane to assemble new production machine	No
9	$2001.69	Copper	No
9	$2027.27	Copper	No
9	$3292.88	Copper	No
9	$3316.16	Copper	No

CAPITAL ASSETS

YEAR	AMOUNT	ITEM	DECISION
1998	$24,600.00	Lab equipment for quality control	Yes
1998	$24,475.07	Cryogentic unit used for tool production	Yes
1998	$5,730.00	Quality control equipment	Yes
1998	$29,950.00	Quality control equipment	Yes
1998	$14,258.34	Conveyor	No
1998	$7,129.17	Conveyor	No
1998	$49,904.19	Conveyor	No
1998	$2695.39	Computer equipment to control production equipment	Yes
1998	$6128.00	Printer for product labels	No
1998	$12,820.00	Quality control equipment	Yes
1999	$895.00	Quality control equipment	Yes
1999	$1900.00	Quality control equipment	Yes
1999	$25,237.00	Decoiler	No
1999	$27,980.00	Quality control equipment	Yes

ANALYSIS

Three items under protest involve a dispute over the exemption percentages applied to certain purchases by the Research and Development Department (R&D). Two purchases were for parts for the manufacturing equipment R&D produces. R&D also purchased a jib crane to aid in assembling a production machine that makes "T" fittings. The crane moved work-in-process materials and is used to assemble new production equipment. Taxpayer provided no facts to support its contention that the auditor's methodology—i.e., using a 70% exemption percentage across the board—was erroneous.

Another area of dispute concerns six purchases of #1 copper from various metal companies. The audit found that these purchases were non-exempt. The copper is first tested in R&D, and then shipped to taxpayer's Arkansas plant for melting and shaping into copper tubing. Then it is either resold to unrelated customers or sent back to taxpayer for use in manufacturing taxpayer's products. The entire set of purchases comprises a purchase for testing purposes, rather than for resale. It is immaterial that the copper is sold in its unformed state to other customers or copper manufactured into taxpayer's products. The primary purpose for these purchases was for testing.

There are four remaining expense items the audit determined were non-exempt. The first item involves wax slabs R&D purchased. The audit stated the purchase was non-exempt because R&D used them for lab test materials. In this instance, however, R&D incorporated the slabs into production equipment the department manufactured. Therefore, this purchase is exempt pursuant to 45 IAC 2.2-5-8(a) through (c).

The second item involves software maintenance charges which included non-guaranteed updates. The upgrade was shipped. The audit determined these charges were non-exempt. However, according to Sales Tax Information Bulletin #2 (August 1991), optional warranties and maintenance agreements are not subject to sales and use tax because their purchase "is the purchase of an intangible right to have property supplied and there is no certainty that property will be supplied." Therefore, these charges are exempt.

The third item involves shelving units which transport oxygen fittings from the final cleaning stage to required inspection by Quality Control. The oxygen fittings go from Quality Control to packaging. The audit determined these shelving units were non-exempt because they were transporting finished goods. Because of the nature of the goods—oxygen fittings—strict quality control standards apply. Therefore, the oxygen fittings are being transported as works in progress. The shelving units are therefore exempt pursuant to 45 IAC 2.2-5-8(f)(3), 45 IAC 2.2-5-8(d) and 45 IAC 2.2-5-8(i): "Machinery, tools, and equipment used to test and inspect the product as part of the production process are exempt." The oxygen fittings are not finished goods until they have been tested and inspected.

2. Non-exempt

The non-exempt items concern all purchases related to packaging and certain repair parts. All purchases related to packaging are items purchased for post-production activities. These include purchases of label adhesive, plates and dies for labels, tape dispensers, label sheets attached to packages containing the fittings, blue label print foil ribbon, staplers, boxing glue, and a labeler which applies labels to boxes. These items are all used in post-production activities and therefore do not qualify for the production exemption. These items fail the "immediate effect" test of 45 IAC 2.2-5-8(g): "... the property must also be an integral part of the integrated process which produces tangible personal property."

The audit also disallowed an exemption for repair parts to repair the conveyor for the cleaning line. The audit determined the conveyor was actually transporting finished goods. Cleaning the fittings is part of the production process; the conveyor transports the fittings from the wash tank to the hopper which then loads the finished goods into cardboard boxes. Therefore, this purchase is non-exempt pursuant to 45 IAC 2.2-5-8(h)(2). Since the conveyor is not exempt production machinery, the repair parts are not exempt repair parts: "Replacement parts, used to replace worn, broken, inoperative, or missing parts or accessories on exempt machinery and equipment, are exempt from tax." 45 IAC 2.2-3-8(h)(2).

Finally, the audit determined that taxpayer's purchase of bar code labels was non-exempt. The labels are affixed to small, individual fittings as desired by taxpayer's customers. IC § 6-2.5-5-6 provides that "[t]ransactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for incorporation as a material part of other tangible personal property which the purchaser manufactures... for sale in his business." 45 IAC 2.2-5-14(e)(1), quoted on page 4, *supra*, provides that in order for the exemption to take effect, "[t]he material must be physically incorporated into and become a component part of the finished product." Bar code labels are not component parts of metal fittings as they are discarded upon installation, and have no affect whatsoever on the finished fitting.

B. Capital Assets

Taxpayer made a number of capital purchases which the audit determined were either entirely taxable or only 80% taxable. Items the audit determined were 80% taxable are all 100% used for quality control during production of taxpayer's fittings. Such machinery includes those used for tensile testing of the fittings and grain analysis of the copper. R&D uses the equipment whenever product deficiencies arise. Once R&D determines the problem, production equipment and raw materials are adjusted accordingly in order to produce useable copper fittings. Taxpayer made eight such purchases. All eight are 100% exempt as the machines are directly used to have an effect on raw materials used in taxpayer's production process. 45 IAC 2.2-5-14 (d) and (e).

One of the pieces of equipment taxpayer purchased which the audit determined was 100% taxable was a cryogentic processing unit used to produce new tooling used to pressurize bars of raw materials to make the fittings. This unit is exempt pursuant to 45 IAC 2.2-5-11. The computer and software items control the production process and are also exempt.

The remainder of the capital purchases are non-exempt because they are used in pre-production or post-production work: the conveyor between the wash tank and hopper which loads completed fittings into cardboard boxes (post-production); a printer used to print labels in the boxing department (post-production); and a "header machine" that straightens coiled copper tubing prior to

cutting, the first actual step in production (pre-production). Taxpayer argued that the copper tubing produced in its Arkansas plant is all part of an integrated production process that ends up at the Indiana plant to be turned into fittings. This is pre-production activity.

FINDING

Taxpayer's protest is partially sustained and partially denied.

DEPARTMENT OF STATE REVENUE

04-20010237.LOF

LETTER OF FINDINGS NUMBER: 01-0237
SALES AND USE TAX
For Years 1997, 1998, and 1999

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

ISSUES

I. Sales/Use Tax—Best information available; failure to maintain adequate records

Authority: IC 6-8.1-5-1(a); IC 6-8.1-5-4(a); IC 6-8.1-5-4(c) IC 6-8.1-5-1(b).

Taxpayer argues that the proposed assessment should be reduced because, in the taxpayer's opinion, the auditor's assessment, which was based on the best information available, was unreasonable.

STATEMENT OF FACTS

Taxpayer is a transient vendor registered to do business in Indiana. Taxpayer's activities involve the annual leasing of space at an annual festival, the use of which facilitates the taxpayer's sales of novelty items to festival attendees. With regard to its sales at the festival, taxpayer could provide no source documents to the auditor for examination. Rather, taxpayer kept manual records of sales in a notebook exclusively under the taxpayer's control.

Because the auditor did not feel that the taxpayer's handwritten notes were trustworthy, the audit proceeded on the basis of the best information available. In order to compute taxpayer's Indiana retail gross receipts, taxpayer's rental expense was multiplied by a factor of 10, a number that the auditor determined to be reasonable given the auditor's experience with festivals of a like nature.

Taxpayer claims that the auditor's factor is faulty for two reasons. First, it is a figure determined by the auditor's own experience. Taxpayer suggests that a figure derived from its federal income tax forms, which disclose the relationship between taxpayer's overall rental expense and overall gross income, would be more appropriate. Second, taxpayer contends that Indiana rental expense is not accurate because taxpayer sublets some of its space to other vendors. This subletting would necessarily cause a lessening in the taxpayer's available space for making sales. Taxpayer argues that, regardless of the factor used, the factor should be multiplied against the amount of rental expense incurred for the taxpayer's own benefit, and not that which taxpayer subsequently sublet away.

DISCUSSION

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. IC 6-8.1-5-1(a). Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. IC 6-8.1-5-4 (a). A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times. IC 6-8.1-5-4 (c). 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 supplied the Department with his own hand-written records of sales during the festival. However, these records are suspect, as they are self-serving, subject to tampering and human error, and no evidence exists that these records were kept during the festival itself and were not made in anticipation of the audit. As a result, the auditor's reliance on extrinsic evidence is warranted in this situation.

However, the taxpayer has provided sufficient evidence to contradict the auditor's assumption that taxpayer's gross revenue is a multiple of 10 of its rental expense. Taxpayer's proposed reliance on federal income tax forms is justified as a valid foundation for a determination using the best information available and establishes the multiple as 7 2/3.

Taxpayer has failed, however, to prove that the rental expense in Indiana is anything other than what is shown on the contract between taxpayer and the festival's organizers. Aside from a list of supposed sublessors supplied by taxpayer himself, no evidence exists that any formal subletting took place. The contract itself specifies that subletting is not allowed. There is no evidence of any

contractual terms between taxpayer and his alleged sublessors. None of the alleged sublessors are registered as retail merchants with the Department, and the people working the booths that were leased by taxpayer all stated that they were taxpayer's employees.

FINDINGS

The taxpayer is sustained to the extent that the gross revenue multiple is adjusted to 7 2/3 and denied as to the remainder of the protest.

DEPARTMENT OF STATE REVENUE

0420020302.LOF

LETTER OF FINDINGS: 02-0302
Indiana Gross Retail Tax
For the Tax Years 1998, 1999, and 2000

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

ISSUE

I. Sales Tax Assessments.

Authority: IC 6-2.5-2-1; IC 6-2.5-2-1(b); IC 6-8.1-5-1(a); IC 6-8.1-5-1(b); 45 IAC 2.2-4-8; 45 IAC 2.2-4-8(a).

Taxpayer argues that the audit erred in assessing additional sales tax liability over and above the amount of sales tax that taxpayer had originally paid. Taxpayer maintains that the audit incorrectly assessed the additional taxes based on the amount of its gross yearly sales rather than on the retail transactions which actually occurred within Indiana.

STATEMENT OF FACTS

Taxpayer is a transient seller of various craft items. Taxpayer travels from venue to venue offering her goods to the public. In addition, taxpayer rents booth space located at a particular Indiana venue to other vendors. The Department of Revenue (Department) conducted an audit of taxpayer's business records. Based upon those records, the Department concluded that taxpayer had substantially underpaid sales tax. Accordingly, the Department assessed additional sales tax. Taxpayer challenged these assessments on the contention that the assessment was – in large part – based upon sales transactions concluded at out-of-state locations. In addition, taxpayer argued that she was not responsible for collecting sales tax on income received from renting the booth spaces to other vendors. Taxpayer submitted a protest, and an administrative hearing was conducted during which taxpayer further explained the basis for her protest. This Letter of Findings results.

DISCUSSION

Taxpayer paid sales tax to Indiana during 1998, 1999, and 2000. During 1998, taxpayer paid tax based on approximately $14,000 in Indiana sales; in 1999, taxpayer paid tax based upon approximately $6,000 in Indiana sales; in 2000, taxpayer paid sales tax based on approximately $14,000 in Indiana sales.

Finding that taxpayer had "grossly" underreported Indiana sales, the audit determined that taxpayer's records for those three years were "not reliable and [could not] be used to determine her Indiana taxable sales." Based upon the available records, the audit concluded that taxpayer's taxable sales were between 10 to 30 times greater than the sales amounts originally reported. In addition, the audit determined that taxpayer should have been collecting sales tax on the transactions involving the rental of booth spaces.

Taxpayer maintains that the additional assessments are wholly incorrect on the ground that these assessments are based upon the gross receipts received in Indiana, Kentucky, Ohio, Michigan, Illinois, Tennessee, and Missouri. In addition, taxpayer argues that the receipts for the booth rental were not subject to sales tax because the booth spaces were rented for more than 30 days.

Pursuant to IC 6-2.5-2-1, a sales tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is otherwise applicable. The statute requires that, "The retail merchant shall collect the tax as agent for the state." IC 6-2.5-2-1(b). In addition, 45 IAC 2.2-4-8(a) imposes sales tax on income derived from the "renting or furnishing for periods of less than thirty (30) days any accommodation including booths [or] display spaces...."

A. Indiana and Out-of-State Sales.

Taxpayer has provided information purporting to establish what portion of its annual receipts were acquired from "retail transactions made in Indiana" and what portion of those receipts were acquired from out-of-state transactions. Taxpayer provided a list of the in-state and out-of-state events she attended. Taxpayer provided a list of general ledger entries and a list of bank deposits.

However, taxpayer has provided no original source documents indicating what sales occurred at what locations; for example, taxpayer was unable to provide a cash register tape or individual sales receipts.

Much of the information provided by taxpayer is incomplete, conflicting, or apparently erroneous. For example, taxpayer represents that during 1998, taxpayer was selling goods at a specific five-day event which took place in Michigan. However, a copy

of an "Agreement for Exposition Space," indicates that taxpayer was simultaneously selling goods at a nine-day event which took place in Indiana during the same period. The Indiana and Michigan events are approximately 300 miles apart. The obvious disparity seems irreconcilable. In addition, taxpayer's original 1999 records indicate approximately 20 occasions in which taxpayer rented booth space at Indiana locations which taxpayer failed to account for during the audit review.

Of course, taxpayer should not be assessed Indiana sales tax on those out-of-state transactions for which sales tax was paid to the foreign jurisdiction; if taxpayer paid Ohio sales tax on retail transactions which occurred in Ohio, Indiana has no business trying to collect Indiana sales tax on those same transactions. However, taxpayer has provided no information which would substantiate that she ever paid sales tax to another state. Instead, taxpayer frankly admits that she never paid sales tax to another state.

Taxpayer has demonstrated that a portion of her annual sales took place at out-of-state locations. What taxpayer has failed to do is provide any demonstrably reliable and accurate method of differentiating between sales which took place in Indiana and those sales which took place at out-of-state locations. None of the information which taxpayer has provided is original to any specific transaction or location. Instead, the information consists of such secondary sources as general ledger entries or records of bank deposits. Even a cursory examination reveals that the information taxpayer has provided is incomplete, inaccurate, or contradictory. Faced with such circumstances, IC 6-8.1-5-1(a) provides that, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available." Because apparently *some* portion of the taxpayer's sales took place out-of-state, the proposed assessment cannot be said to be completely accurate. However, given that taxpayer never paid sales tax to another state, given the total absence of any original sales records, and given that the available records are problematic, the proposed 1998, 1999, and 2000 sales tax assessments were based upon the "best information available."

The audit report's original conclusions and the consequent assessments are presumed correct. IC 6-8.1-5-1(b) states in part that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid." Faced with the audit report's original conclusions, "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Taxpayer has failed to meet her burden of demonstrating that the proposed sales tax assessments were attributable to retail transactions which occurred entirely at out-of-state locations.

B. Lease Income.

Taxpayer rents booth spaces to other transient vendors during a 10-day Indiana tourist festival. Taxpayer does not own these spaces; she herself leases a block of vendor spaces from the actual owner and then subleases the spaces to the individual vendors. The audit determined that taxpayer should have been collecting sales tax on each lease transaction. Taxpayer disagrees arguing that the booth spaces were rented for one year and that the receipts were not subject to sales tax.

45 IAC 2.2-4-8 provides that, "For the purpose of the state gross retail tax and use tax: Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any accommodation, including booths, display spaces and banquet facilities... is a retail merchant making retail transactions in respect thereto and the gross income received shall constitute gross retail income from retail unitary transactions."

The receipt/application provided to each of the vendors clearly states that the "Contract will be for the duration of one year" and that the amount of rent charged is the "Yearly Rental Total." However, the parties' actual contract states that "Booth space is rented for the month of October but occupancy is between October 12-21st." There is apparently a discrepancy between the language of the receipt/applications and the terms of the contract.

Considering both the language of the contract itself and the practical reality governing these transactions, it is evident that taxpayer is providing space to vendors interested in selling goods to customers who are present during the 10-day tourist festival. There is nothing to indicate that the individual vendors use or even have access to the booth spaces during the remainder of the year. To the contrary, the contract language specifically indicates that the vendors are permitted access to the booth spaces for 10 days out of the year. In addition, taxpayer's records indicate that the vendors are provided electrical and sanitary services only during the 10-day festival.

Taxpayer has provided numerous copies of vendor receipt/applications indicating that taxpayer is renting the booth spaces "for the duration of one year." However, there is nothing to indicate that taxpayer has the authority or the means of allowing individual lessors to occupy these spaces for one year. There is nothing to indicate that the parties ever intended the vendors to occupy these spaces for one year. Despite what is printed on the receipt/applications, the Department is not required to exalt the form of the transactions over the substance of these booth rental agreements. Under 45 IAC 2.2-4-8, taxpayer should have been collecting sales tax on each of these transactions.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE
NOTICE OF RESCISSION
LETTER OF FINDINGS 02-0308

The Indiana Department of Revenue hereby rescinds and withdraws Letter of Findings 02-0308, issued on July 29, 2003, because said Letter of Findings contains an error of law. Said withdrawal is effective December 3, 2003.

DEPARTMENT OF STATE REVENUE

0520020364.LOF

LETTER OF FINDINGS NUMBER: 02-0364
Cigarette Tax
For Tax Period 1998-2000

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

I. Cigarette Tax--Imposition

Authority: IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 8.1-1-28

Taxpayer protests the imposition of cigarette tax on cigarettes reportedly exported from Indiana.

STATEMENT OF FACTS

Taxpayer is in the business of distributing tobacco products and other products in Indiana and several other states. The Indiana Department of Revenue ("Department") determined that the cigarettes in question never left Indiana based on taxpayer's records reported to the governments of the states in question, and therefore assessed cigarette tax on those cigarettes which had not been previously paid. Taxpayer protests the imposition of additional cigarette tax. Further facts will be provided as necessary.

I. Cigarette Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of additional cigarette tax for the tax years in question. The Department reviewed taxpayer's Indiana returns as well as taxpayer's returns to Kentucky and Illinois and Missouri. As a result, the Department noted discrepancies between the amount taxpayer reported shipped into Kentucky and Illinois from Indiana and the amount reported on taxpayer's Indiana returns shipped from Indiana into those states.

The cigarette tax is established in IC 6-7-1-1, which states:

> It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertises or indicate the price of such cigarettes.

Also of relevance is 45 IAC 8.1-1-28, which states:

> The tax imposed by the Act *[IC 6-7-1]* upon distributors of cigarettes within this State does not apply to cigarettes which are shipped from within this State to a point, outside the State, not to be returned to this State. Distributors need not affix tax stamps to the individual packages of cigarettes that are sold and shipped outside the State. The burden of proof, however, is at all times upon the Indiana distributor to show that such cigarettes actually went into interstate commerce.

The Department reviewed taxpayer's Indiana returns for the years in question, then reviewed taxpayer's returns for Kentucky, Illinois and Missouri for the same years. The Department determined that taxpayer had reported a certain number of cigarettes as shipped from its Indiana point of origin to Kentucky, Illinois and Missouri destinations. As explained in 45 IAC 8.1-1-28, such cigarettes are not taxed in Indiana.

The Department also determined that taxpayer reported fewer cigarettes shipped to the Kentucky and Illinois destinations than it reported shipped from the Indiana point of origin. As a result of fewer cigarettes reported as shipped into those states, taxpayer paid fewer cigarette taxes to those states. The Department determined that, since the number of cigarettes shipped from Indiana to Kentucky and Illinois did not match the number of cigarettes shipped into Kentucky and Illinois from Indiana, the cigarettes were

never shipped out of Indiana and were therefore subject to Indiana's cigarette tax.

Taxpayer states that there is no requirement that a taxpayer pay taxes on cigarettes in another state in order to meet the requirements of 45 IAC 8.1-1-28. Taxpayer believes that the only requirement is that it provide proof of interstate shipping of the cigarettes. Therefore, taxpayer believes, it has satisfied the requirements of 45 IAC 8.1-1-28 by reporting the cigarettes as interstate shipping. Taxpayer states that the Department is mistaken in requiring cigarette taxes to actually be paid in another state.

Taxpayer misunderstands the Department's method. Taxpayer reported a number of cigarettes as shipped to Kentucky, Illinois and Missouri. No cigarette tax was paid on those cigarettes. Taxpayer reported a smaller number of cigarettes arriving in Kentucky and Illinois. The Department determined that the original number reported by taxpayer was incorrect and the number reported to Kentucky and Illinois were correct. That left a number of cigarettes which, while originally reported as shipped out of Indiana, in fact never left Indiana and never had cigarette taxes paid on them. These are the cigarettes upon which the Department has imposed cigarette taxes.

The Department did not base its determination on whether or not taxes were paid in another state. The Department based its determination on whether or not the cigarettes left Indiana. As for taxes paid or not paid to other states, if cigarettes never leave Indiana, it stands to reason that taxes will not be paid to other states.

The Department refers to the last sentence of 45 IAC 8.1-1-28, which states:

The burden of proof, however, is at all times upon the Indiana distributor to show that such cigarettes actually went into interstate commerce.

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

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

Taxpayer sent in documentation to support its protest that the cigarettes were shipped interstate to Kentucky and Illinois. As previously explained, the Department based its determination on the reports taxpayer made on its Kentucky and Illinois tax returns, which state that the cigarettes in question did not go into interstate commerce. The documentation taxpayer submitted does not meet the burden of proving that the cigarettes actually went into interstate commerce, as required by 45 IAC 8.1-1-28. Neither does it meet the burden of proving the proposed assessment wrong, as required by IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020608.LOF

LETTER OF FINDINGS NUMBER: 02-0608
Sales and Use Tax
For the Years 1999-2000

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

ISSUE

I. Sales and Use Tax- Imposition of Sales Tax on Leases

Authority: IC 6-2.5-2-1, IC 6-2.5-4-10, IC 6-8.1-5-1 (b), IC 6-2.5-5-8, 45 IAC 2.2-4-27.

The taxpayer protests the imposition of the sales tax.

II. Sales and Use Tax-Imposition of Use Tax

Authority: IC 6-2.5-3-2.

The taxpayer protests the imposition of the use tax.

III. Sales and Use Tax-Services

Authority: IC 6-2.5-2-1, IC 6-2.5-3-2, IC 6-2.5-4-1, IC 6-2.5-1-2, IC 6-2.5-1-1.

The taxpayer protests the imposition of use tax on invoices it contends represent service charges.

IV. Sales and Use Tax-Reimbursement of Expenses

Authority: to IC 6-2.5-3-2.

The taxpayer protests the assessment of tax on certain transactions that it contends were in actuality the reimbursement of expenses.

STATEMENT OF FACTS

The taxpayer is an out-of-state management company operating a golf course in Indiana. After an audit, the Indiana Department

of Revenue, hereinafter referred to as the "department," assessed additional sales and use tax. The taxpayer protested this assessment and a telephone hearing was held. This Letter of Findings results.

I. Sales and Use Tax- Imposition of Sales Tax on Leases

DISCUSSION

Indiana imposes a sales tax on retail transactions made in Indiana. Persons who acquire tangible personal property in a retail transaction are liable for the tax. Retail merchants collect the tax and remit it to the state. IC 6-2.5-2-1. Persons renting tangible personal property are retail merchants making a retail transaction. IC 6-2.5-4-10. Since Indiana imposes a sales tax on retail transactions and rentals of tangible personal property constitute retail transactions, Indiana imposes the sales tax on rentals of tangible personal property. The sales tax on rentals is to be collected and remitted to the state in the same manner as any other imposition of sales tax. 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).

The taxpayer rents golf carts, golf clubs, and club carts without collecting and remitting sales tax on the rentals. The department assessed sales tax on these rentals and the taxpayer protested this assessment. The taxpayer contends that it need not collect and remit sales tax on the rentals because it paid sales tax when it purchased the property for lease. The taxpayer bases this contention on the language of the regulation concerning the imposition of sales tax on rental transactions found at 45 IAC 2.2-4-27 as follows:

(a) In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.

(b) Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.

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

The taxpayer argues that since these regulations start with the phrase, "In General," most taxpayers operate in this manner, but some taxpayers do not. The phrase, "in general" means that there are acceptable exceptions to this normal behavior. The taxpayer contends that it availed itself of one of the exemptions by paying the sales tax on the purchase of the property to be rented and not collecting sales tax when it rented the golf clubs, etc. The taxpayer argued that it could choose the more convenient method of paying the sales tax on the property at the time of purchase for leasing. The taxpayer's position is not supported by the law and regulations. They specifically impose the sales tax on leases of tangible personal property unless the transaction qualifies for a stated exemption. No exemption for "convenience" is found in the law. Further, IC 6-2.5-5-8 provides an exemption from the sales tax for property acquired for leasing in the course of a taxpayer's business. Therefore, in this situation, the taxpayer should not have paid the sales tax when it purchased the golf clubs, etc. for rental. It should have collected and remitted the sales tax when it leased the property. The department gave the taxpayer credit for the sales taxes it paid when it purchased the property.

The taxpayer argues further that its understanding of the law and its duties under the law was affirmed through communication with a departmental employee. It is not possible at this point for the department to know the totality of the taxpayer's communications with the department's employee several years ago. The department offers a procedure for obtaining a ruling on the tax consequences of a particular situation. The taxpayer did not avail itself of this process. Therefore, the taxpayer's documentation of communication with the department's employee is not adequate to sustain its burden of proving that the tax was applied inappropriately.

FINDING

The taxpayer's protest is denied.

II. Sales and Use Tax-Imposition of Use Tax

DISCUSSION

Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana on which no sales tax was paid at the time of purchase. IC 6-2.5-3-2. The department assessed use tax on top dressing sand, reference numbers 92276 and 99078 on page 13 of the audit. The taxpayer presented invoices indicating that sales tax was paid to the vendor on the top dressing sand.

The department also assessed use tax on the taxpayer's use of property such as clothing for staff and scorecards. The taxpayer protests this assessment arguing that it was the retail vendors' responsibility to collect and remit the tax. Since the vendors did not collect the tax and the vendors are all still in business, the department should collect any tax due from the vendors.

At the time of the audit, the taxpayer was subject to the imposition of the use tax on the tangible personal property it used in Indiana if it had not paid sales tax on it at the time of purchase. The department's proper remedy at this point is to assess and collect the use tax from the taxpayer rather than chasing down vendors who failed to collect the tax for some unknown, and possibly valid, reason.

FINDING

The taxpayer's protest to the assessment of use tax on reference numbers 92276 and 99078 is sustained. The remainder of the taxpayer's protest is denied.

III. Sales and Use Tax-Services

DISCUSSION

Retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. The use of tangible personal property acquired in a retail transaction is subject to the use tax unless the sales tax has been paid. IC 6-2.5-3-2. A retail transaction is defined generally as the acquiring and subsequently selling of tangible personal property. IC 6-2.5-4-1. Except for certain enumerated services, sales of services are generally not retail transactions and are not subject to sales or use tax. There are two instances when an otherwise nontaxable sale or use of a service is subject to the appropriate tax. The first is when the services are performed with respect to tangible personal property being transferred in a retail transaction and the services take place prior to the transfer of the tangible personal property. IC 6-2.5-4-1(e). The second is when the services are part of a retail unitary transaction. IC 6-2.5-1-2. A unitary transaction is defined as a transaction that includes the transfer of tangible personal property and the provision of services for a single charge pursuant to a single agreement or order. IC 6-2.5-1-1.

The taxpayer protests the imposition of use tax on parking lot bumpers. The taxpayer provided an invoice indicating payment to a company that specializes in parking lots. The invoice indicates that among the products it sells are parking lot bumpers. The invoice indicates that the taxpayer paid $824.00 to the company to "deliver and install 32 parking bumpers pinned in asphalt. " The taxpayer contends that the charge on that invoice represented only the nontaxable services of delivery and installation. The taxpayer was unable to supply a separate invoice or any other evidence that the parking bumpers were purchased separately and delivered prior to the delivery and installation services represented by the invoice. In this case, the services were performed prior to the transfer of the parking lot bumpers to the taxpayer. Therefore, assessment of use tax on the amount of the invoice is proper.

The taxpayer also protests the assessment of use tax on audit page 13 reference numbers 9850, 9890, and 8790 representing month end adjusting entries for expensed items. The taxpayer contends that these assessed amounts actually represent exempt labor charges. The taxpayer did not produce documentation sufficient to sustain its burden of proving that the audit was incorrect and the charges were actually for labor charges.

FINDING

The taxpayer's protest is denied.

IV. Sales and Use Tax-Reimbursement of Expenses

DISCUSSION

The department also assessed use tax on the taxpayer's lease of items such as tractors and mowers from another corporation. The taxpayer contends that these transactions were in actuality nontaxable reimbursals of expenses. The taxpayer originally purchased the equipment and paid the sales tax on the equipment. After the opening of the golf course, the taxpayer set up the leasing corporation as a holding company and transferred the tractor and related items to it. The taxpayer directs the movements of the equipment, pays insurance and wages of the leasing corporation's employees. The two corporations are owned by the same persons. The purpose of the equipment transfer was to ease accounting procedures. The taxpayer contends that the payments are actually reimbursals of the leasing corporation's expenses and depreciation rather than leases. The department disagrees. The taxpayer receives the benefits of the two separate corporations and clearly set up the situation as a leasing situation. Therefore, the taxpayer owes use tax on the leases pursuant to IC 6-2.5-3-2.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20030211P.LOF

LETTER OF FINDINGS NUMBER: 03-0211P
TAX ADMINISTRATION
For Years 1999, 2000, 2001 and 2002

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. Tax Administration - Interest

Authority: IC 6-8.1-10.1

Taxpayer requests waiver of the interest imposed.

II. Tax Administration - Penalty

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

Taxpayer requests waiver of the 10% negligence penalty imposed for failure to use ordinary business care.

STATEMENT OF FACTS

Taxpayer is protesting the imposition of the interest and 10% negligence penalty imposed because it was the victim of employee theft and because it is experiencing difficult financial times that may preclude it from being capable of paying the accrued penalties and interest.

I. Tax Administration - Interest

DISCUSSION

Pursuant to IC 6-8.1-10.1, the department has no authority to waive interest.

FINDINGS

The taxpayer is respectfully denied.

II. Tax Administration – Penalty

DISCUSSION

IC 6-8.1-10-2.1(d) provides:

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

Furthermore, 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 45 IAC 15-11-2(c). 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. Employee theft of the magnitude in this situation, absent any civil or criminal liability against the perpetrators, does not show reasonable care and therefore does not relieve a taxpayer of its duty to collect and remit taxes as they become due.

FINDINGS

The taxpayer is respectfully denied.

DEPARTMENT OF STATE REVENUE

02-20030253P.LOF

LETTER OF FINDINGS NUMBER: 03-0253P
Negligence Penalty
For Years 1998, 1999, and 2000

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

ISSUE

I. Tax Administration - Ten Percent (10%) Negligence Penalty

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

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

STATEMENT OF FACTS

Taxpayer is in the business of selling and renting construction equipment to contractors, manufacturers, mining companies, and others from five locations out of state and four locations in Indiana. During the tax years in question, taxpayer did claim receipts as required by statute. However, taxpayer failed to correctly assess its liability at the correct tax rate.

I. Tax Administration - Ten Percent (10%) Negligence Penalty

DISCUSSION

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

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

Taxpayer claims that because it reported its receipts to the Department, albeit at the incorrect rate, that the penalty should be waived. Taxpayer feels that the discrepancies involved were not substantial enough to warrant having penalties assessed, especially in light of taxpayer's attempts to comply with the law. Finally, taxpayer claims that it has installed safeguards that will prevent such mishaps in the future.

However, the auditor claims, and taxpayer does not refute, that in prior years the company, albeit in a different corporate form, had undergone an audit where the correct tax rate was revealed to taxpayer. This kind of information could have and should have been relied upon by the taxpayer when computing its liabilities from the point of that prior audit forward.

It is the taxpayer's responsibility to correctly assess and remit taxes. Reasonable care on the part of the taxpayer would have included knowledge gained from previous audits. Failure to use said knowledge is proof of taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Reasonable care should be taken regardless of the magnitude of the potential liability. Finally, subsequent remedial measures provide no evidence that a taxpayer is not negligent.

FINDING

The taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0220030269P.LOF

LETTER OF FINDINGS NUMBER: 03-0269P
Income Tax
Fiscal Year Ending September 30, 2001

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of a "no activity" income tax return for the fiscal year 2001.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the late penalty should be waived as no tax was due on the return. The taxpayer also states that the corporation is no longer in operation.

The Department points out that the State of Indiana's regulations require the filing of an income tax return for a tax year where there is no tax liability. The taxpayer was in operation during the fiscal year in which the penalty was assessed.

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 no basis for waiver of the penalty. The taxpayer has failed to demonstrate the reasonable care and diligence which are required in overcoming the imposition of penalty under IC 6-8.1-10-2.1. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0220030310P.LOF

LETTER OF FINDINGS NUMBER: 03-0310P
Income Tax
For the Years 1992-1999

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- Ten Percent (10%) Negligence Penalty

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

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

STATEMENT OF FACTS

The taxpayer is a major purveyor of office supplies and furniture. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional income tax, interest, and penalty. The taxpayer paid the assessment and protested the imposition of the ten percent (10%) negligence penalty. Although given ample opportunity to do so, the taxpayer did not request a hearing or submit additional documentation. Therefore, this Letter of Findings is based on the contents of the file.

I. Tax Administration- Ten Percent (10%) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. The taxpayer contends that the negligence penalty is inappropriate in this situation because the taxpayer did not intentionally fail to pay the proper amount of tax. Specifically, the taxpayer argued that its underpayment of taxes was due to limitations in its data gathering systems prior to 2000.

Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach 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's standard for the negligence penalty, as stated in the regulation, is significantly lower than intentional nonpayment of tax as argued by the taxpayer. Rather, the penalty can be properly imposed when the taxpayer is inattentive to its duties. In this case, the taxpayer carelessly failed to collect the accurate data necessary to determine, report, and pay the appropriate amount of tax. The taxpayer's carelessness and inattention to its duties constitutes negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20030321.LOF

LETTER OF FINDINGS NUMBER: 03-0321
SALES/USE TAX
For Year 2000

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. Sales/Use Tax – Like kind exchange

Authority: IC 6-2.5-1-5(b); IC 6-2.5-1-6; 45 IAC 2.2-1-1(l).

Taxpayer protests the imposition of gross retail tax on a transaction claimed to be a like kind exchange.

II. Tax Administration – Ten Percent (10%) Negligence Penalty

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

The taxpayer protests the imposition of the ten percent (10%) negligence penalty that resulted primarily from the taxpayer's failure to collect Indiana sales tax and having outdated exemption certificates.

STATEMENT OF FACTS

Taxpayer sells and rents construction and mining equipment, including trailers to haul construction equipment. They also service and repair the equipment and sell related parts from all locations. Several sales are under rent purchase options where the rental customer may opt to purchase the equipment.

In June 2000, taxpayer entered into a cash sales contract in which it agreed to sell to a third party a custom-made crane. Part of the agreement contemplated the trade-in of similar construction equipment. Taxpayer contends that it is this transaction that is exempt from gross retail tax as a like kind exchange.

I. Sales/Use Tax – Like kind exchange

DISCUSSION

Taxpayer contends that when it entered into the transaction in question, it did so with the contemplation that a like kind exchange would take place. Like kind exchanges are exempt from gross retail tax under IC 6-2.5-1-5(b), which reads in relevant part:

"Gross retail income" does not include that part of the gross receipts attributable to:

(1) the value of any tangible personal property received in a like kind exchange in the retail transaction, if the value of the property given in exchange is separately stated on the invoice, bill of sale, or similar document given to the purchaser.

Like kind exchanges are defined in IC 6-2.5-1-6:

"Like kind exchange" means the reciprocal exchange of personal property between two (2) persons, when:

(1) the property exchanged is of the same kind or character, regardless of grade or quality; and

(2) the persons exchanging the property both own the property prior to the exchange.

Indiana regulations take the requirements one step further. 45 IAC 2.2-1-1(l) requires that "(an) exchange agreement must specify the definite units or quantity of property to be exchanged." In other words, it must be known at the time of the transaction what property is being exchanged for what property. Mere contemplation is not enough.

Taxpayer cites to certain concerns that made it difficult, if not impossible, for the taxpayer or the third party to definitely establish at the time of the contract what would be the traded-in or exchanged item. These concerns include the difficulty in valuating the third party's exchanges, the unique and specialized quality of the crane taxpayer was selling, and the unexpected early availability of the crane.

The regulations make it clear, however, that such concerns are not to be given consideration.

Taxpayer admittedly did not know the exact details of the exchange at the time of the sales contract. The terms of the contract itself illustrate this point. It reads, in part:

Other: Trade-Ins: To be determined at future date and 5% Indiana Sales Tax to be charged on difference (sic) price.

Because the definite units or quantity of property to be exchanged was not specified in the sales contract as required by 45 IAC 2.2-1-1(l), taxpayer's transaction cannot be classified as a like kind exchange, exempt from gross retail tax under IC 6-2.5-1-5(b).

FINDINGS

The taxpayer is respectfully denied.

II. Tax Administration – Ten Percent (10%) Negligence Penalty

DISCUSSION

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

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's careless-ness, 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 reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

Taxpayer admits that it incorrectly assessed Kentucky sales tax when Indiana sales tax would have been appropriate. However, taxpayer claims that these mistakes were innocent and not part of any scheme to avoid paying tax to Indiana.

Taxpayer further admits that a portion of the assessment was due to the fact that taxpayer held outdated exemption certificates for several customers. However, taxpayer contends that penalties should be waived because certificates, albeit outdated, were available and because procedures have been put into place to prevent future problems.

It is the taxpayer's responsibility to correctly assess and remit taxes. Reasonable care on the part of the taxpayer would have included maintaining updated exemption certificates. Failure to update these certificates is proof of taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Also, subsequent remedial measures provide no evidence that a taxpayer is not negligent.

FINDINGS

The taxpayer is respectfully denied.

DEPARTMENT OF STATE REVENUE

0320030333P.LOF

LETTER OF FINDINGS NUMBER: 03-0333P
Withholding Tax
For the month of February 2003

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 late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of a monthly withholding tax return for the month of February 2003.

The taxpayer is a company located in Indianapolis.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the late penalty should be waived as the error was the result of a troubled medical condition of a key staff person.

The Department points out that the taxpayer has control of situations involving the taxpayer's employees. As such, the taxpayer is responsible to make sure the duties of the respective employees are carried out.

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 was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420030350P.LOF

LETTER OF FINDINGS NUMBER: 03-0350P
Sales & Use Tax
For the month of April 2003

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 late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of a monthly sales tax return for the month of April 2003.

The taxpayer is a company located out-of-state.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the late penalty be waived as the error was unintentional and not typical of the taxpayer's payment history.

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 was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420030376P.LOF

LETTER OF FINDINGS NUMBER: 03-0376P
Sales & Use Tax
For the month of November 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

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of a monthly sales tax return for the month of November 2002.

The taxpayer is a company located in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the late penalty be waived as the error was the result of an unintentional oversight, and furthermore, this is the first time the taxpayer has been late.

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 was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420030380P.LOF

LETTER OF FINDINGS NUMBER: 03-0380P
Sales and Use Tax
For the Years 1998-2000

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

ISSUE

I. Tax Administration- Ten Percent (10%) Negligence Penalty

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

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

STATEMENT OF FACTS

The taxpayer manufactures concrete pipes, culverts, related products, and large wall and roof sections for commercial construction. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use tax interest, and penalty. The taxpayer protested the imposition of the ten percent (10%) negligence penalty. A telephone hearing was held on October 28, 2003. This Letter of Findings results.

I. Tax Administration- Ten Percent (10%) Negligence Penalty

DISCUSSION

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

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach 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 argues that its deficiency in tax payments was not due to a willful intent to disregard the law. The taxpayer cited its 1997 centralization of tax reporting functions, establishment of a tax department, and 1997 institution of a new software system to report sales and use taxes as evidence that it attempted to pay the appropriate amount of sales and use tax to Indiana. These changes in the taxpayer's practice did not, however, keep the taxpayer from failing to collect and remit sales tax on certain sales without valid exemption certificates or failing to remit accrued use tax. The taxpayer's inattention to these duties constitutes negligence.

FINDING

The taxpayer's protest is denied.