INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Monitored Natural Attenuation for Petroleum Contaminated Sites
Identification Number: W0054-WASTE
Date Originally Adopted: March 18, 2004
Dates Revised: None
Other Policies Repealed or Amended: None
Brief Description of Subject Matter: IDEM criteria by which sites requesting Monitored Natural Attenuation (MNA) as a remedial option will be evaluated.
Citations Affected: Indiana Code (IC) 13-23 – Underground Storage Tanks; IC 13-24-1 – Petroleum Releases, IC 13-25-5; 329 Indiana Administrative Code (IAC) 9 – Underground

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 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 nonrule policy document may be put into effect by IDEM 30 days after presentation to the appropriate board**.** Pursuant to IC 13-14-11.5, this policy will be available for public inspection for at least 45 days prior to presentation to the appropriate board. If the nonrule policy is presented to more than one board, it will be effective 30 days after presentation to the last. IDEM will submit the policy to the Indiana Register for publication. Revisions to the policy will follow the same procedure of presentation to the board and publication.

Purpose
The primary purpose for this non-rule policy document (NPD) is to do the following:
- Identify criteria for evaluating and selecting Monitored Natural Attenuation (MNA) as a remedial option for petroleum contaminated sites.
- Identify monitoring and reporting requirements, when MNA is approved for corrective action.

Definitions
Chemicals of Concern - "Chemicals of Concern" (COCs) for petroleum are potentially harmful chemicals within a mixture that are present in sufficient quantity to serve as indicator compounds for that particular mixture.
Corrective Action Plan – A "Corrective Action Plan" is a plan that is designed to minimize, contain, eliminate, remediate, mitigate, or clean up a release. For purposes of this NPD, the term "Corrective Action Plan" (CAP) will be used interchangeably with the term "Remediation Work Plan".
Monitored Natural Attenuation - "Monitored Natural Attenuation" refers to the reliance on natural attenuation processes (within the context of a carefully controlled and monitored clean-up approach) to achieve site-specific remedial objectives within a time frame that is reasonable compared to other methods. The "natural attenuation processes" that are at work in such a remediation approach include a variety of physical, chemical, or biological processes that, under favorable conditions, act without human intervention to reduce the mass, toxicity, mobility, volume, or concentration of contaminants in soil and ground water. These in situ processes include, biodegradation, dispersion, dilution, sorption, volatilization, and chemical or biological stabilization, transformation, or destruction of contaminants.

Applicability
This NPD applies to remediation of soil and ground water using MNA for refined petroleum releases as defined by IC 13-11-2-160. It is written with the intention of being consistent with all relevant laws and policies including, but not limited to, the Risk Integrated System of Closure (RISC). Information collected during implementation of a MNA CAP may also be used for closures using RISC or any other appropriate program guidance.

Once the soil and ground water investigation is completed, the responsible party may choose to use a RISC closure demonstration or a remediation method, including MNA, as the corrective action plan. When choosing a RISC closure demonstration, the CAP requirements will be satisfied by meeting the requirements of Section 6.3.3 of the RISC Technical Resource Guidance Document.

This NPD is **not** intended to exclude the use of any closure options available using RISC or other guidance such as a plume stability demonstration. Information collected before or during the MNA monitoring may be used to evaluate a site for closure at any time. The sampling frequency, chemicals of concern, data quality objectives, etc. may vary depending on the program area and contaminant(s).

The use of MNA for hazardous substances as defined by IC 13-11-2-98 or other chemicals of concern is not included in the scope

of this NPD. Any decisions regarding the remediation of these substances will be determined on a site-specific basis.

Introduction and Background

As Monitored Natural Attenuation (MNA) has become an accepted remedial technology, the IDEM determined that many CAPs proposing MNA were incomplete or inappropriate. For that reason, the IDEM determined that a NPD is needed for the following reasons:

- Improve the quality of corrective action proposals by providing guidance to the responsible parties and consultants regarding evaluation criteria and proposal format.
- Preserve IDEM and responsible party resources by reducing or eliminating proposals that are incomplete and/or inappropriate.
- Improve consistency within IDEM regarding the approval of MNA corrective action approvals.

Monitored natural attenuation is appropriate as a remedial approach only when it can be demonstrated capable of achieving a site's remedial objectives within a time frame that is reasonable compared to engineered systems and/or source removal. The IDEM expects that monitored natural attenuation typically will be used in conjunction with active remediation measures, e.g. source control or removal, or as a follow-up to active remediation measures that have already been implemented. The amount of site characterization necessary for MNA may be greater than the characterization required for engineered systems since these systems often provide greater hydraulic control of ground water plumes.

Implementation

When considering MNA as a remedial option, developers of CAPs should use a stepped approach. The steps are as follows:

Step 1 - Initial Screening – This step lists the basic conditions which should be met in order to consider MNA as a remedial option.

Step 2 – Generic Approval - This step lists all of the COC concentration limits needed for generic approval. Since the COC limits are relatively low concentration of COCs in the soil and ground water, sites meeting these limits will be approved for MNA under normal conditions.

Step 3 – Site Specific Approval – This step provides more detailed monitoring and demonstration requirements due to relatively high concentrations of COCs in the soil and ground water. If Step 3 is used when developing a CAP, Step 2 is not required.

Site Conditions Suitable for MNA Application

Step 1 – Initial Screening

The following conditions in Step 1 should be met for MNA approval:

- The lateral and vertical extent of soil and groundwater contamination are delineated to "off-site" or "residential" guidelines including the installation of ground water monitoring wells.
- Free product is not present or has been removed to the extent practicable.
- Contamination is **not** from hydrocarbon oils that do not lend themselves to natural attenuation, such as crude oil, or lubricating and fuel oils, such as virgin motor oil, used/waste oil, hydraulic oil, and fuel oils #4, 5 and 6 (bunker oil).
- A well field or water supply well is not impacted or imminently threatened.
- No other public or environmental receptor exposures exist or are imminently threatened.

If all of the Step 1 conditions are met, proceed to Step 2. If all of the Step 1 conditions are not met, MNA is not acceptable.

Step 2 – Generic Approval

If all of the following Step 2 conditions are met, then the CAP is generally acceptable. If all of the Step 2 conditions are not met, proceed to Step 3.

- Benzene detected in groundwater is less than 300 parts per billion (ppb) on-site (On-site may mean the area for which there is site control.) and 15 ppb off-site.
- The contamination source(s) is removed and/or the maximum total petroleum hydrocarbons (TPH) in the soil vadose zone is less than 1,500 parts per million (ppm) on-site and 300 ppm off-site. (No specific MNA screening values exist for specific COCs in the soil such as benzene, toluene, ethyl benzene, xylene, MTBE, or any of the target semivolatile organic compounds at this time.)
- MTBE in groundwater is less than 45 parts per billion (ppb) on or off-site.

Step 3 - Site-Specific Approval

If Step 1 conditions are met, but not Step 2, then a justification may be required for approval. When evaluating sites for MNA using Step 3, IDEM will need the following additional information:

- Primary Evidence – Historical ground water and/or soil chemistry data that demonstrate a clear and meaningful trend of decreasing contaminant mass and/or concentration. In the case of sites that meet the limits of Step 2, this is not generally needed for CAP approval. In some instances, sites may have limited primary evidence. In these instances, secondary evidence is more critical.
- Secondary Evidence – Hydrogeologic and geochemical data that can be used to demonstrate indirectly the type(s) of natural

attenuation processes and the rate at which such processes will reduce contaminant concentrations. Biochemical indicators are listed in the next section of this document.

- Other Factors – Other factors that may be considered when evaluating a site for MNA as a remedial option include the nature and volume of the spilled material, property control, pathways or conduits for exposure, and proximity to receptors.

The justification should include, but is not limited to, a computer generated site model to predict the fate and transport of the contaminants, remediation objectives and timeframe for achieving the remediation objectives. Under most circumstances, closure objectives should be reached within three (3) times the time it would take using an engineered system while not exceeding 15 years.

IDEM reserves the right to make site specific decisions regarding additional information requests or MNA CAP approval based on the nature of the contaminants, age of the release and site conditions.

Additional Information Required for CAP Approval

The following discussion items should be included in the CAP along with other information that may be required by the individual remediation program:

- For all sites, the site's hydrogeologic conditions should be included.
- For all sites, a discussion of remedial options other than MNA should be included, in case MNA proves to be unacceptable or ineffective.
- For sites using Step 3, an indication that conditions exist on the site to support the biological activity necessary for biodegradation processes should be evaluated. An initial round of ground water sampling is required for MNA indicator parameters in addition to those parameters required in the Underground Storage Tank (UST) Branch Guidance Manual, Voluntary Remediation Program (VRP) Resource Guide, or other appropriate and applicable guidance. MNA indicator parameters that can be measured in the field include: dissolved oxygen, dissolved ferrous iron, hydrogen sulfide, and Oxidation-Reduction Potential (ORP). The following MNA indicator parameters should be based on laboratory analysis: nitrate, nitrite, and sulfate. (See Tables 1 and 2 titled "Analytical Parameters for Monitored Natural Attenuation Sites" and "Data Collection and Analytical Methods.") The reasons for monitoring these indicators are based on the availability of trend data for the COCs, in the ground water as well as site specific conditions. Ground water samples should be collected from within the contaminant plume and from background locations for comparison purposes. The results of the analyses of the above parameters should be included in the "sampling" discussion of the site characterization or CAP.

Additional Information Required for CAP Approval for Sites Making Claims to the Excess Liability Trust Fund

- A cost comparison of the MNA approach to alternative methods should be included. The cost estimate for the MNA approach should be based on usual and customary industry standards and assumptions given the nature of the contamination and site specific geological conditions. The following is a list of items to be included in the cost estimate for the MNA method:
    1. Long term MNA costs should include: Quarterly Corrective Action Progress Reporting (CAPR) including laboratory analysis (per the UST Branch Guidance Manual, VRP Resource Guide, or other appropriate and applicable guidance) and MNA indicator monitoring costs (See "Additional Information Required for CAP Approval"). MNA monitoring costs may require the installation of additional wells for background samples.
    2. Soil laboratory analysis/monitoring costs (The interval of monitoring to be determined by IDEM staff, but assume annually for cost comparison purposes).
    3. Provide a discussion concerning the total estimated cost and estimated remediation time.
- The cost estimate for the alternative methods should also be based on usual and customary engineering/industry standards and assumptions given the nature of the contamination. Include the site-specific geological conditions. The following is a list of items to be included in the cost estimate for the alternative methods:
    1. Initial set-up costs including: remedial system design, system purchases (or short term lease), system building/housing, utility hook-up costs, system installation (piping, trenching, well installation, etc.), discharge permitting (air and water), and estimated miscellaneous installation costs.
    2. Long-term engineering system estimated costs including: annual operation and maintenance (O&M) costs, annual utility costs, laboratory monitoring costs, other miscellaneous costs.
    3. Groundwater laboratory analysis/monitoring costs (per the UST Branch Guidance Manual, VRP Resource Guide, or other appropriate and applicable guidance), field testing parameters (anticipated air monitoring, discharge water testing to Publicly Owned Treatment Works (POTW) / National Pollutant Discharge Elimination System (NPDES), etc.).
    4. Final soil laboratory analysis/monitoring costs.
    5. A brief discussion concerning the total estimated cost and estimated remediation time.

Additional Information Required Upon CAP Approval

If the site is approved to use MNA for corrective action, IDEM may require one or both of the following.

- Ground water monitoring of MNA indicator parameters in addition to those parameters required in the RISC, UST Branch Guidance Manual, VRP Resource Guide, or other appropriate and applicable guidance may be required depending on the site conditions. MNA indicator parameters that can be measured in the field include the following: dissolved oxygen, dissolved ferrous iron, hydrogen sulfide, and ORP. The following MNA indicator parameters should be based on laboratory analysis: nitrate, nitrite, and sulfate. (See Tables 1 and 2 titled "Analytical Parameters for Monitored Natural Attenuation Sites" and "Data Collection and Analytical Methods.") Please note that these samples should be collected from within and outside the contaminant plume for comparison purposes. Any changes in the procedures for sample acquisition, sample preservation, shipping, time and storage, chain of custody, decontamination of equipment between samples, or signed certificate of laboratory must be noted when submitting this information quarterly. Decisions regarding the frequency of monitoring MNA parameters beyond the initial baseline analysis will be determined based on site-specific conditions. Typically, a quarterly sampling frequency may be appropriate.
- Periodic sampling of soils may be required if the contamination levels on the site warrant this action. The time intervals at which these samples will be collected should be recommended by the responsible party. Typically, an annual sampling frequency may be appropriate. However, site specific conditions may dictate the frequency.

Summary

This is a non-rule policy document, not a law or regulation. Special circumstances and/or site conditions may allow for modified action. Information collected during the monitoring period, may be used for closure determination under the relevant program guidance.

Table 1 Analytical Parameters for Monitored Natural Attenuation Sites

Parameter	Purpose
Dissolved Oxygen (DO)	Identify reducing zones, estimate assimilative capacity. Dissolved oxygen is an electron acceptor; assimilative capacity should be based on change in DO, compared to upgradient concentration.
Nitrate (NO_3^-)	Identify reducing zones, estimate assimilative capacity. Nitrate is an electron acceptor; assimilative capacity should be based on change in NO_3^-, compared to upgradient concentration.
Sulfate (SO_4^{2-})	Identify reducing zones, estimate assimilative capacity. Sulfate is an electron acceptor; assimilative capacity should be based on change in SO_4^{2-}, compared to upgradient concentration.
Soluble Ferrous Iron (Fe^{2+})	Identify reducing zones, estimate assimilative capacity. Ferrous iron is a byproduct of the biodegradation reaction. Assimilative capacity is based on the measured Fe^{2+} concentration.
Oxidation-Reduction Potential (ORP)	Identify reducing and oxidizing zones. Validate DO measurements.
Benzene, Toluene, Ethyl benzene, Xylene, (BTEX) and Methyl tertiary Butyl Ether (MTBE)	Primary indicator that provides evidence of plume status and decreasing trend.

Table 2 Data Collection and Analytical Methods

Parameter	Method Description	Reference	Method Number
Oxidation-Reduction Potential (ORP)	ORP/Eh Meter	See Manufacturer Guidance	
Dissolved Oxygen (DO)	Membrane Electrode (Field)	MCAWW[1]	360.1
Hydrogen Sulfide (H_2S)	Color Chart (Field) Colorimetric (Lab)	Hach® SMEWW[2]	HS-C Test 4500-S2-D
Sulfate (SO_4^{2-})	Anion Chromatography (Lab)	SW-846	9056A, 9035, 9036, 9038

Soluble Ferrous Iron (Fe^{2+})	Colorimetric (Field) Colorimetric (Field)	SMEWW Hach®	3500-FeD 25140-25
Nitrate (NO_3^-)	Anion Chromatography (Lab)	SW-846[3]	9056A

Notes: Field tests can also be performed by simple colorimetric methods supplied by CHEMetrics, Inc. For various field tests, CHEMetrics, Inc. and Hach® provide detailed instructions on how to perform the analysis.

References

1. Indiana Department of Environmental Management. February 15, 2001. *Risk Integrated System of Closure – Technical Resource Guidance Document, Final*.
2. OLQ Geological Services Technical Memorandum. 1998. *Monitored Natural Attenuation*.
3. U.S. Environmental Protection Agency. 1999. *Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites*, EPA Directive 9200.4-17P, Office of Solid Waste and Emergency Response. Washington, D.C.

Footnotes

1. U.S. Environmental Protection Agency. Revised 1993. *Methods for Chemical Analysis of Water and Wastes*, Environmental Monitoring and Support Laboratory, EPA-600/4-79-020. Cincinnati, Ohio.
2. Standard Methods for the Examination of Water and Wastewater, 1992. American Public Health Assoc., American Water Works Assoc., Water Environment Assoc., 18th Edition
3. Test Methods for Evaluating Solid Waste – Physical/Chemical Methods, EPA SW-846, 3rd Edition, 1986, Update 1, July 1992, Updates II and IIa, 1994, Update III, 1996, and proposed Updates IVa, and proposed IVb, 1998.

DEPARTMENT OF STATE REVENUE
AUDIT-GRAM NUMBER IR-004
February 12, 2004
[This Audit-Gram replaces the prior issue dated January 1, 1999 published at 22 IR 1294]

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

Durable Medical Equipment.

Authority: IC 6-2.5-5-18; IC 16-42-19-5; IC 6-2.5-1-18; 45 IAC 2.2-5-27; Information Bulletin # 48, 7/10/84; Sales Tax Clarification Letter, 1/04.

IC 6-2.5-5-18. Sales... of medical equipment, supplies and devices.

(a) Sales of... medical equipment, supplies, and devices are exempt from the state gross retail tax, if the sales are prescribed by a person licensed to issue the prescription. [1980]

45 IAC 2.2-5-27. Medical exemptions; definitions.

(a) The term "person licensed to issue a prescription" shall include only those persons licensed or registered to fit and/or dispense such devices. [1982]

"Person licensed to issue a prescription" **means** only those persons licensed or registered to fit and/or dispense such devices. [Temporary Regulations 2004]

IC 6-2.5-1-18. "Durable medical equipment" defined [effective January 1, 2004].

"Durable medical equipment" means equipment…that:

(1) can withstand repeated use;
(2) is primarily and customarily used to serve a medical purpose;
(3) generally is not useful to a person in the absence of illness or injury; and
(4) is not worn in or on the body. [2003]

I. POLICY PRIOR TO JANUARY 1, 2004

Prior to January 1, 2004, hot tubs and tanning beds prescribed by a licensed practitioner may be purchased exempt from sales tax. The following definitions provide guidance in determining if the item has been prescribed by a licensed practitioner and, therefore, qualifies for exemption from sales tax:

A. "PRESCRIPTION" DEFINED

IC 16-42-19-7 "Prescription" defined.

"[P]rescription" means...

(1) a written order to or for an ultimate user for a drug or device containing the name and address of the patient, the name and strength or size of the drug or device, the amount to be dispensed, adequate directions for the proper use... name of the practitioner, issued and signed by a practitioner; or

(2) an order... reduced to writing by the pharmacist. [1993]

The above terms "Drug" and "Device" are further defined in IC 25-26-13-2.

B. "PRACTITIONER" DEFINED

IC 16-42-19-5. "Practitioner" defined.

"[P]ractitioner" means...

(1) A licensed physician... (IC 25-22.5).

(2) A veterinarian... (IC 15-5-1.1)

(3) A dentist... (IC 25-14).

(4) A podiatrist... (IC 25-29).

(5) An optometrist... (IC 25-26-15).

(6) An advanced practice nurse...(IC 25-23-1-19.5). [1993]

The term "practitioner" licensed to issue a prescription also includes a Doctor of Osteopathy (D.O.). [See IC 25-22.5-1-1.1(a)(1)(B)].

II. POLICY EFFECTIVE JANUARY 1, 2004

Under Indiana Code 6-2.5-1-18, effective January 1, 2004, recreational hot tubs and tanning beds are not considered to be primarily used to serve a medical purpose. They are subject to the collection of sales tax whether or not prescribed by a licensed practitioner.

Durable medical equipment is defined under Indiana Code 6-2.5-1-18 to be an item that "…(2) is primarily and customarily used to serve a medical purpose; (3) generally is not useful to a person in the absence of illness or injury...." Since both the hot tub and tanning bed are widely used by persons who have not incurred injury or illness, they do not qualify for exemption.

DEPARTMENT OF STATE REVENUE
AUDIT-GRAM NUMBER IR-012
February 12, 2004
[This Audit-Gram replaces the prior issue dated September, 1999 published at 22 IR 4009]

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

Food for Immediate Consumption – Bakery Products

Authority: IC 6-2.5-5-20; 45 IAC 2.2-5-39(b) (3); 45 IAC 2.2-5-43; 45 IAC 2.2-5-44

45 IAC 2.2-5-39. Food for human consumption… examples.

(a) The gross retail tax act specifies the items which constitute tax exempt food for human consumption.

"NONTAXABLE ITEMS"

Bakery Products [1982]

(b) The following items are exempt from sales and use tax if sold without eating utensils provided by the seller:

…

(3) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas. [2004]

45 IAC 2.2-5-43. Food for immediate consumption.

(a) Sales of food which ordinarily is sold for immediate consumption at or near the premises of the seller are taxable…[1982]

45 IAC 2.2-5-44. Combination business; sales of groceries and meals.

Where a person operates a combination-type business at one location such as an eating place combined with a donut or pastry shop, sales by such retailer of nontaxable grocery items… are nontaxable when sold for home consumption… For example, bulk sales of donuts… are nontaxable when sold for home consumption. However, individual orders (e.g. … a single serving bakery item)… [is]… taxable regardless of whether sold for consumption on the premises or sold on a "take-out" basis for off-premises consumption. [1987]

I. GENERAL STATEMENT

Prior to January 1, 2004, the sales of bakery products are exempt from sales tax unless sold as a single serving. A single serving is subject to the collection of sales tax.

Effective January 1, 2004, the sales of bakery items are not taxable unless they are sold through a vending machine, sold with eating utensils provided by the seller or sold in a heated state. [FN 1]

II. PRIOR TO JANUARY 1, 2004

Sales of "food for human consumption" as defined in 45 IAC 2.2-5-39 are not subject to the collection of sales tax. Since food for human consumption includes bakery products, they are exempt from the collection of sales tax.

The term "food for human consumption" does not include food which is sold for immediate consumption as defined in 45 IAC 2.2-5-43. The sale of a single serving of a nontaxable bakery product, i.e., one donut, is subject to the collection of sales tax. The department presumes the donut is purchased for "immediate consumption."

The bulk sale of a nontaxable bakery product, i.e., more than one donut, is not subject to the collection of sales tax. The department presumes the donuts are purchased for home consumption.

SUMMARY:

A. A sales transaction which includes more than one donut is exempt.

B. A sales transaction which includes not more than one donut is taxable.

II. EFFECTIVE JANUARY 1, 2004

The sales of bakery items are exempt from the collection of sales tax unless they are:

A. sold through a vending machine;

B. sold with eating utensils [FN 2] provided by the seller; or,

C. sold in a heated state.

[FN 1] Sales Tax Clarification letter, January 2004

[FN 2] Eating utensils include plates, knives, forks, spoons, glasses, cups, napkins, or straws (IC 6-2.5-5-20[c] [7]).

DEPARTMENT OF STATE REVENUE

STATE OF INDIANA	)	
	)	SS: BEFORE THE STATE OF INDIANA
COUNTY OF MARION	)	DEPARTMENT OF STATE REVENUE
	)	
IN THE MATTER OF:	)	
	)	
ATLAS FOUNDATION	)	Docket Number: 29-2003-0335
	)	
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 December 4, 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 December 4, 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 5TH DAY OF JANUARY, 2004

Kenneth L. Miller, Commissioner
Indiana Department of State Revenue

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
AMERICAN LEGION POST #340
DOCKET NO. 29-2003-0401

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER

An administrative hearing was held on Tuesday, October 28, 2003 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

Petitioner, American Legion Post #340, was represented by William Owens, Commander. Steve Carpenter appeared on behalf of the Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-32-8-5, evidence was submitted, and testimony given. The Department maintains a record of the proceedings. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Proposed Order.

REASON FOR HEARING

On September 2, 2003, the Petitioner was assessed civil penalties in the amount of three thousand dollars ($3,000) and its license was suspended for a period of three (3) years. The Petitioner protested in a timely manner.

SUMMARY OF FACTS

1) The Indiana Department of Revenue Criminal Investigation Division conducted an investigation of the Petitioner on April 28, 2003.

2) On September 2, 2003, the Petitioner was assessed civil penalties in the amount of three thousand dollars ($3,000) and its license was suspended for a period of three (3) years.

FINDINGS OF FACTS

1) The Indiana Department of Revenue Criminal Investigation Division initiated an investigation of the Petitioner on April 28, 2003. (Record at 9).

2) According to the Department's letter dated September 2, 2003, the Petitioner did not maintain accurate records of its pull tab sales for the periods ending April 2000, 2001, and 2002.

3) The Department used records, subpoenaed from the distributors Petitioner used, showing what games were purchased during the periods in question. (State's Exhibit C).

4) A spread sheet of income generated from those games was developed. (State's Exhibit C).

5) Due to the failure to maintain accurate records the Petitioner underestimated its charity gaming license fees. (State's Exhibit C).

6) On June 11, 2003, the Criminal Investigation Division (CID) of the Indiana Department of Revenue along with the Indiana State Excise Police found four (4) cherry master video poker machines in Petitioner's Post. (State's Exhibit B).

7) The illegal gambling devices were photographed by the Indiana State Excise Police on June 11, 2003. (State's Exhibit B).

8) The Petitioner was charged with 1 count of being a public nuisance.

9) Petitioner was cited by the Indiana State Excise Police for possession of a gaming device under IC 35-45-5-3, and promoting professional gambling pursuant to IC 35-45-5-4. (State's Exhibit B).

10) The Department then notified Petitioner by letter that its Indiana Charity Gaming License was suspended for a period of three (3) years and was assessed one thousand dollars ($1,000).

11) Petitioner stated that the previous Commander of their Post had stolen money from the Post and had destroyed the records in question. (Record at 20).

12) The current Post Commander stated that they had filed police reports and spoke to the local prosecutor. (Record at 31 & 32).

13) The Petitioner contends that they have lots of items in their charity gaming stock but have no idea what they have. (Record at 23).

14) The Petitioner was asked, "So is it fair to say you have no records prior to June 2002, because there was another commander?" Petitioner's representative responded, "Right". (Record at 30).

15) Again Petitioner's representative was asked, "Did you ever contact any of the distributors to get information to reconstruct those records?" The response was, "No, we didn't -- well we had an accountant, and the accountant was taking care of our business." The Department's representative then stated, "But my question was did you contact—did you or anybody on your behalf contact the distributor to get information to reconstruct the records…" The Petitioner replied, "No, we didn't." (Record at 30).

16) When asked whether the Petitioner had gaming machines in their lodge the Petitioner's representative responded, "Yes, we have them." (Record at 31).

STATEMENT OF LAW

1) Pursuant to 45 IAC 18-8-4, the burden of proving that the department's findings are incorrect rests with the individual or organization against which the department's findings are made. The department's investigation establishes a prima facie presumption of the validity of the department's findings.

2) The Department's administrative hearings are conducted pursuant to IC § 4-21.5 et seq. (See, House Enrolled Act No. 1556).

3) "[B]ecause Pendelton's interest in his insurance license was a property interest, and not a liberty interest. Rather, a preponderance of the evidence would have been sufficient." Pendelton v. McCarty, 747 N.E. 2d 56, 65 (Ind. App. 2001).

4) "It is reasonable…to adopt a preponderance of the evidence standard where it can be demonstrated that a protected property interest exists." Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind.App. 1993).

5) IC 4-32-11-3 The license fee that is charged to a qualified organization that renews the license must be based on the total gross revenue of the qualified organization from allowable events and related activities in the preceding year or, if the qualified organization held a license under IC 4-32-9-6 through IC 4-32-9-10, the fee must be based on the total gross revenue of the qualified organization from the preceding event and related activities

6) IC 35-45-5-4 provides, "Except as provided in subsection (b), a person who:

(1) knowingly or intentionally owns, manufactures, possesses, buys, sells, rents, leases, repairs, or transports a gambling device, or offers or solicits an interest in a gambling device;

(2) before a race, game, contest, or event on which gambling may be conducted, knowingly or intentionally transmits or receives gambling information by any means, or knowingly or intentionally installs or maintains equipment for the transmission or receipt of gambling information; or

(3) having control over the use of a place, knowingly or intentionally permits another person to use the place for professional gambling; commits promoting professional gambling, a Class D felony.

(b) Subsection (a)(1) does not apply to a boat manufacturer who:

(1) transports or possesses a gambling device solely for the purpose of installing that device in a boat that is to be sold and transported to a buyer; and

(2) does not display the gambling device to the general public or make the device available for use in Indiana.

(c) When a public utility is notified by a law enforcement agency acting within its jurisdiction that any service, facility, or equipment furnished by it is being used or will be used to violate this section, it shall discontinue or refuse to furnish that service, facility, or equipment, and no damages, penalty, or forfeiture, civil or criminal, may be found against a public utility for an act done in compliance with such a notice. This subsection does not prejudice the right of a person affected by it to secure an appropriate determination, as otherwise provided by law, that the service, facility, or equipment should not be discontinued or refused, or should be restored."

7) IC 35-45-5-3 provides that, "A person who knowingly or intentionally:

(1) engages in pool-selling;

(2) engages in bookmaking;

(3) maintains, in a place accessible to the public, slot machines, one-ball machines or variants thereof, pinball machines that award anything other than an immediate and unrecorded right of replay, roulette wheels, dice tables, or money or merchandise pushcards, punchboards, jars, or spindles;

(4) conducts lotteries, gift enterprises, or policy or numbers games, or sells chances therein;

(5) conducts any banking or percentage games played with cards, dice, or counters, or accepts any fixed share of the stakes therein; or

(6) accepts, or offers to accept, for profit, money or other property risked in gambling; commits professional gambling, a Class D felony."

8) IC 4-32-9-17 states, "A qualified organization shall maintain accurate records of all financial aspects of an allowable event under this article…"

9) IC 4-32-9-17 further states, "…A qualified organization shall make accurate reports of all financial aspects of an allowable event to the department within the time established by the department..."

10) Under IC 4-32-12-1, The department may suspend or revoke the license of or levy a civil penalty against a qualified organization or an individual under this article for any of the following:

(1) Violation of a provision of this article or of a rule of the department.

(2) Failure to accurately account for:

(A) bingo cards;

(B) bingo boards;

(C) bingo sheets;

(D) bingo pads;

(E) pull tabs;

(F) punchboards; or
(G) tip boards.
(3) Failure to accurately account for sales proceeds from an event or activity licensed or permitted under this article.
(4) Commission of a fraud, deceit, or misrepresentation.
(5) Conduct prejudicial to public confidence in the department.
(b) If a violation is of a continuing nature, the department may impose a civil penalty upon a licensee or an individual for each day the violation continues.

11) IC 4-32-12-2 states, "The department may impose upon a qualified organization or an individual the following civil penalties:(1) Not more than one thousand dollars ($1,000) for the first violation.(2) Not more than two thousand five hundred dollars ($2,500) for the second violation.(3) Not more than five thousand dollars ($5,000) for each additional violation."
12) IC 4-32-12-3 states, In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:
(1) Suspend or revoke the license.
(2) Lengthen a period of suspension of the license.
(3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.
(4) Impose an additional civil penalty of not more than one hundred dollars ($100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

1) It is the charitable organization itself that is granted the license to conduct charity gaming.
2) The members that run the charitable organization are responsible for maintaining the organization's charitable status.
3) The members of the charitable organization are responsible for making sure that all charity gaming laws are followed.
4) Any violation of the Indiana charity gaming laws subjects the charitable organization to fines and penalties.
5) Even after the members of an organization who are purported to have violated charity gaming laws are gone or removed from office, the charitable organization is ultimately responsible for the violations, and therefore will be subject to any fines and penalties imposed by the Department.
6) Pursuant to 45 IAC 18-8-4, the burden of proving that the department's findings are incorrect rests with the individual or organization against which the department's findings are made. The department's investigation establishes a prima facie presumption of the validity of the department's findings.
7) Petitioner's representative admitted under oath that the Petitioner did not possess any financial records for the periods in question, and that they had illegal gambling machines on the premises.
8) The reconstructed records show that the Petitioner underestimated the amount of gross proceeds it received, and as a result Petitioner owes additional license fees for the years at issue.

PROPOSED ORDER

Following due consideration of the entire record, the Administrative Law Judge orders the following:
Petitioner's appeal is denied.

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

IN REGARDS TO THE MATTER OF:
JEFFERY L. WIDMAN
DOCKET NO. 29-2003-0489

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 five (5) years.

FINDINGS OF FACTS

1) Petitioner protested the Department's proposed actions on August 9, 2002.
2) The Department acknowledged the Petitioner's appeal in a letter.
3) The Department sent Petitioner a letter dated May 21, 2003 regarding the legislative changes that directly affected the procedures governing the administrative hearing.
4) Pursuant to IC 4-21.5-3-1 notice was given to Petitioner's counsel on September 23, 2003 regarding a possible dismissal of the appeal.
5) Petitioner 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.

PROPOSED ORDER

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: January 2, 2004

_____
Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
TAMMY MORGAN
DOCKET NO. 29-2003-0490

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.

FINDINGS OF FACTS

1) Petitioner protested the Department's proposed actions on August 9, 2002.
2) The Department acknowledged the Petitioner's appeal in a letter.
3) The Department sent Petitioner a letter dated May 21, 2003 regarding the legislative changes that directly affected the procedures governing the administrative hearing.
4) Pursuant to IC 4-21.5-3-1 notice was given to Petitioner's counsel on September 23, 2003 regarding a possible dismissal of the appeal.
5) Petitioner 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.

PROPOSED ORDER

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: January 2, 2004

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

0220000354.LOF

LETTER OF FINDINGS NUMBER: 00-0354
Corporate Income Tax

For the Tax Year Ending January 3, 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. Gross Income Tax-Imposition of Tax

Authority: IC 6-8.1-5-1 (b), IC 6-2.1-2-2, 45 IAC 1-1-120.

The taxpayer protests the imposition of tax on income from sales to Indiana customers.

II. 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 is a manufacturer of pharmaceutical products. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional gross income tax, interest, and penalty for the tax year ending January 3, 1993. The taxpayer protested the assessment and penalty. A hearing was held and this Letter of Findings results.

I. Gross Income Tax-Imposition of Tax

The taxpayer employed sales representatives throughout the United States. The sales representatives detailed the taxpayer's products to physicians. This entailed discussion in depth of the indications, possible side effects, and results of clinical studies of the taxpayer's products. Almost all the customers who actually purchased the taxpayer's products in Indiana were wholesalers, chains, and clinics. The sales representatives did not perform services for customers; maintain inventory of goods for sale; distribute merchandise for sale; or accept, reject, or approve orders.

The taxpayer operated an administrative sales office in Indiana for part of the year 1992. This office consisted of a District Manager and an Office Coordinator. The office occupied 450 square feet of space. The District Manager was in charge of regional sales representatives in Indiana and the surrounding states. None of the sales representatives used the taxpayer's administrative office as their personal office.

The department assessed gross income tax on the taxpayer's income from sales of pharmaceuticals in Indiana during the tax year ending January 3, 1993. The taxpayer protests this assessment contending that it did not have adequate nexus in Indiana to subject its Indiana sales to Indiana gross income tax. All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

The department imposed gross income tax on the taxpayer pursuant to IC 6-2.1-2-2 as follows:

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

(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.

Indiana gross income tax is imposed on a nonresident's income from the sale of products shipped into Indiana when it meets the test set out at 45 IAC 1-1-120 as follows:

Taxable Inshipments: (a) Sales made by a nonresident, when the seller has established a business situs within the state, and the sales originated from, were channeled through or were otherwise connected with the Indiana situs,..

The taxpayer agrees that it had a business situs in Indiana during the tax year ending January 3, 1993. The taxpayer argues, however, that the activities of the administrative office were not adequately connected to its sales within Indiana to subject the receipts from those sales to the Indiana gross income tax. Although the Indiana office did not process orders or maintain inventories for delivery, it did serve an important role in working with the sales representatives to help them expand territory market share and develop positive business relationships with customers. These vital services to the sales representatives helped the sales representatives increase sales of taxpayer's products in the state. This connection between the Indiana business situs and the Indiana sales subjects the income derived from these sales to the Indiana gross income tax.

FINDING

The taxpayer's protest is denied.

II. 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 presented sufficient evidence to sustain its burden of proof that it was not negligent in its failure to pay the proper amount of tax in this instance.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420030096.LOF

LETTER OF FINDINGS NUMBER: 03-0096
Sales Tax
Responsible Officer
For the Tax Period June, 1995 – September, 1997

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

ISSUES

1. Sales Tax-Responsible Officer Liability

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

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

STATEMENT OF FACTS

The taxpayer was affiliated with a corporation that did not properly remit collected sales taxes to the state during the tax period June, 1995 through September, 1997. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed the additional sales taxes, interest and penalty against the taxpayer as a responsible officer. The taxpayer protested the assessment of tax and penalty. A hearing was held and this Letter of Findings results.

1. Sales Tax-Responsible Officer Liability

DISCUSSION

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

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

An individual who:

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

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

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

Pursuant to Indiana Department of Revenue v. Safayan, 654 N.E. 2nd 270 (Ind. 1995) at page 273: "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid." The factors considered to determine whether a person has such authority are the following:

1. The person's position within the power structure of the corporation;

2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and

3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

In 1991 the taxpayer was a retail employee of the corporation when the owners during the tax period purchased the business. At that time, the taxpayer changed her status to a commission only outside sales person. In 1993 the taxpayer was made a regular salaried employee in consideration for giving up the outside sales commissions. At that time, she was given ten shares of stock and the title of Vice President. No powers or authority accompanied her new title. The taxpayer resigned from the corporation in January 1998. During her association with the corporation, the taxpayer had no decision making authority, no ability to enter into contracts, no fiscal responsibilities, no authority to issue checks except for preauthoritized checks for COD deliveries, no access to corporate books or records, and no knowledge of the tax delinquency.

The taxpayer provided significant documentation evidencing that she did not have the position within the corporate power structure, authority as an officer and employee, or control over finances that would give her the duty to remit the trust taxes to the

state of Indiana. The taxpayer sustained her burden of proving that the department incorrectly assessed the corporation's sales tax liability against her personally.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420030179P.LOF

LETTER OF FINDINGS NUMBER: 03-0179P
Sales & Use Tax
For the Calendar Year of 1999

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

II. Tax Administration - Interest

Authority: IC 6-8.1-10-1

The taxpayer protests the interest assessment.

STATEMENT OF FACTS

The negligence penalty and interest were assessed on the underpayment of use tax resulting from a Department audit conducted for the calendar year 1999.

The taxpayer is a company located in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be waived as business conditions have turned downwards.

The Department points out the error in the audit is material.

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.

II. Tax Administration – Interest

Interest may not be waived according to statute IC 6-8.1-10-1.

DEPARTMENT OF STATE REVENUE

02-20030255.LOF

LETTER OF FINDINGS NUMBER: 03-0255
Gross Income Tax
For the Years 1988, 1989, 1993, 1994, & 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-Agency

Authority: Ind. Code § 6-2.1-2-2(a)(2)**;** 45 IAC 1-1-54(2); *U-Haul Co. of Indiana, Inc. v. Indiana Department of State Revenue* 784 N.E.2d 1078 (Ind. Tax 2003); *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 184-200 (1995); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

Taxpayer protests the Department's assessment of additional tax with respect to amount received by a principal for rental income from Indiana, on the basis that it was actually collected for clerical and administrative expenses.

STATEMENT OF FACTS

Taxpayer is primarily a service company based in Arizona, providing various clerical and administrative services. Taxpayer has a contractual relationship with three sets of businesses (collectively, "System"). Taxpayer provides clearing house, accounting, computer, management analysis, and other services to the System in accordance with three groups of businesses. One set ("Set 1 businesses") consists of businesses that provide moving equipment to System. Set 1 receives a percentage of rental amounts collected by dealers.

Another set of businesses ("Set 2 businesses") consists of businesses that merchandise and supervise the maintenance and repair of rental equipment. Each business in Set 2 is assigned a region in which the Set 2 businesses are responsible for establishing and servicing dealer arrangements. Set 2 businesses receive a percentage of gross rental income collected within their regions.

A third set of businesses ("Set 3 businesses") consists of businesses that display and rent moving equipment to the public. Under contracts with taxpayer, Set 3 makes weekly deposits of all rental income collected from the public to a bank account held by taxpayer. Set 3 businesses receive a percentage of gross rental amounts received from the public for leasing activities.

Department conducted an audit of taxpayer and each set of businesses. After review, it was determined by audit that the income from Indiana rentals was subject to gross income tax to the taxpayer, based on the fact that taxpayer is the principal and the sets of businesses are agents with respect to the collection of rental income in Indiana. Taxpayer protests the imposition of gross income tax with respect to the rental receipts attributed to it, maintaining that taxpayer's receipts were for clerical and administrative services performed outside Indiana.

I. Gross Income Tax-Agency

DISCUSSION

For income derived by certain taxpayers prior to January 1, 2003, Indiana imposes a tax known as the gross income tax. Ind. Code § 6-2.1-2-2. For a taxpayer who is not an Indiana resident or domiciliary, the tax is imposed on the receipt of taxable gross income derived from activities or businesses or any other sources within Indiana. Ind. Code § 6-2.1-2-2(a)(2).

Taxpayer's income under its contractual relationship with its sets of businesses derives from the rental activity conducted by its agents' rental of property. *U-Haul Co. of Indiana, Inc. v. Indiana Department of State Revenue* 784 N.E.2d 1078, 1084 (Ind. Tax 2003). To the extent that the taxpayer's receipts are the result of Indiana rental of moving equipment, the rentals constitute an activity or business conducted within Indiana. *Id.*

Taxpayer argues that the income was derived from essentially clerical and administrative services, in effect for the benefit of its sets of businesses, and therefore only taxable in the state in which the services were actually rendered, in contrast to the agent in *U-Haul* who argued successfully that its payments were not for their direct benefit. *Id.* at 1079. Taxpayer's arguments regarding the receipts being for clerical and administrative-type expenses under contractual arrangements ignores one minor thing: while taxpayer did engage in such activities, the Tax Court explicitly found that the taxpayer maintained a significant degree of control over the sets of businesses with respect to income derived from renting moving equipment, enough to create an agency relationship with the sets of businesses with taxpayer as principal. *Id.* at 1083-1084. The rental of moving equipment in Indiana by taxpayer and its agents constitutes an activity or business conducted within Indiana.

Further, taxpayer has consistently maintained for several years of Departmental audits, protests and litigation involving the sets of businesses that the Set 2 businesses have been agents for taxpayer for the collection of the rental income derived from activities in Indiana. Taxpayer's activities in this case are the activities conducted by the taxpayer in *U-Haul*. In *U-Haul*, a service company, rental companies and rental dealers had the same relationship as the relationship between taxpayer and the sets of businesses in this case. The Tax Court found an agency relationship between the service company as principal and rental companies as agents which exempted the rental companies in that case from gross income tax on the rental income to the extent it was not retained by the agents. *Id.* at 1084. Thus, as the same relationship existed between taxpayer and its sets of businesses as existed between the service company and rental companies and rental dealers in *U-Haul*, an agency relationship existed between taxpayer and the sets of businesses.

In addition, taxpayer cites to *U-Haul* for the proposition that the principal is not subject to gross income tax when another taxable person is acting as an agent for gross income tax. While an agency relationship does alter *who* the taxpayer is, and may result in an exempt principal based on that principal not being an otherwise taxable entity, it does not change the *character* of the transaction from which the relevant income derived. Here, the gross income was derived from rental of property within Indiana, and

is gross income within the meaning of the statute.

Taxpayer also argues, in the alternative, that less than the full amount of gross income should be taxed to taxpayer. While a portion of the gross income may have been payable to the various sets of businesses acting as agents, taxpayer has derived the beneficial interest in the full amount of gross income. Its payments to its sets of businesses reflect the discharge of contractual obligations under the agency. 45 IAC 1-1-54(2). Taxpayer had the right to the full amount of the gross income at the moment it was deposited into its bank account, and if taxpayer refused to permit conveyance the income to the sets of businesses, the sets of businesses would sue taxpayer for their contractual portions. Thus, taxpayer had a beneficial interest in the full portion of the gross income at the time of receipt, and only later relinquished its share.

Taxpayer also raises a constitutional challenge based on a lack of ties to Indiana. This point will not be belabored. Taxpayer has entered into Indiana via its agents, which is plainly sufficient to create nexus for taxation in Indiana. Taxpayer incurs no additional tax if all states impose a similar tax, while the tax relates fairly to the amount of services that Department provides taxpayers and its agents. Taxpayer's liability for gross income tax is the same for its income derived from Indiana as if taxpayer was located in Indiana. Finally, taxpayer's taxes fairly reflect taxpayer's benefit received from roads, police and fire protection, as well as the myriad of other services that the government of Indiana provides. *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 184-200 (1995); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320030302P.LOF

LETTER OF FINDINGS NUMBER: 03-0302P
Withholding Tax
For the Calendar Year 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.

II. Tax Administration – Interest

Authority: IC 6-8.1-10-1

The taxpayer protests the interest assessment.

STATEMENT OF FACTS

The late penalty and interest were assessed on the late filing of a non-resident shareholder withholding for the calendar year 2002.

The taxpayer is a company located in Indianapolis.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be waived as the taxpayer has a good tax compliance history, and, the error was the result of the unintentional clerical mistake.

With regard to the tax compliance history, the taxpayer has had several tax calculation mistakes and late filings. The Department does not find the taxpayer has an exemplary tax compliance 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 ignorant of listed tax laws. Ignorance 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.

II. Tax Administration – Interest

Interest may not be waived according to statute IC 6-8.1-10-1.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20030437P.LOF

LETTER OF FINDINGS NUMBER: 03-0437P
Tax Administration—Penalty
For the Years 1997, 1998, 1999 & 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. Tax Administration—Penalty

Authority: 45 IAC 15-11-2

Taxpayer protests the 10% negligence penalty.

STATEMENT OF FACTS

The penalty was proposed in the first instance because the auditor determined taxpayer had not self-assessed and remitted sales and use tax even though taxpayer was aware of its duty to do so. Taxpayer argues that it had no intent to defraud or deprive the Department of the revenue owed.

I. Tax Administration—Penalty

DISCUSSION

Penalty assessments depend on a number of factors outlined in the regulation cited *supra*, and can be waived based on a showing of sufficient cause:

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

The Department finds the taxpayer did not act with reasonable care. Taxpayer freely admits mistakes were made, but that its intent was not to defraud the Department. Fraudulent intent is not one of the requirements for the negligence penalty to apply. The Department denies taxpayer's request to abate the 10% penalty assessment.

FINDING

Taxpayer's request to abate the 10% negligence penalty is denied.

DEPARTMENT OF STATE REVENUE

04-20030462P.LOF

LETTER OF FINDINGS NUMBER: 03-0462P
Tax Administration—Penalty
For the Years 2000, 2001 & 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—Penalty

Authority: 45 IAC 15-11-2

Taxpayer protests the 10% negligence penalty.

STATEMENT OF FACTS

The penalty was proposed in the first instance because the auditor determined taxpayer had not self-assessed and remitted use tax even though taxpayer was aware of its duty to do so. Taxpayer argued that it had been a good corporate taxpayer over the years and the clerical errors resulted in a very small percentage of purchases included in the audit.

I. Tax Administration—Penalty

DISCUSSION

Penalty assessments depend on a number of factors outlined in the statute and regulation cited *supra*, and can be waived based on a showing of sufficient cause:

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

The Department finds the taxpayer did not act with reasonable care because clerical omissions and/or mistakes constitute negligence. The Department denies taxpayer's request to abate the 10% penalty assessment.

FINDING

Taxpayer's request to abate the 10% negligence penalty is denied.

DEPARTMENT OF STATE REVENUE

0420030274P.LOF

LETTER OF FINDINGS NUMBER: 04-0274P
Use Tax
For Tax 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. Tax Administration—Negligence Penalty

Authority: IC 6-2.5-1-8; IC 6-2.5-4-1; IC 6-2.5-6-10; IC 6-8.1-10-2.1; 45 IAC 15-11-2

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

STATEMENT OF FACTS

As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments of use taxes for 1999 and 2000. Taxpayer paid amounts equal to the assessments, but protested the imposition of a ten percent negligence penalty. Further facts will be provided as necessary.

I. Tax Administration—Negligence Penalty

DISCUSSION

Taxpayer's business consists of data processing, data storage, and administration of data systems and billing systems for telephone companies. Taxpayer protests the imposition of a ten percent negligence penalty on assessments for tax years 1999 and 2000. The Department imposed the negligence penalty due to underpayment of use tax for the years in question, as provided in IC 6-8.1-10-2.1. As the result of an audit, the Department determined that taxpayer was taking a one percent (1%) collection fee from use tax payments it made to Indiana. Also, the Department determined that a one percent collection fee is allowed for sales tax but not use tax, and taxpayer was therefore not entitled to the collection fee on its use tax payments.

Taxpayer paid an amount equal to the underlying assessments, but did not pay an amount equal to the penalties. Taxpayer states in its protest that it paid sales tax and use tax consistently and timely during the audit period and was unaware that any sales tax or use tax had been omitted. Taxpayer also points out that the amount in question is a small fraction of its overall tax payments, most of which were properly paid.

The relevant statute is IC 6-2.5-6-10(a), which states:

> (a) In order to compensate retail merchants for collecting and timely remitting the state gross retail tax and the state use tax, every retail merchant, except a retail merchant referred to in subsection (c), is entitled to deduct and retain from the amount

of those taxes otherwise required to be remitted under IC 6-2.5-7-5 or under this chapter, if timely remitted, a retail merchant's collection allowance.

IC 6-2.5-1-8 states:

"Retail merchant" means a person who is described as a retail merchant in IC 6-2.5-4 or who is required to hold a retail merchant's certificate under IC 6-2.5-8.

IC 6-2.5-4-1(b) explains:

A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

(1) acquires tangible personal property for the purpose of resale; and

(2) transfers that property to another person for consideration.

Since taxpayer's business is data processing, data storage, and administration of data systems and billing systems for telephone companies it is not acquiring tangible personal property for the purpose of resale and so is not a retail merchant making a retail transaction under IC 6-2.5-4-1(b). Therefore, taxpayer is not a retail merchant under IC 6-2.5-1-8, and is not permitted to use the retail merchant's collection allowance described in IC 6-2.5-6-10(a).

The Department refers to 45 IAC 15-11-2(b), which states:

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

Also, 45 IAC 15-11-2(c) provides in pertinent part:

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

Since taxpayer was not permitted the collection allowance under IC 6-2.5-6-10, the amount of use tax it remitted to the State was incorrect. Therefore, taxpayer did not exercise such reasonable care, caution or diligence as would be expected of an ordinary reasonable taxpayer. Under 45 IAC 15-11-2(b), this is negligence.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030466P.LOF

LETTER OF FINDINGS NUMBER: 04-0466P
Sales and Use Tax
For Tax Years 1999, 2000 and 2001

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

ISSUE

I. Tax Administration—Negligence Penalty

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

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

STATEMENT OF FACTS

Taxpayer operates a chain of auto parts stores. As the result of an audit for the tax years 1999 through 2001, the Indiana Department of Revenue ("Department") issued proposed assessments for unpaid use taxes. The assessments included a ten percent (10%) negligence penalty for each assessment. Taxpayer protests the imposition of penalties. Further facts will be provided as necessary.

I. Tax Administration—Negligence Penalty

DISCUSSION

Taxpayer protests the imposition of a ten percent negligence penalty on assessments for tax years 1999, 2000 and 2001. The

Department imposed the negligence penalty due to underpayment of use tax for the three years in question, as provided in IC 6-8.1-10-2.1.

Taxpayer paid the amounts of the underlying assessments, but did not pay the full assessment equal to the penalty amounts. Taxpayer states that it has paid thousands of dollars of taxes to the State of Indiana in the past, and that its failure to pay the full amount of taxes due was not intentional and will not happen in the future.

The Department refers to 45 IAC 15-11-2(b), which states:

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

Also, 45 IAC 15-11-2(c) provides in pertinent part:

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

The assessments imposed as the result of the Department's audit were due to taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. This qualifies as negligence under 45 IAC 15-11-2(b). Taxpayer has not affirmatively established that failure to pay the full amount of tax due for 1999, 2000 and 2001 was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is denied.