**DEPARTMENT OF STATE REVENUE**
**AUDIT-GRAM NUMBER IR-024**
**March 2, 2004**

**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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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**

**Combined Return [FN 1] – Financial Institutions Tax**

**Authority:** IC 6-5.5-1-18(a); IC 6-5.5-5-1; 45 IAC 17-3-2(b); 45 IAC 17-3-5

**IC 6-5.5-5-1. Combined return...**

(a) [A] unitary group... shall file a combined return covering all the operations of the unitary business and including all the members of the unitary business. [1990]

**IC 6-5.5-1-18. "Unitary business" and "unitary group" defined [effective until January 1, 2002].**

(a) …The term "unitary group" includes those entities that are engaged in a unitary business transacted wholly or partially within Indiana.

**IC 6-5.5-1-18. "Unitary business" and "unitary group" defined [effective January 1, 2002].**

(a) …The term "unitary group" includes those entities that are engaged in a unitary business transacted wholly or partially within Indiana. However, the term does not include an entity that does not transact business in Indiana.

**I. GENERAL STATEMENT**

Prior to January 1, 2002 all members of a unitary group were required to be included in the combined Financial Institutions Tax return. Effective January 1, 2002 only those members of the unitary group who have nexus in Indiana are to be included in the filing.

**II. TAXPAYER DEFINED [FN 2]**

A taxpayer is any corporation transacting the business of a financial institution in Indiana as a holding company, regulated financial corporation (bank, credit union, production credit association, Edge Act corporation), a subsidiary [FN 3] of a holding company or regulated financial corporation or any other corporation carrying on the business of a financial institution. Transacting the business of a financial institution requires that eighty (80) percent or more of the corporation's gross income be derived from:

A. Making, acquiring, selling or servicing loans or extension of credit.
B. Leasing real or personal property that is the economic equivalent of the extension of credit, i.e., financial lease.
C. Operating a credit card, debit card, charge card, or similar business.

**III. TRANSACTING BUSINESS IN INDIANA**

The Financial Institutions Tax utilizes an economic nexus concept rather than the usual physical presence nexus. Under IC 6-5.5-3-1 a taxpayer is considered to be transacting business within Indiana if any of the following activities are present:

A. Maintains an office in Indiana;
B. Has an employee, representative, or independent contractor conducting business in Indiana;
C. Regularly sells products or services of any kind or nature to customers of Indiana that receive the product or service in Indiana;
D. Regularly solicit business from potential customers in Indiana;
E. Regularly performs services outside of Indiana that are consumed in Indiana;
F. Regularly engages in transactions with customers in Indiana that involve intangible property and result in receipts flowing to the taxpayer from within Indiana;
G. Owns or leases tangible personal property or real property located in Indiana; or,
H. Regularly solicits and receives deposits from customers in Indiana.

**IV. UNITARY GROUP – PRIOR TO JANUARY 1, 2002**

For purposes of Financial Institutions Tax, a unitary group includes all members of a unitary group [FN 4]. If one member of a unitary group is conducting the business of a financial institution in Indiana, then all members of the unitary group engaged in a unitary business must file a combined return even if some of the members are not transacting business in Indiana. There should be no attempt to limit group membership to only those entities that conduct business in Indiana.

**V. UNITARY GROUP – EFFECTIVE JANUARY 1, 2002**

The unitary group includes those entities that are engaged in a unitary business transacted wholly or partially within Indiana. The unitary group may include **only** those members that are transacting business in Indiana.

**VI. AUDIT PROCEDURE**

If a combined return is required and has not been filed, all unfiled periods may be reviewed and adjustments proposed.

If any member of the required combined group has filed an income tax or financial institutions tax return in Indiana and made tax payments, the payment made will be credited against any proposed adjustment to the combined return. [FN 5]

Note, however, that credit can only be given for those payments made by entities on which the statute is open or under Indiana extension. Any payment made that would be out of statute at the time the audit is completed is not refundable.

[FN 1] IC 6-5.5-2-1 and IC 6-5.5-5-1 require at least two (2) taxpayer members before a combined return is required.
[FN 2] IC 6-5.5-1-17
[FN 3] IC 6-5.5-1-14 defines a subsidiary as a corporation who has 50 percent of their voting stock or net worth owned by another corporation.
[FN 4] IC 6-5.5-1-18
[FN 5] IC 6-8.1-9-1(a)

**DEPARTMENT OF STATE REVENUE**
**AUDIT-GRAM NUMBER IR-025**
**March 17, 2004**

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

**ISSUE**

**Property Provided With an Operator**

**Authority:** IC 6-2.5-4-10; IC 6-2.5-1-21; 45 IAC 2.2-4-27(d)(4); *Mason Metals Co.*, Ind. Tax Ct., 1992; Information Bulletin #42, June 1995

**IC 6-2.5-4-10. Renting or leasing… to another.**

(a) A person… is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person. [1980]

(a) A person…is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease. [2003]

**IC 6-2.5-1-21. "Lease or rental" defined [effective January 1, 2004].**

(a) …."Lease" or "rental" does not include:

….

(3) providing tangible personal property along with an operator for a fixed or indeterminate period, if:

(A) the operator is necessary for the equipment to perform as designed; and

(B) the operator does more than maintain, inspect, or set up the tangible personal property.

….

(d) This section applies only to leases or rental entered into after June 30, 2003, and has no retroactive effect on leases or rentals entered into before July 1, 2003. [2003]

**45 IAC 2.2-4-27(d)(4) Tangible personal property; renting and leasing**

….

(d) The rental or leasing of tangible personal property…is taxable.

….

(4) When tangible personal property is rented or leased together with the services of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice…. [Temporary Regulations 2004]

**I. GENERAL STATEMENT**

The income from lease or rental of tangible personal property is subject to the collection of sales tax by the lessor. Income from the performance of services is not subject to sales or use tax.

Prior to January 1, 2004, transactions which include elements of both taxable lease income and exempt service income must be further analyzed to determine the extent of the parties' right to control the property.

Effective January 1, 2004, property rented or leased with an operator is considered to be a service not subject to sales or use tax if:

A. the operator is necessary for the equipment to perform as designed; and,

B. the operator does more than maintain, inspect or set-up the property.

Property rented or leased with an operator is subject to sales or use tax if the operator does no more than set-up, perform maintenance or inspect the property. If the charge for the operator's service is not separately stated, the rental/lease is considered to be a retail unitary transaction subject to sales or use tax on the total amount.

**II. DOCUMENTS EVIDENCING LEASE OR SERVICE**

The rental/lease agreement is evidence of the intention of the parties. Such evidence can be overcome by proof that the facts and the reality are otherwise. [FN 1] The burden of proving otherwise rests with those seeking to invalidate the written agreement. Unless either party to the transaction can prove that the substance of the transaction is in fact the provision of an exempt service, the rental of tangible personal property is subject to sales tax.

**III. PROPERTY PROVIDED WITH AN OPERATOR – Prior to January 1, 2004**

A. Control of Leased Property

**45 IAC 2.2-4-27. Tangible personal property; renting and leasing.**

(3) Renting or leasing property with an operator:

(A) The renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised. [1972]

The charge for the lease of tangible personal property including any unstated charge for the services of an operator is entirely subject to sales tax if the lessee maintains "control" over the property during its intended activity.

B. Performance of a Service

**45 IAC 2.2-4-27. Tangible personal property; renting and leasing.**

(3) Renting or leasing property with an operator:

(B) The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator. [1972]

The distinction between A, a taxable transaction for rental of tangible personal property including the unstated charge for the services of an operator and B, an exempt transaction for the performance of a service which requires the services of an operator, is the right of the parties to "control" the operation of the property.

C. Lease of Property with an Operator

**45 IAC 2.2-4-27. Tangible personal property; renting and leasing.**

(3) Renting or leasing property with an operator:

(C) When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice rendered by the lessor to the lessee. [1972]

If the lessee maintains "control" over the leased tangible personal property, any separately stated charge for the services of an operator is exempt. If such charge is not separately stated to the lessee, the entire lease charge is a unitary transaction subject to sales tax.

**IV. INDICATORS OF "CONTROL" OVER PROPERTY [FN 2]**

1. Employment of the driver or operator.
2. Command over the activities of the property including the route (if movable), time of operation, most efficient method of operation, idle time, units of production, et al.
3. Obligation to pay operational costs and required maintenance and repairs.
4. Payment of fuel costs.
5. Responsibility to secure equipment when not in service.
6. Obligation to pay insurance and obtain government permits as required.

A determination of the party possessing "control" over property is not limited to the above factors; however, the existence of any one or more of the factors supports a rebuttable presumption.

**V. PROPERTY PROVIDED WITH AN OPERATOR – effective January 1, 2004**

A. Property rented or leased along with the services of an operator is not subject to sales or use tax provided:

1. the operator is necessary for the equipment to perform as designed; and,
2. the operator does more than maintain, inspect, or set-up the tangible personal property.

B. When the lessor provides the services of an operator to simply set-up, provide maintenance and/or inspect the property, the rental or lease is considered to be a taxable retail transaction. To be exempt from sales or use tax, the charge for the operator's services must be separately stated on the invoice. If not separately stated, the rental/lease is considered to be a retail unitary transaction subject to the collection of sales or use tax on the total charge.

C. The renting or leasing of a vehicle together with an operator, regardless of extent of control exercised, is not subject to sales or use tax if the vehicle is directly used in the rendering of public transportation. [FN 3]

D. Long-term rentals or leases entered into prior to December 31, 2003 are not subject to the provisions of IC 6-2.5-1-21.

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[FN 1] See *Meridian Mortgage Co.*, Indiana Appeals Court, 1979.
[FN 2] See *Mason Metals Company, Inc.*, Ind. Tax Ct., 1992 quoting *Indianapolis Transit Sys.*, Ind. App. 1976.
[FN 3] 45 IAC 2.2-5-27(d)(5)

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**DEPARTMENT OF STATE REVENUE**
**COMMISSIONER'S DIRECTIVE #21**
**January 2004**
**(Updated April 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 charges are included in gross retail income. **(Installation charges were included for the period January 1, 2004 through March 17, 2004.)**
- 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. **(This provision was moved to IC 6-2.5-1-5 effective March 18, 2004. Additionally, this statute now states that transfer of tangible personal property in a retail transaction does not take place until after delivery.)**

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.
- **Effective July 1, 2004, the deduction may only be assigned in writing.**

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.

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Kenneth L. Miller
Commissioner

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**DEPARTMENT OF STATE REVENUE**
**COMMISSIONER’S DIRECTIVE #22**
**January 2004**

**(NOTE: This document is applicable only for transactions that took place during the period of January 1, 2004 through March 17, 2004. See Commissioner’s Directive #23 for transactions that take place after March 17, 2004)**

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**SUBJECT**: Delivery and Installation Charges Subject to Indiana Sales and Use Tax

**I. INTRODUCTION**

Effective January 1, 2004, Indiana enacted legislation to bring Indiana’s sales and use tax statutes into conformity with the Streamlined Sales and Use Tax Agreement.

**II. STATUTORY CHANGES**

P.L. 257-2003 amended IC 6-2.5-1-5 concerning the definition of “gross retail income”. The amendment includes delivery and installation in the definition of gross retail income.

**III. DELIVERY CHARGES**

Delivery charges are now included in gross retail income and subject to tax regardless of shipping terms. Delivery that is made by or on the behalf of the seller of tangible personal property will be taxable whether or not the delivery charge is separately stated.

**IV. INSTALLATION CHARGES**

A. An installation charge is defined as a charge to add something new or different to tangible personal property. Before January 1, 2004, installation charges that were separately stated were generally not subject to Indiana sales tax. Effective January 1, 2004, installation charges by a seller to install tangible personal property are subject to Indiana sales tax, even if the installation charges are separately stated.

B. Installation charges billed and furnished by a third party are exempt.

C. If the tangible personal property that is sold is not subject to sales tax because of an available exemption, then the installation charges will not be subject to sales tax.

D. Charges to incorporate tangible personal property into a permanent attachment to real property are not subject to sales tax. An improvement to realty takes place whenever tangible personal property is permanently attached to land or attached to a structure that is permanently attached to land. Such charges are not subject to sales tax regardless of whether the contract is a “lump sum” contract or a “time and materials” contract.

1. Examples of non-taxable installations that constitute improvements to realty are: doors, garage doors, garage door openers, windows, cabinets, garbage disposals, water heaters, water softeners, alarms, furnaces, central air conditioning units, gutters, and carpeting.

2. Examples of taxable installations that do not constitute improvements to realty are: personal computers, home stereos, televisions, refrigerators, stoves, dishwashers, garbage compactors, washers, dryers, and window air conditioning units.

**NOTE:** The purchase and installation of new home appliances does not constitute repair or replacement per Section V below.

**Example 1.** A department store sells drapes and charges to install them. The drapes are taxable and the installation charge is also taxable.

**Example 2.** A department store sells blinds, but an independent contractor does the installation and bills the customer directly. The installation charge is not taxable because it is not part of the sales price.

**Example 3.** A store sells and installs modular workstations. Two separate contracts are drawn up by the store. One contract is for the sale of the workstations, and one for the installation. Sales tax applies to both the sale and the installation. Separate invoices do not make the installation exempt.

**Example 4.** An individual purchases running boards for their truck from an auto parts dealer and takes them to an unrelated dealership to have them installed. The charge to install the running boards is not taxable because the transaction between the dealership and the individual did not include the sale of the property being installed.

**Example 5.** An individual takes their car to a dealership to have a sunroof added to their car. The installation charges are taxable even if they are separately stated because it is an addition to tangible personal property.

**V. REPAIR/REPLACEMENT CHARGES**

**Repair Charges.** Repair charges are charges to restore an item so that it can be used for its original purpose. Separately stated charges for repair services are not taxable. Labor charges for replacement items are also not subject to sales tax.

**Example 6.** The charge to reupholster a sofa is $500 ($200 material, $300 labor). The labor is for removing the old fabric and replacing it with new fabric. Since the sofa is being restored to its original form, tax will only be charged on the $200 for material, if the material and labor charges are separately stated.

**Example 7.** A person takes their car to be repaired as the result of an automobile accident. The repair or replacement of fenders, auto glass (etc) will require that the sales tax be paid on the materials that are replaced or repaired, but the labor will be exempt if it is separately stated.

**Replacement Charges.** Replacement charges are charges for replacing an item that is part of another item of tangible personal property. Charges to install replacement items are exempt from tax if they are separately stated. Replacement charges will not be subject to tax even if the replacement item were to be considered an “upgrade.” In order to be considered an upgrade, an item must be of the exact same nature as the item it is replacing.

**Example 8.** A person has the oil and filter changed on their car. The oil and filter are taxable, but the charge to install them is exempt if it is separately stated.

**Example 9.** A person has the heating element on a clothes dryer replaced. The heating element is taxable, but the labor to install the element is exempt if separately stated.

**Example 10**. A person has a new set of after market wheels installed on their car. The installation charges are not subject to tax because the wheels are considered an upgrade.

**Example 11**. A person has a new car stereo with a cd player installed in their car. The original stereo did not have a cd player. The charges to install the new stereo with a cd player would not be subject to sales tax because the new stereo is still of the exact same nature as the car’s original stereo even though it has additional capabilities.

**Example 12.** A person has a subwoofer installed in their car. The charges to install the subwoofer are subject to sales tax because it is additional equipment and not a replacement or upgrade.

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Kenneth L. Miller
Commissioner

**DEPARTMENT OF STATE REVENUE**
**COMMISSIONER'S DIRECTIVE #23**
**April 2004**
**(Supersedes Commissioner's Directive #22 issued 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**: Delivery and Installation Charges Subject to Indiana Sales and Use Tax

**I. INTRODUCTION**

Effective January 1, 2004, Indiana enacted legislation to bring Indiana's sales and use tax statutes into conformity with the Streamlined Sales and Use Tax Agreement. A further change was made effective March 18, 2004 by HEA 1365-2004.

**II. STATUTORY CHANGES**

P.L. 257-2003 amended IC 6-2.5-1-5 concerning the definition of "gross retail income". That amendment included delivery and installation in the definition of gross retail income. HEA 1365-2004 removed installation from the definition of gross retail income and amended IC 6-2.5-4-1 to state that the transfer of tangible personal property in a retail transaction does not take place until after delivery.

**III. DELIVERY CHARGES**

Delivery charges are included in gross retail income and subject to tax regardless of shipping terms. Delivery that is made by or on the behalf of the seller of tangible personal property will be taxable whether or not the delivery charge is separately stated.

A. Delivery charges billed and furnished by a third party are exempt.

Example #1 – A company purchases a piece of equipment from the manufacturer. The purchasing company hires a trucking company to pick up the piece of equipment at the manufacturer's facility and deliver it to purchaser's location. The shipping charges are not subject to sales tax because they are not included in a retail transaction.

B. If the tangible personal property that is sold is not subject to sales tax because of an available exemption, then the delivery charges will not be subject to sales tax.

Example #2 – An office supply retailer purchases 500 ballpoint pens from a wholesaler for $1,000. The wholesaler charges the purchaser $100 to deliver the pens to the purchaser. The purchaser issues an exemption certificate to the wholesaler indicating that the pens are being purchased for resale. The entire $1,100 charge is exempt from sales tax.

C. Separately stated charges for delivery of prepared food beyond the seller's location are subject to sales tax.

Example #3 – A pizza parlor imposes a $3.00 charge to deliver pizzas to customer's residence. The $3.00 charge is subject to sales tax.

D. Charges to incorporate tangible personal property into a permanent attachment to real property are not subject to sales tax. However, contractors that enter into time and material contracts are acting as retail merchants with regard to the tangible personal property transferred pursuant to such contracts. Any charges for delivery of tangible personal property included in a time and materials contract are subject to sales tax. Contractors that enter into lump sum contracts must pay sales tax or accrue use tax on any delivery charges incurred by the contractor with regard to the tangible personal property transferred pursuant to such contracts.

Example #4 – A contractor enters into a time and materials contract to replace a driveway. The contractor charges its customer $100 for gravel and $25 to have it delivered to the jobsite. The contractor must collect sales tax on the entire $125 charge.

Example #5 – A contractor enters into a lump sum contract to replace a driveway. The contractor charges his customer a flat fee of $5,000 to replace the driveway. The contractor purchases gravel from the aggregate company for $100 and the aggregate company charges the contractor $25 to deliver the gravel to the jobsite. The contractor must pay sales tax, or accrue use tax if he has given the aggregate company an exemption certificate, on the entire $125 charge.

The Tax Court decision in *Cowden and Sons Trucking, Inc. v. Indiana Department of State Revenue*, 575 N.E. 2d 718 (Ind. Tax 1991) is no longer valid due to the statutory changes made by P.L. 257-2003 and HEA 1365-2004. Therefore, transportation companies that purchase tangible personal property for delivery to customers and charge their customers for the tangible personal property will be required to register as retail merchants and collect sales tax on the entire charge for such transactions.

Example #6 – A residential customer orders 3 yards of white rock to be delivered from a hauling company. The hauling company proceeds to an aggregate company and purchases 3 yards of white rock that it delivers and dumps at the customer's residence. The hauling company does not mark up the price of the white rock from the price it paid at the aggregate company and adds that amount to its hauling charges. The hauling company is acting as a retail merchant and must collect sales tax on the entire amount it charges its customer for the white rock and delivery regardless of whether the charges are separately stated on the bill.

**IV. INSTALLATION CHARGES**

As of March 18, 2004, separately stated installation charges are not subject to sales tax. For the period of January 1, 2004 through March 17, 2004, such charges were subject to sales tax. Sales tax should have been collected on such charges during that period.

Installation charges that are not separately stated from the selling price of an item or the delivery charge for an item will continue to be subject to sales tax.

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Kenneth L. Miller
Commissioner

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**DEPARTMENT OF STATE REVENUE**
**INFORMATION BULLETIN # 60**
**SALES TAX**
**April 2004**
**(Replaces Bulletin #60 dated December 2002)**

**DISCLAIMER:** Informational bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules and court decisions. Any information 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**: Construction Contractors

**REFERENCES:** IC 6-2.5-1-5, IC 6-2.5-3-3, IC 6-2.5-4-1, IC 6-2.5-4-9, IC 6-2.5-5-3, 45 IAC 2.2-3-7 through 45 IAC 2.2-3-12, 45 IAC 2.2-4-21 through 45 IAC 2.2-4-26

**INTRODUCTION**

The general rule for the application of sales or use tax is that all sales of tangible personal property are taxable, and all sales of real property are not taxable. This general rule is not changed by the conversion of tangible personal property into realty. Therefore, all construction material purchased by a contractor is taxable either at the time of purchase, or if purchased exempt (or otherwise acquired exempt) upon disposition unless the ultimate recipient could have purchased it exempt.

**DEFINITIONS**

A. "Construction Contractor" means anyone who is obligated under the terms of a contract to furnish the necessary labor or materials, or both, to convert construction material into realty, including a general or prime contractor, a subcontractor, or a specialty contractor. The term includes a person engaged in the business of: building, cement work, carpentry, plumbing, heating and cooling, electrical work, roofing, wrecking, excavating, plastering, tile work, road construction, landscaping, or installing underground sprinkler systems.

B. "Construction materials" means any tangible personal property to be used for incorporation in or improvement of a facility or structure constituting or becoming part of realty. A "facility" means any additions to the land.

C. "Lump sum contract" means a contract to incorporate construction materials into real estate with the charge for labor and materials being quoted as one price. The contractor may subsequently furnish a breakdown of the charges for labor and materials without changing the nature of the lump sum contract. For example, a typical lump sum contract provides that the contractor will build a structure for a total stated price such as $40,000. A lump sum contractor generally must pay sales tax to the vendor who sells the contractor construction materials. If the vendor is located out-of-state and is not required to collect Indiana sales tax or if the person for whom the structure is being built would be exempt from sales tax for the purchase of the construction materials, the lump sum contractor would not pay sales tax. Although the contractor may not pay sales tax when purchasing material from an out-of-state vendor, the contractor would be liable for use tax if the construction materials are stored, used or consumed in Indiana for a nonexempt purpose. Unless otherwise exempt, when a lump sum contractor purchases construction materials free of sales tax, the contractor must pay use tax on those materials when they are incorporated into real property in Indiana. To purchase construction materials exempt from sales tax, a lump sum contractor must be registered as a retail merchant.

D. “Time and materials contract” means a contract to incorporate construction materials into real estate with the charge for the labor and materials being separately stated and the final contract price being dependent on the cost of the materials and the amount of labor it actually takes to complete the contract. Time and materials contractors are considered retail merchants making retail transactions with respect to the sale of construction materials and must register as retail merchants with the Department. Contractors that perform time and material contracts must separately state the charge for any construction materials and must collect Indiana sales tax on the full sales price of the construction material including overhead and profit charges. (Effective March 18, 2004, sales tax must also be collected on delivery charges in a time and materials contract.) The construction materials used by a contractor in a time and materials contract should be purchased exempt by the contractor. The sales tax collected by the contractor must be separately stated on the invoice. A time and materials contractor would be entitled to the eighty-three hundredths of one percent (.83%) collection allowance for timely remittances. Exemption certificates and direct pay permits must be retained by time and materials contractors to prove their non-liability for collecting sales tax on a sale of construction materials. If a time and materials contractor purchases construction materials exempt from sales tax and subsequently uses those materials to fulfill a lump sum contract, the contractor would be subject to use tax on those materials.

E. “Improvement to real estate” means that personal property has been incorporated into and becomes a permanent part of the real property. To accomplish this, the personal property generally takes on an immovable character. An immovable fixture is characterized by three elements:

(1) Real or constructive annexation of the article in question to the land.

(2) Adaptation of the personal property as part of the land.

(3) The intention of the party making the annexation to make the personal property a permanent part of the land so that it would pass with the land upon a sale.

Examples of installations that constitute improvements to realty are: doors, garage doors, garage door openers, windows, cabinets, garbage disposals, water heaters, water softeners, alarms, furnaces, central air conditioning units, gutters, and carpeting.

Examples of installations that do not constitute improvements to realty are: personal computers, home stereos, televisions, refrigerators, stoves, dishwashers, garbage compactors, washers, dryers, and window air conditioning units.

Indiana Property Tax regulations concerning commercial property may be consulted as a guideline to determine whether property is real or personal, but it should not be considered determinative.

**Tax Consequences**

A contractor’s purchase of machinery, tools, equipment and supplies that are not incorporated into the structure being built is subject to sales and/or use tax at the time of purchase. No exemption is available to the contractor because of the exempt status of the customer. Rule 45 IAC 2.2-3-12 [c], which is specifically applicable to contractors under contract for an improvement to real estate with an organization entitled to exemption from sales and use tax, states:

(1) Utilities, machinery, tools, forms, supplies, equipment, and any other items used or consumed by the contractor and which do not become part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.

**Note:**

In the construction and repair of public roads, bridges, highways and other public infrastructure for a governmental entity, a contractor may be specifically required to provide certain items of tangible personal property for the safety of the public, for traffic control, or to enable the government to perform its responsibilities. Such items include, but are not limited to, traffic signals; signs; barrels; barricades; temporary pavement markings; materials to construct temporary traffic lanes, roads and bridges; erosion control and drainage materials; aggregates used to set grades; and field offices and communications equipment, provided such offices and equipment are exclusively for government representatives. The purchase, lease or use of such items by a contractor or its subcontractor to comply with the requirements of a government construction contract are not subject to sales or use tax, provided the item is used solely, in connection with the construction and/or repair of public roads, bridges, highways or other public infrastructures that will be paid for by a governmental entity and is not used for any other purpose.

**Direct Payment Permits**

A contractor holding a direct payment permit may issue it to his suppliers, but when acting as a contractor should remember that he must obtain an exemption certificate—not a direct payment permit—from any exempt customer for whom he is making an improvement to real estate as a result of a lump sum contract.

A lump sum contractor does not sell tangible personal property or collect sales tax as a result of the contract and may not accept a direct payment permit. If the organization, for which the contractor is constructing the improvement, is entitled to an exemption, it must give the contractor an exemption certificate (Form ST-105) -- not a direct payment permit—certifying the exemption.

A prime contractor receiving an exemption certificate for a particular job should issue exemption certificates to subcontractors. Contractors and subcontractors must be registered as retail merchants in order to issue exemption certificates (ST-105 or ST-134).

**Asphalt Manufacturers**

The manufacturing exemption will apply to an asphalt plant and paver, including repair parts and fuel for the respective equipment. Asphalt manufacturers/contractors will be granted an exemption for dump trucks used to transport "hot mix asphalt" from their asphalt plant to the job site. No exemption is available to the extent the respective dump trucks are used to haul "raw materials". Additionally, no exemption for dump trucks is available to contractors who do not produce "hot mix asphalt". Actual records must be maintained to document the exempt usage, if any. Graders, rollers, distributors, front-end loaders and other construction equipment are not exempt and will be subject to Indiana sales and use tax.

**Streets and Sewers**

Contractors acquiring material for incorporation as an integral part of a public street or of a public water, sewage or other utility service system are exempt from sales tax on the purchase of the construction material. The public street or public utility service system must be required under an approved subdivision plot and must be accepted by the appropriate Indiana political subdivision to be publicly maintained after its completion.

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Kenneth L. Miller
Commissioner

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**DEPARTMENT OF STATE REVENUE**

**IN REGARDS TO THE MATTER OF:**
**AMVETS POST NO. 332**
**DOCKET NO. 29-2003-0426**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER**

An administrative hearing was held on Tuesday, December 16, 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, AMVETS #332, was represented by John T. Wilson, Attorney at Law, 403 W. 8th Street, Anderson, Indiana 46016. 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 October 20, 2003, the Petitioner's application to conduct charity gaming was denied. The Petitioner protested in a timely manner.

**FINDINGS OF FACTS**

1) Petitioner submitted a CG-1 (Indiana Department of Revenue Charity Gaming Qualification Application) dated August 8, 2003 to the Indiana Department of Revenue. (Department's Exhibit B).

2) Petitioner's CG-1 was received by the Compliance Division of the Indiana Department of Revenue on August 8, 2003. (Department's Exhibit B).

3) On September 1, 2003 Petitioner received notice that it had been approved as a qualified organization. (Department's Exhibit B).

4) Petitioner's CG-1 was signed by its Post Commander Rich Ulrey and Harold Barkdull its Treasurer. Above their signatures is a certification which states, "We certify under penalty of perjury that the organization applying is a qualified organization and that there is no misrepresentation or falsification in the information stated. We certify that to the best of our knowledge the operators of the charity gaming events have not been convicted of any felonies. We understand that false or misleading statements will be cause for rejection of this application or revocation of future licenses." (Department's Exhibit B).

5) Lori Broadwater is listed on Petitioner's CG-1 as a proposed operator of Petitioner's charity gaming events and a member of Petitioner's organization. Ms. Broadwater was listed as having been an active member for two (2) years. (Department's Exhibit B).

6) Wendy Jones is listed on Petitioner's CG-1 as a proposed operator of Petitioner's charity gaming events and a member of

Petitioner's organization. Ms Jones was listed as having been an active member for one (1) year. (Department's Exhibit B).
7) Petitioner submitted a CG-2 (Indiana Department of Revenue Annual Bingo and/or Pull Tab Application) dated September 4, 2003 to the Indiana Department of Revenue. (Department's Exhibit A).
8) Petitioner's CG-2 was received by the Compliance Division of the Indiana Department of Revenue on September 5, 2003. (Department's Exhibit A).
9) Petitioner's CG-2 was signed by its Post Commander Rich Ulrey and Harold Barkdull its Treasurer. Above their signatures is a certification which states, "We certify under penalty of perjury that the organization applying is a qualified organization, and that there are no misrepresentation or falsification in the information stated. We understand that false or misleading statements will cause rejection of this application or revocation of future license(s)." (Department's Exhibit A).
10) Lori Broadwater is listed on Petitioner's CG-2 as a bingo operator who will supervise, manage, and be responsible for the operation and conduct of the gaming event. Ms. Broadwater was listed not only as a member of Petitioner's organization but also an active member for two (2) years. (Department's Exhibit A).
11) Wendy Jones is listed on Petitioner's CG-2 as a bingo operator who will supervise, manage, and be responsible for the operation and conduct of the gaming event. Ms. Jones was listed as a not only as a member of Petitioner's organization but also an active member for one (1) year. (Department's Exhibit A).
12) Line 9 on Department Form CG-2 states, "Is any tangible personal property (i.e. tables, chairs, bingo blowers, etc.) being leased or donated to you for this event." Petitioner answered "Yes." (Department's Exhibit A).
13) Line 9 continues, "If you answered yes, list the name and address of the lessor or donor. Attach a signed copy of the lease agreement or donation statement from the donor." Petitioner listed only ARC Promotions (Department's Exhibit A).
14) Line 10 on Department Form CG-2 states, "Does your organization own bingo equipment?" Petitioner answered "No." (Department's Exhibit A).
15) The Indiana Department of Revenue Criminal Investigation Division conducted an investigation of the Petitioner on September 19, 2003. (Record at 7).
16) A check of the membership department of the National AMVETS organization indicated that no record of membership for Lori Broadwater and Wendy Jones existed. (Record at 12).
17) A review of Petitioner's Auxiliary dues remittance form dated July 15, 2002 shows Lori Broadwater and Wendy Jones as new members. (Department's Exhibit C).
18) The Petitioner conducted two (2) raffles without obtaining a raffle license. (Record at 14-15).
19) According to Department's Exhibit C both raffle events, if held after Petitioner's qualification date of September 1, 2003, could have qualified for the single event exclusion as the value of the prizes awarded was less than $1,000. Nevertheless, a qualified organization is still required to send the Department written notice of the planned event (See IC 4-32-9-3).
20) ARC Promotions is not licensed as either a manufacturer or distributor to sell, distribute, or manufacture bingo equipment. (Record at 16-17).
21) The Department then notified Petitioner by letter that its Indiana Charity Gaming License application was denied. (Department's Exhibit D).
22) According to the Department's letter dated October 20, 2003, the Petitioner's application to conduct charity gaming was denied (Record at 17).
23) The Petitioner contends that there are sufficient members that would qualify as operators or workers. (Record at 24).
24) Petitioner stated that they had not purchased any equipment from ARC Promotions and they have made arrangements with Lancaster Bingo a licensed distributor. (Record at 24-25).
25) Petitioner argues that the only reason they listed ARC Promotions on its application is that the equipment already in place at the location to be used for gaming purposes belongs to ARC Promotions. (Record at 25).
26) In reviewing Petitioner's CG-2, there was no signed copy of the lease agreement or donation statement from the donor concerning the tangible personal property to be used by the Petitioner in conducting its gaming operation. (Department's Exhibit A).
27) ARC Promotion's equipment was being used at the location Petitioner had chosen to run it gaming operation. (Record at 31).
28) An organization called Hoop Shooters had been using ARC Promotion's gaming equipment and had been conducting gaming operations in the location to be used by the Petitioner. (Record at 32).
29) The owners of ARC Promotions are Auxiliary and Sons members of Petitioner's organization. (Record at 32-33).
30) Petitioner admitted at hearing that they had two raffles and that they did not possess a license for either, and that they did not try to hide the raffles in any way. (Record at 26-27).
31) Petitioner asks that it be granted a license to conduct charity gaming, and be given an opportunity to amend its application that was denied by the department. (Record at 38).

**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 4-32-9-3 states, "(a) A qualified organization is not required to obtain a license from the department if the value of all prizes awarded at the bingo event, charity game night, raffle event, or door prize event, including prizes from pull tabs, punchboards, and tip boards, does not exceed one thousand dollars ($1,000) for a single event and not more than three thousand dollars ($3,000) during a calendar year.

(b) A qualified organization described in subsection (a) that plans to hold a bingo event more than one (1) time a year shall send an annual written notice to the department informing the department of the following:

(1) The estimated frequency of the planned bingo events.
(2) The location or locations where the qualified organization plans to hold the bingo events.
(3) The estimated amount of revenue expected to be generated by each bingo event.

(c) The notice required under subsection (b) must be filed before the earlier of the following:

(1) March 1 of each year.
(2) One (1) week before the qualified organization holds the first bingo event of the year.

(d) A qualified organization described in subsection (a) shall maintain accurate records of all financial transactions of an event conducted under this section. The department may inspect records kept in compliance with this section."

6) IC 4-32-9-28 states, "An operator must be a member in good standing of the qualified organization that is conducting the allowable event for at least one (1) year at the time of the allowable event."
7) IC 4-32-7-4 provides, "The department has the sole authority to license entities under this article to sell, distribute, or manufacture the following:

(1) Bingo cards.
(2) Bingo boards.
(3) Bingo sheets.
(4) Bingo pads.
(5) Any other supplies, devices, or equipment designed to be used in playing bingo designated by rule of the department.
(6) Pull tabs.
(7) Punchboards.
(8) Tip boards.

(b) Qualified organizations must obtain the materials described in subsection (a) only from an entity licensed by the department.
(c) The department may not limit the number of qualified entities licensed under subsection (a).

8) IC 4-32-9-28 states, "An operator must be a member in good standing of the qualified organization that is conducting the allowable event for at least one (1) year at the time of the allowable event."
9) IC 4-32-12-1 provides in pertinent part, "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."

**CONCLUSIONS OF LAW**

1) On October 20, 2003, the Petitioner's application to conduct charity gaming was denied.

2) Petitioner appealed the denial in a timely manner.

3) The issue at hearing was whether the Department's denial was proper.

4) Petitioner's two raffles must have been held after Petitioner's qualification date of September 1, 2003, for the single event exclusion in IC 4-32-9-3 to apply.

5) Petitioner failed to inform the Department pursuant to IC 4-32-9-3 of its two raffles.

6) Petitioner listed two operators whose term of membership was in violation of IC 4-32-9-28.

7) Petitioner's officers signed the CG-1 and CG-2 stating that they understood that false statements on its application would cause the rejection of the application.

8) Petitioner's violation of Indiana charity gaming laws was sufficient to warrant a denial of its license application.

**PROPOSED ORDER**

Following due consideration of the entire record, the Administrative Law Judge orders the following:

The Petitioner's appeal is denied. However, Petitioner may correct/amend its application and resubmit it to the Department. If Petitioner chooses to amend its application for resubmission, the Department is directed to expedite its review.

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

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**DEPARTMENT OF STATE REVENUE**

**IN REGARDS TO THE MATTER OF:**
**HAMILTON TOWNSHIP**
**VOLUNTEER FIRE COMPANY**
**DOCKET NO. 29-2003-0459**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER**

An administrative hearing was held on Thursday, February 12, 2004 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, Hamilton Township Volunteer Fire Company, was represented by Eric Baty. 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 November 20, 2003, the Petitioner's application to conduct charity gaming was denied. The Petitioner protested in a timely manner.

**FINDINGS OF FACTS**

1) Petitioner submitted a CG-2 (Indiana Department of Revenue Annual Bingo and/or Pull Tab Application) dated July 11, 2003 to the Indiana Department of Revenue. (Department's Exhibit A).

2) Petitioner's CG-2 was received by the Compliance Division of the Indiana Department of Revenue on July 22, 2003 and August 27, 2003. (Department's Exhibit A).

3) Petitioner's CG-2 was signed by Charles F. Rife and Tim Baty. Above their signatures is a certification which states, "We certify under penalty of perjury that the organization applying is a qualified organization, and that there are no misrepresentation or falsification in the information stated. We understand that false or misleading statements will cause rejection of this

application or revocation of future license(s).” (Department’s Exhibit A).
4) Line 8 on Department Form CG-2 states, “Does your organization own, lease (rent), or use a donated facility where the licensed event will be conducted? (Check one).” Petitioner checked lease (rent).
5) Line 8 continues, “**If leased** (rented), enter name and address of lessor and attach a copy of your signed lease agreement. **If donated**, attach a **notarized** statement from the donor that the facility is being offered rent free.” Petitioner listed Network Agency.
6) Line 9 on Department Form CG-2 states, “Is any tangible personal property (i.e. tables, chairs, bingo blowers, etc.) being leased or donated to you for this event.” Petitioner answered “Yes.” (Department’s Exhibit A).
7) Line 9 continues, “If you answered yes, list the name and address of the lessor or donor. Attach a signed copy of the lease agreement or donation statement from the donor.” Petitioner listed only Network Agency (Department’s Exhibit A).
8) Line 10 on Department Form CG-2 states, “Does your organization own bingo equipment?” Petitioner answered “No.” Line 10 continues, “If you answered yes, list the seller’s name, date of purchase, purchase price, and the type of equipment purchased.” However, even though Petitioner checked “No” it listed “Shawn Dyer” under the name of the seller and under date of purchase put “donated when needed.” (Department’s Exhibit A).
9) The Indiana Department of Revenue Criminal Investigation Division conducted an investigation of the Petitioner on September 25, 2003. (Department’s Exhibit H).
10) Petitioner provided the Department with two (2) leases.
11) The first lease, submitted with its Form CG-2, was between the Petitioner and Network Agency dated July, 1, 2003. (Department’s Exhibit B).
12) The second lease, dated September 24, 2003, submitted to the Department’s Criminal Investigation Agent was between the Petitioner and Susie Lambert. (Department’s Exhibit C).
13) After reviewing all the leases submitted into evidence (specifically Department’s Exhibits B, C, D, and E) it is impossible to tell who actually has the valid lease to the property to be used by the Petitioner for its charity gaming.
14) It is evident that the lease dated September 24, 2003, was created in the hopes of satisfying the Department, and does not reflect the true intentions of the parties.
15) A review of Petitioner’s 2003 membership roster does not show a Shawn Dyer as a member. (Department’s Exhibit F).
16) Petitioner stated that Shawn Dyer is a member of its organization. (Record at 23).
17) Shawn Dyer is not licensed as either a manufacturer or distributor to sell, distribute, or manufacture bingo equipment. (Department’s Exhibit G).
18) Petitioner stated that they had not purchased any equipment from Shawn Dyer and they have now made arrangements with Lancaster Bingo a licensed distributor. (Record at 20).
19) Petitioner argues that the only reason they listed Shawn Dyer on its application is that the equipment already in place at the location to be used for gaming purposes belongs to Shawn Dyer. (Record at 20).
20) In reviewing Petitioner’s CG-2, there was no signed copy of the lease agreement or donation statement from the donor concerning the tangible personal property to be used by the Petitioner in conducting its gaming operation. (Department’s Exhibit A).

## 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 4-32-7-4 provides, “(a) The department has the sole authority to license entities under this article to sell, distribute, or manufacture the following:

(1) Bingo cards.
(2) Bingo boards.
(3) Bingo sheets.
(4) Bingo pads.
(5) Any other supplies, devices, or equipment designed to be used in playing bingo designated by rule of the department.
(6) Pull tabs.
(7) Punchboards.

(8) Tip boards.

(b) Qualified organizations must obtain the materials described in subsection (a) only from an entity licensed by the department.

(c) The department may not limit the number of qualified entities licensed under subsection (a).

6) IC 4-32-12-1 provides in pertinent part, "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."

**CONCLUSIONS OF LAW**

1) On November 20, 2003, the Petitioner's application to conduct charity gaming was denied.

2) Petitioner appealed the denial in a timely manner.

3) The issue at hearing was whether the Department's denial was proper.

4) Petitioner's officers signed CG-2 stating that they understood that false statements on its application would cause the rejection of the application.

5) The Petitioner's did not have a properly executed CG-2.

6) A valid lease for the premises, to be used by the Petitioner, did not accompany its CG-2 application.

7) Petitioner's gaming equipment, allegedly owned by Shawn Dyer, and which was to be used for charity gaming purposes violates the provisions of IC 4-32-7-4.

8) Petitioner's inability to properly fill out its charity gaming application, and obvious misunderstanding of the charity gaming laws, produced inconsistencies in its application amounting to sufficient provocation to warrant the denial of its application.

**PROPOSED ORDER**

Following due consideration of the entire record, the Administrative Law Judge orders the following:

The Petitioner's appeal is denied. However, Petitioner may correct/amend its application and resubmit it to the Department. If Petitioner chooses to amend its application for resubmission, the Department is directed to expedite its review.

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

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**DEPARTMENT OF STATE REVENUE**

03990529.LOF

**LETTER OF FINDINGS: 99-0529**
**Indiana Gross Retail Tax**
**For the Years 1996, 1997, and 1998**

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

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

**ISSUE**

**I. Exempt Sales Transactions – Gross Retail Tax.**

**Authority**: IC 6-2.5-2-1(a); IC 6-2.5-2-1(b); IC 6-2.5-5-27; IC 6-2.5-8-8(a); IC 6-8.1-5-1(b); Panhandle Eastern v. Dept. of State Revenue, 741 N.E.2d 816 (Ind. Tax Ct. 2001).

Taxpayer argues that it was not required to collect sales tax on transactions in which the purchaser provided either an exemption certificate or an Interstate Commerce Commission operating number.

**STATEMENT OF FACTS**

Taxpayer is in the business of buying and selling axles. It sells axles to recreational vehicle manufacturers and to companies which convert vans. Taxpayer also sells axles to the public and makes axle repairs for members of the public.

The Department of Revenue conducted an audit review of taxpayer's 1996, 1997, and 1998 business records. The final audit report determined that taxpayer failed to collect sales tax on a number of transactions and assessed taxpayer for those uncollected taxes. Thereafter, taxpayer submitted a protest of the assessment in which it requested "review by the Legal Division." An administrative hearing was conducted during which taxpayer explained that it had obtained tax exemption certificates and Interstate Commerce Commission operating numbers from a number of its customers. This Letter of Findings results.

**DISCUSSION**

**I. Exempt Sales Transactions – Gross Retail Tax.**

Taxpayer argues that it was not required to collect sales tax on transactions for which he customer provided an exemption certificate or the customer provided an Interstate Commerce Commission operating number.

IC 6-2.5-2-1(a) imposes "[a]n excise tax, known as the state gross retail tax... on transactions made in Indiana." Under IC 6-2.5-2-1(b), the retail merchant is required to "collect the tax as agent for the state."

**A. Exemption Certificates**.

Under certain circumstances, the retail merchant is not required to collect sales tax. For example, under IC 6-2.5-8-8(a), "A person... who makes a purchase in a transaction which is exempt from the state gross retail tax and use taxes, may issue an exemption certificate to the seller instead of paying the tax." Once the purchaser provides the exemption certificate, the retail merchant is under no obligation to collect sales tax on the transaction. IC 6-2.5-8-8(a) states that, "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."

Taxpayer has provided exemption certificates which purportedly relieve taxpayer from responsibility for collecting sales tax on certain transactions for which the audit review otherwise assessed the tax. The assessments contained in the original audit review report are presumed correct. IC 6-8.1-5-1(b) states that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid." Once the assessment has been made, "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Id.

Because taxpayer has belatedly provided exemption certificates relevant to certain of the challenged assessments, taxpayer has met its burden of demonstrating that certain of the original sales tax assessments may be incorrect. Therefore, the audit division is respectfully requested to review the newly submitted exemption certificates and to make whatever adjustments as may be found appropriate.

**B. Interstate Commerce Commission Operating Numbers**.

In addition to the exemption certificates, taxpayer has provided "Interstate Commerce Commission operating numbers" for certain of its customers. Taxpayer is of the opinion that evidence of these numbers relieves it of the responsibility for collecting sales tax from the customers which provided the numbers. However, taxpayer has offered no explanation as to how these numbers are relevant in determining whether a particular customer or transaction is exempt from the state's gross retail tax. Nevertheless, it will be presumed that taxpayer believes possession of the operating number entitles the customer to claim the public transportation exemption.

IC 6-2.5-5-27 provides a specific sales tax exemption specifying that, "Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property." Taxpayer apparently argues that there is a direct corollary between a customer which possesses an Interstate Commerce Commission operating number and a customer which is entitled to make purchases exempt from the state's gross retail tax. However, taxpayer's proposition is flawed because there is no blanket public transportation exemption.

In Panhandle Eastern v. Dept. of State Revenue, 741 N.E.2d 816, 819 (Ind. Tax Ct. 2001), the court stated that the "public transportation exemption provided by section 6-2.5-5-27 is an all or nothing exemption." The tax court interpreted this "all or nothing" language to mean that, "If a taxpayer acquires tangible personal property for predominate use in providing public transportation, then it is entitled to the exemption. If a taxpayer is not predominately engaged in transporting the property of another, it is not entitled to the exemption." Id. A customer may have an Interstate Commerce Commission operating number but may not be entitled to the sales tax exemption because it is not providing "public" transportation – i.e. it is engaged in transporting its own property – or because the customer is not "predominately" engaged in public transportation. In such cases, the customer falls within the "nothing" category. Under other circumstances, a customer which provides an Interstate Commerce Commission operating number may be entitled to the sales tax exemption because, pursuant to IC 6-2.5-5-27, that particular customer is providing "public" transportation and because it is "predominately" engaged in providing that service. That particular customer falls under the "all" category, and the customer is entitled to make purchases exempt from the state's gross retail tax.

The Department finds no support for taxpayer's argument that its customers which have an Interstate Commerce Commission operating number are exempt from sales tax. Absent any indication that a particular customer is predominately engaged in providing public transportation, the operating numbers are irrelevant.

**FINDING**

Taxpayer's protest is sustained in part and denied in part. Taxpayer is entitled to a review of the exemption certificates submitted following completion of the audit report. Taxpayer is not entitled to claim an exemption on the basis that a particular customer possesses an Interstate Commerce Commission operating number.

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**DEPARTMENT OF STATE REVENUE**

04-990580.LOF

**LETTER OF FINDINGS NUMBER: 99-0580**
**Gross Retail & Use Taxes**
**Penalty**
**For Years 1996, 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—Miscellaneous**

**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 gross retail and use taxes on purchases where no invoices or exemption certificates were produced during the audit.

**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.

**STATEMENT OF FACTS**

Taxpayer, a corporation formed in 1995 when four different corporations merged, is in the business of retailing two-way radio equipment, setting up, installing, and servicing communications equipment. Taxpayer had cellular and paging sales operations in Illinois, as well as other sales operations in Indiana and Missouri. The cellular and paging operations were sold in 1997. Taxpayer in 1997 also sold towers, which had "repeaters" on them. During the audit, taxpayer was given ample opportunity to provide documentation to support its claim that no gross retail or use taxes were owed to the Department of Revenue. However, taxpayer had kept incomplete records from the time of the merger until the audit, and was unable to locate invoices and exemption certificates. The Department issued its proposed assessment of use tax liability for the years at issue, and taxpayer protested. Protest review on numerous occasions over a lengthy period of time attempted to obtain information from taxpayer. The Hearing Officer assigned to the protest also gave taxpayer ample opportunity to provide documents supporting its protest of the proposed assessment of Indiana gross retail and use taxes. Taxpayer did not provide such documentation and has had no further contact with any Department representative since filing its protest in November of 1999. Taxpayer has not responded to the Department's repeated requests for documents, and for taxpayer's appearance at a hearing on the protest. Additional facts will be added as necessary.

**I. Gross Retail and Use Tax—Purchases**

**DISCUSSION**

Taxpayer protests the gross retail and use tax assessment on purchases for its business. As discussed in the Statement of Facts *supra*, taxpayer has had ample opportunity to provide the necessary documentation supporting the protest of the proposed assessment of Indiana gross retail and use taxes. Taxpayer has also had ample opportunity to schedule a hearing on its protest. Taxpayer has neither provided the Department with documents, nor contacted the Hearing Officer to schedule a hearing on the protest.

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 provide 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 gross retail and use taxes.

**FINDING**

Taxpayer's protest concerning the assessment of gross retail and use taxes on purchases where invoices and exemption certificates were not produced during the audit 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.

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**DEPARTMENT OF STATE REVENUE**

01-20010081.LOF

**LETTER OF FINDINGS NUMBER: 01-0081**
**Individual Income Tax**
**For The Period: 1996 through 1998**

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

**ISSUES**

**I. Income Tax: Residence/Domicile**

**Authority**: IC 6-3-2-1(a); IC 6-3-1-12; 45 IAC 3.1-1-21; 45 IAC 3.1-1-22; State Election Board v. Bayh, 521 N.E.2d 1313 (Ind. 1988).

The taxpayers protest the proposed assessment of state income tax on earnings for 1996, 1997, and 1998.

**II. Income Tax: Issuance of Proposed Assessments**

**Authority**: IC 6-8.1-5-2

The taxpayers protest the proposed assessments issued on August 4, 2003, and September 19, 2000.

**III. Tax Administration: Penalty**

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

The taxpayers protest the imposition of a 10% penalty.

**STATEMENT OF FACTS**

Taxpayers filed Form IT-40 PNR (Indiana Part-Year or Full-Year Nonresident Individual Income Tax Return) for the years at issue. The taxpayers claim that they were non-residents, living and working in a foreign country (hereinafter country X), for the tax years at issue. More facts will be provided as needed below.

**I. Income Tax: Residence/Domicile**

**DISCUSSION**

The Indiana Code 6-3-2-1(a) states the following:

> Each taxable year, a tax at the rate of three and four-tenths percent (3.4%) of adjusted gross income is imposed upon the adjusted gross income of every *resident* person, and on that part of the adjusted gross income derived from sources within Indiana of every nonresident person. (*Emphasis added)*

The statutory definition of "Resident" can be found at IC 6-3-1-12:

> The term "resident" includes (a) any individual who was domiciled in this state during the taxable year, or (b) any individual who maintains a permanent place of residence in this state and spends more than one hundred eighty-three (183) days of the taxable year within this state, or (c) any estate of a deceased person defined in (a) or (b), or (d) any trust which has a situs within this state.

Also of import is the Indiana Administrative Code. 45 IAC 3.1-1-21 states in part that an Indiana resident is "Any individual who was domiciled in Indiana during the taxable year" or "Any individual who maintains a permanent place of residence in this state and spends more than 183 days of the taxable year within this state...." Domicile is defined at 45 IAC 3.1-1-22. The definition notes "a person has only one domicile at a given time even though that person maintains more than one residence at that time." It goes on in pertinent part to note:

> Once a domicile has been established, it remains until the conditions necessary for a change of domicile occur.
>
> In order to establish a new domicile, the person must be physically present at a place, and must have the simultaneous intent of establishing a home at that place. It is not necessary that the person intend to remain there until death; however, if the person, at the time of moving to the new location, has definite plans to leave that new location, then no new domicile has been established.
>
> The determination of a person's intent in relocating is necessarily a subjective determination. There is no one set of standards that will accurately indicate the person's intent in every relocation. The determination must be made on the facts present in each individual case.

Finally, the Indiana Supreme Court weighed in on domicile in State Election Board v. Bayh, 521 N.E.2d 1313, 1318 (Ind. 1988), stating, "Intent and conduct must converge to establish a new domicile."

Turning to the taxpayers' arguments, they note the following. First, the taxpayers claim they were physically present in country "X" and that they were not present in Indiana the requisite number of days required under IC 6-3-1-12(b). Regarding their Indiana home, they explain that after they failed to sell it that they rented it out. Taxpayers state that they "properly reported the rental income on tax returns from this [the home] for the years 1996, 1997, and 1998." The taxpayers further explain that when the home did eventually sell, it was reported as "business property" and not a "sale of residence." With respect to their tax filings, the taxpayers note that they filed IT-40 PNR. The taxpayers state they filed Federal Form 2555, which contains the "Bona Fide Residence Test." According to the taxpayers, they had no intent to return to Indiana to live. They rented an apartment in country "X". They obtained International Drivers' licenses. They also state that they did not vote in Indiana during the years at issue. When their employer was sold to another company, the taxpayers returned to the United States.

The Department's position is that the taxpayers never lost their Indiana domicile, thus the taxpayers remained residents under Indiana Code 6-3-1-12(a). The taxpayers had Indiana Drivers' licenses for the periods of time at issue (in fact, one of the two taxpayers renewed his Indiana driver's license on December 30, 1997). The taxpayers respond that to "obtain [an] International Drivers License you must have a valid drivers license previously. Therefore, to keep valid International Drivers license taxpayers elected to keep their Indiana Drivers license." The Department also notes that on tax returns the taxpayers used Indiana addresses (P.O. Box addresses in Indiana for two of the years and an actual Indiana address for the other year). The taxpayers contend that the use of an Indiana "P.O. Box" was because the mail in the country they were living in was not as reliable as U.S. mail. The taxpayers also had W-2's that indicated Indiana wages. The taxpayers stated on their returns that those W-2's were incorrect/erroneous.

The taxpayers were assigned to live in foreign country "X" for three (3) years. The taxpayers claim that they "had no intent at the time of leaving Indiana to return to Indiana to live." The taxpayers further state the following:

> Taxpayers expected not only for the ["X"] stay to be extended, but to very probably be assigned to other parts of the world when ["X"] responsibilities were completed.

As 45 IAC 3.1-1-22 states, in pertinent part, "if the person, at the time of moving to the new location, has definite plans to leave that new location, then no new domicile has been established." That is, the taxpayers had expected to "very probably" be assigned to yet another location in another part of the world, thus not establishing new domicile in country "X".

The facts, when viewed in their totality, show that the taxpayers did not lose their Indiana domicile—they had Indiana Drivers licenses; they used Indiana addresses on tax returns; there were W-2's that indicated Indiana wages; they owned what they characterize as "investment property" in Indiana; the foreign work assignment in country "X" was for a period of time (i.e., three years—though, according to the taxpayers, they thought it might be extended longer) and the taxpayers expected to be assigned to yet another location after country "X"; and lastly, the fact that they did return to Indiana.

**FINDING**

The taxpayers' protest is denied.

**II. Income Tax: Issuance of Proposed Assessments**

**DISCUSSION**

The taxpayers also argue the following:

> The Department issued Proposed Assessment for the year 1996 on August 4, 2003. This is long after the statute of limitations had passed. Taxpayer had received a prior proposed assessment for the year 1996.

And further:

> [H]ow can it be considered valid when taxpayer receives two Proposed Assessments, almost three (3) years apart .....

The date issued for the two proposed assessments for 1996 were September 19, 2000, and August 4, 2003. Taxpayers' 1996 IT-40 PNR was mailed to the Department in January of 1998.

The statute at issue, IC 6-8.1-5-2, states in pertinent part "Except as otherwise provided in this section, the department may not issue a proposed assessment under section 1 of this chapter more than three (3) years after the latest of the date the return is filed ...."

Thus the September 19, 2000 proposed assessment would be within the statute. The August 4, 2003, one would not be.

**FINDING**

The taxpayers are sustained regarding the proposed assessment issued on August 4, 2003; they are denied regarding the proposed assessment issued on September 19, 2000.

**III. Tax Administration: Penalty**

**DISCUSSION**

The taxpayers protest the imposition of the ten percent (10%) negligence penalty. The Indiana Code section 6-8.1-10-2.1 imposes a penalty if the tax deficiency was due to the negligence of the taxpayer. Department regulation 45 IAC 15-11-2(b) states that negligence is "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer."

Subsection (d) of IC 6-8.1-10-2.1 allows the penalty to be waived upon a showing that the failure to pay the deficiency was due to reasonable cause. To establish this, 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...." 45 IAC 15-11-2(c).

The taxpayers state that they do not "believe that a valid dispute of alleged taxable income is willful negligence and believes the proposed penalty should be waived ...." Given the fact sensitive nature of the issue residence/domicile (*See supra* I.), the taxpayers' position was incorrect but not unreasonable.

**FINDING**

The taxpayers' protest is sustained.

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**DEPARTMENT OF STATE REVENUE**

0420010100.LOF

**LETTER OF FINDINGS NUMBER: 01-0100**
**Responsible Officer**
**Periods 1996 through 1999**

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

**ISSUES**

**I. Sales and Withholding Tax: Responsible Officer Liability**

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

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

**STATEMENT OF FACTS**

The taxpayer was the president of a company (hereinafter referred to as Company X). On Company X's "Business Tax Application Form" (i.e., Form BT-1) the taxpayer is listed as "President."

In addition, the BT-1 form asks who is the "Person responsible for filing tax forms" for Company X—the taxpayer named himself as that person. At the bottom of the BT-1, below the signature line (which the taxpayer signed as "President"), the following language can be found:

> The partners or corporate officers are each *personally*, jointly and severally liable for the sales tax collected and the income tax withheld. The taxes are trust fund taxes and not discharged in bankruptcy proceedings. (*Emphasis added*)

**I. Sales and Withholding Tax: Responsible Officer Liability**

**DISCUSSION**

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

An individual who:

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

(2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) 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. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

The proposed withholding taxes were assessed against taxpayer pursuant to IC 6-3-4-8. Also of import is Indiana Department of Revenue v. Safayan, 654 N.E. 2nd 270, 273 (Ind.1995), which states "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid."

Finally, the Indiana Department of Revenue's "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid." IC 6-8.1-5-1(b). That statute also states the burden of proof rests with the taxpayer.

The taxpayer makes a number of arguments: (1) the taxpayer disagrees with when the proposed assessment period should have ended; (2) the taxpayer contends that he did not have a remitting duty after a certain date; and (3) the taxpayer disagrees with the Department's proposed assessment amounts.

(1) The taxpayer argues that the business, which was administratively dissolved, actually stopped doing business in late November/early December of 1997. In support of that argument, the taxpayer provided copies of Company X's bank records for November and December of 1997. The records for December show a series of overdraft fees and a nominal balance, indicating that the business had in fact wound down.

(2) The taxpayer next states that he in fact left the business in August 1997. No evidence to that end was presented (e.g., company minutes; copy of a resignation letter). In correspondence with the Department the taxpayer stated that he "left the business in August 1997." During the hearing the taxpayer repeated that he left the company in August 1997.

(3) Finally, the taxpayer takes issue with the amounts assessed by the Department. As he states in a letter,

> The tax liability figures provided to me are totally unrealistic. The business … closed prior to Thanksgiving in 1997 and during the last five months, we failed to earn enough money to pay basic costs and in fact were able to only meet payroll for the employees that did not share in ownership.

And in another letter the taxpayer stated that he disputed the amounts for the periods of time April 1996 through November 1997. The Department early on informed the taxpayer the following:

> The liabilities for the months of April 1996 through June 1997 are based on returns actually filed. These returns were received by the department without the appropriate amount of tax. The amounts of tax due stated on these returns are deemed correct by the department unless documentation can be presented to the contrary.

And further in the same letter the Department stated:

> The liabilities for the months of July 1997 and thereafter are based upon the best information available. If you wish to file sales tax returns for these months at this time, the department will consider them, and (subject to verification) possibly adjust the liabilities accordingly.

Since the taxpayer disputes the proposed assessment amounts, the Department has extended time for the taxpayer to provide his calculations and photocopies of relevant source documents that buttress and support those calculations. The time period elapsed without the taxpayer submitting his documentation.

**FINDING**

The taxpayer's protest is denied with regards to issues (2) and (3). With regards to issue (1), the bank records do indicate that the business closed at the end of November 1997, and thus the taxpayer is sustained on that issue.

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**DEPARTMENT OF STATE REVENUE**

04-20010147.LOF

**LETTER OF FINDINGS NUMBER: 01-0147**
**Responsible Officer**
**Periods 1996 through 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**

**I. 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, 273 (Ind.1995).

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

**STATEMENT OF FACTS**

The taxpayer owned 13% of the stock of an auto repair business (hereinafter referred to as "Company X"), and was a corporate officer. In an affidavit, the taxpayer describes his duties as doing the mechanical work necessary to repair customer cars. Additional facts will be provided below.

**I. Sales Tax: Responsible Officer Liability**

**DISCUSSION**

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

An individual who:

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

(2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) 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. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

Also of import is Indiana Department of Revenue v. Safayan, 654 N.E. 2nd 270, 273 (Ind.1995), which states "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid."

Finally, the Indiana Department of Revenue's "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid." IC 6-8.1-5-1(b). That statute also states the burden of proof rests with the taxpayer.

The taxpayer argues that his duties were to fix and repair cars, and that he would only occasionally accept a payment from a customer (and then only if no one was in the office). When he did accept payment from customers, he states he would put the money in the cash register. He states that the President of Company X was the person who in fact held the managerial duties, and that the President of Company X was the "person with control of the checkbook and wrote the majority of the checks. He [the President] had access to the checkbook. He would take the checkbook home with him at night."

The taxpayer also supplied supporting documentation to show that he did not have check writing responsibilities or office duties.

In Safayan the Indiana Supreme Court considered "whether the person actually exercised control over the finances of the business." Id. at 273. From the facts presented at hearing, it is apparent that the taxpayer did not have actual control over the finances of the company.

**FINDING**

The taxpayer's protest is sustained.

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**DEPARTMENT OF STATE REVENUE**

0120020139.LOF

**LETTER OF FINDINGS NUMBER: 02-0139**
**Adjusted Gross Income Tax**
**For the Tax Years 1994-1999**

**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. Adjusted Gross Income Tax-Calculation of Tax**

**Authority:** IC 6-3-2-1, IC 6-3-1-3.5.

The taxpayer protests the calculation of her adjusted gross income tax for 1999.

**STATEMENT OF FACTS**

After an investigation, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional adjusted gross income tax, interest, and penalty for the tax years 1994 through 1999. The taxpayer first protested all the assessments. She later withdrew her protests to all but the 1999 assessment. This Letter of Findings is based upon the documentation in the file.

**I. Adjusted Gross Income Tax-Calculation of Tax**

**DISCUSSION**

Indiana imposes an adjusted gross income tax on residents. IC 6-3-2-1. Pursuant to Indiana adjusted gross income tax is calculated by starting with the federal adjusted gross income and making certain adjustments. IC 6-3-1-3.5. The taxpayer submitted documentation indicating that the Internal Revenue Service amended her federal adjusted gross income for 1999. The amended 1999 federal adjusted gross income must be used as the basis for calculating her 1999 Indiana adjusted gross income tax.

**FINDING**

The taxpayer's protest is sustained. Her 1999 Indiana adjusted gross income tax will be recalculated based upon the amended 1999 federal adjusted gross income tax.

**DEPARTMENT OF STATE REVENUE**

0220020242.LOF

**LETTER OF FINDINGS: 02-0242**
**Indiana Gross Income Tax**
**For the Years 1998, 1999, and 2000**

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

**ISSUES**

**I. Mutual Fund Commissions Received in an Agency Capacity – Gross Income Tax.**

**Authority**: IC 6-2.1-2-2(a)(1); IC 6-2.1-2-2(a)(2); Policy Management Systems Corp. v. Indiana Department of State Revenue, 720 N.E.2d 20 (Ind. Tax Ct. 1999); Universal Group Limited v. Indiana Department of State Revenue, 642 N.E.2d 553 (Ind. Tax Ct. 1994); 45 IAC 1.1-1-2; 45 IAC 1.1-1-2(b)(1); 45 IAC 1.1-1-2(b)(2); 45 IAC 1.1-6-10.

Taxpayer argues that it was not subject to Indiana gross income tax on commission payments attributable to the sale of mutual fund shares to Indiana customers.

**II. Abatement of the Ten-Percent Negligence Penalty**.

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

Taxpayer maintains that it had reasonable cause for initially believing that the commission payments it received were not subject to Indiana gross income tax and that – as a result – the ten-percent negligence penalty should be abated in its entirety.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state licensed mutual fund broker registered with the Securities and Exchange Commission (SEC) to sell mutual fund shares. However, it does not itself sell mutual fund shares to individual customers but operates through a network of independent agents who deal directly with the individual customers.

The parties' mutual fund business works like this. There are five parties to each sale of a mutual fund share: 1. the Indiana customer; 2. the independent agent; 3; the insurance company 4; taxpayer (mutual fund broker and licensee); and 5; the agency/broker. The independent agent sells a mutual fund share to an Indiana customer. The customer sends the money to the insurance company which has the capacity to assemble and manage the mutual fund. The insurance company sends a portion of the money – in the form of a commission – to taxpayer which, by virtue of its SEC registration, has the authority to market the mutual fund share. Taxpayer keeps one portion of the commission for itself but sends another portion of the commission amount to the agency/broker. The agency/broker – which deals with the individual independent agents – keeps a portion of the commission but also pays a portion of that amount to the independent agent who originated the sale.

The Department of Revenue conducted an audit review of taxpayer's 1998, 1999, and 2000 business records. The audit determined that taxpayer should have been paying Indiana gross income tax on the commissions it received from the insurance company including that portion of the commissions which it did not retain but which it paid over to the agency/broker. Accordingly, the audit concluded that it owed additional tax and assessed the amounts accordingly.

Taxpayer disagreed with the audit's determination on the ground that the commissions – that portion paid over to the agency/broker and thence to the independent agents – was "received in an agency capacity and should be excluded from [taxpayer's] gross income." Taxpayer submitted a protest setting forth that argument, an administrative hearing was conducted during which taxpayer's representatives further explained the basis for the protest, and this Letter of Findings results.

## DISCUSSION

**I. Mutual Fund Commissions Received in an Agency Capacity – Gross Income Tax.**

Taxpayer's position is that it is not subject to gross income tax on that portion of the commissions it receives from the insurance company but pays over to the agency/broker and the independent agents. To illustrate; an Indiana customer purchases a mutual fund share and pays $100 to the insurance company. The insurance company retains $70 of that amount and pays $30 to taxpayer as a cumulative, three-stage commission amount. Taxpayer receives the $30, keeps $10 for itself, and pays $20 to the agency/broker. The agency/broker receives the $20, keeps $15 for itself – its own commission – and pays $5 to the independent agent who originally sold the mutual fund share to the Indiana customer.

Originally, taxpayer reported none of these commissions – the $30 cited above – as gross income. However, taxpayer now admits that the commission amount which it retains for itself – the $10 cited above – should have been reported as subject to gross income tax. However, it argues that not *all* of the commission amount it receives from the insurance company is part of its gross income. Taxpayer maintains that the amount which it pays over to the agency/broker – $20 in the example above – was received in an agency capacity and should not be included in its gross income.

Indiana imposes a gross income tax upon the entire gross receipts of a taxpayer who is a resident or domiciliary of Indiana. IC 6-2.1-2-2(a)(1). For the taxpayer who is not a resident or domiciliary of Indiana, the tax is imposed on the gross receipts which are derived from business activities conducted within the state. IC 6-2.1-2-2(a)(2). However, 45 IAC 1.1-6-10 exempts that portion of the taxpayer's income which the taxpayer receives while acting in an agency capacity. 45 IAC 1.1-1-2 defines an "agent" as follows:

(a) "Agent" means a person or entity authorized by another to transact business on its behalf.

(b) A taxpayer will qualify as an agent if it meets both of the following requirements:

(1) The taxpayer must be under the control of another. An agency relationship is not established unless the taxpayer is under the control of another in transacting business on its behalf. The relationship must be intended by both parties and may be established by contract or implied from the conduct of the parties. The representation of one (1) party that it is the agent of another party without the manifestation of consent and control by the alleged principal is insufficient to establish an agency relationship.

(2) The taxpayer must not have any right, title, or interest in the money or property received from the transaction. The income must pass through, actually or substantively, to the principal or a third party, with the taxpayer being merely a conduit through which the funds pass between a third party and the principal.

The Indiana Tax Court in Policy Management Systems Corp. v. Indiana Department of State Revenue, 720 N.E.2d 20 (Ind. Tax Ct. 1999) and Universal Group Limited v. Indiana Department of State Revenue, 642 N.E.2d 553 (Ind. Tax Ct. 1994) reviewed the relationship between the imposition of the state's gross income tax and agency principles, echoed the standards set out in 45 IAC 1.1-1-2 and 45 IAC 1.1-6-10, and found that an agency relationship required consent by the principal, acceptance and authority by the agent, and control of the agent by the principal.

Taxpayer has provided a copy of a "selling agreement." The "selling agreement" sets out the relationship between the insurance company, taxpayer, and the agency/broker. These three parties are collectively referred to as the "selling entities." Taxpayer's contention is that the commission money which it receives from the insurance company and then forwards to the agency/broker is received in an agency capacity for gross income tax purposes. Taxpayer points to the terms of the "selling agreement" as supporting this assertion. In particular, taxpayer points to that portion of the "selling agreement" labeled "compensation." That section of the agreement states, "[Insurance company], through [taxpayer], will remit to [agency broker] compensation as set forth the applicable Compensation Schedule hereto, which payments or termination thereof shall be governed by the administrative rules established by the administrative rules established by [insurance company] in its sole discretion."

It is apparent that taxpayer is required to forward to the agency/broker certain commissions earned from the sale of the mutual fund shares. Clearly, taxpayer would be in violation of the parties' agreement if taxpayer were to unilaterally decide to retain for itself the commissions due to agency/broker. It is also clear that the insurance company – and not the taxpayer – has the "sole discretion" to establish the "administrative rules" governing the procedures by which the commission payments are forwarded to the agency/broker. However, taxpayer falls far short of establishing that the commission payments intended for the agency/broker – and thence to the individual, independent agents – were received while it was acting in an agency capacity for the insurance company.

The regulation defining the agency relationship has two components. The first requires that the taxpayer, as the putative agent, establish that is under the control of the principal and that the parties intend to create an agency relationship by that control. 45 IAC 1.1-1-2(b)(1). Taxpayer has provided nothing which establishes that taxpayer (the putative agent) and the insurance company (the putative principal) intended to create an agency/principal relationship and that these two parties were anything more that two distinct business entities which entered into an agreement which made it possible for the insurance company to sell shares of its mutual fund to Indiana customers. The argument fails because taxpayer has introduced nothing which demonstrates that taxpayer was under the control of the insurance company or that the insurance company made itself liable for the taxpayer's business decisions.

Even if it could be established that taxpayer and the insurance company intended to create an agent/principal relationship, the regulation defining that relationship for gross income tax purposes has two components. The second requirement is that the taxpayer not have any right to money received in the transaction but that the income received from the principal "pass through" to the third party. 45 IAC 1.1-1-2(b)(2). The Indiana Tax Court has described that requirement as follows.

> The lesson of Ice Service, Associated Telephone, and Western Adjustment, as discussed in UGL I, is that there is no gross income tax liability for an agent when: 1) the agent, acting in an agency capacity, receives income in which the agent has no right, title, or interest, and; 2) the agent subsequently "passes through" the income to a principal or a third party. Universal Group, 642 N.E.2d 553, 555-56.

Clearly, all the parties to the "selling agreement" intended that the insurance company would pay commissions to the sellers when shares of its mutual funds were sold to Indiana customers. The "selling agreement" also makes it plain that the commissions would be paid "through" the taxpayer. However, there is nothing which establishes that taxpayer had "no right, title, or interest" in the commissions which were owed to the agency/broker. Taxpayer owed the agency/broker the commission payments; however, taxpayer at some point took control over those amounts, and – however briefly – exercised control and dominion over those same amounts.

In sum, taxpayer's argument fails because there is no indication that the insurance company and taxpayer ever intended to create an agency/principal relationship and because there is no indication that the commissions passed through to the agency/broker without taxpayer having some – albeit transitory – degree of beneficial interest in those amounts. "To be outside the gross income tax, there must be *both* and agency and pass through, actual or constructive." Universal Group, 642 N.E.2d at 557 (*Emphasis added*).

**FINDING**

Taxpayer's protest is respectfully denied.

**II. Abatement of the Ten-Percent Negligence Penalty**.

Taxpayer failed to report any of the commission income it received from the insurance company as subject to gross income tax. Taxpayer argues that it had good cause for failing to report the commission income and that its decision not to report the income was supported by a reasonable interpretation of the applicable law and regulations.

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

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

Taxpayer has set forth a facially valid argument that it was not subject to gross income on the commissions that it forwarded to the agency/broker and the individual, independent agents. However, taxpayer's apparent determination that it did not owe gross income tax on *any* of the commissions is entirely unwarranted. The decision that it did not owe gross income tax on its own portion of the commissions attributable to the sale of mutual fund shares to Indiana customers is not indicative of the "reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." 45 IAC 15-11-2(b).

**FINDING**

Taxpayer's protest is respectfully denied.

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**DEPARTMENT OF STATE REVENUE**

0220020308.LOF

**LETTER OF FINDINGS: 02-0308**
**Indiana Corporate Income Tax**
**For 1998 and 1999**

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

**ISSUES**

**I. Applicability of the Throw-Back Rule – Adjusted Gross Income Tax.**

**Authority**: 15 U.S.C.S. § 381; 15 U.S.C.S. § 381(a), (c); 15 U.S.C.S. § 381(a)(1); 15 U.S.C.S. § 381(c); 15 U.S.C.S. §§ 381 to 384; Public Law 86-272; IC 6-3-1-25; IC 6-3-2-2; IC 6-3-2-2(e); IC 6-3-2-2(n); IC 6-3-2-2(n)(1); IC 6-3-2-2(n)(2); Wisconsin Dept. of

Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992); First Chicago NBD Corp. v. Dept. of State Revenue, 708 N.E.2d 631 (Ind. Tax Ct. 1999); Kennametal, Inc. v. Commissioner of Revenue, 686 N.E.2d 436 (Mass. 1997); 45 IAC 3.1-1-53(5); 45 IAC 3.1-1-64; Jerome R. Hellerstein and Walter Hellerstein, State and Local Taxation: Cases and Materials (7th ed. 2001); Personal Income Tax – Nexus Standards (Ohio Dept. of Taxation, Sept. 2001).

Taxpayer argues that the Department of Revenue (Department) erred when it determined that money earned from sales of its truck parts to out-of-state customers was subject to Indiana's adjusted gross income tax.

**II. Abatement of the Ten-Percent Negligence Penalty**.

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

Taxpayer maintains that it is entitled to an abatement of the ten-percent negligence penalty. Taxpayer concludes that the assessments of additional tax, upon which the penalty is based, were the results of the Department's own incorrect application of the throw-back rule.

**STATEMENT OF FACTS**

Taxpayer is an Indiana business which sells truck parts. Taxpayer sells truck parts to Indiana customers, to out-of-state customers, and to customers outside the United States. The Department conducted a review of taxpayer's business records and tax returns determining that the receipts obtained from sales to out-of-state customers should be "thrown back" to Indiana. This decision resulted in the assessment of additional corporate income tax. Taxpayer disagreed with the audit's decision regarding the throw-back sales along with the consequent assessment of additional corporate income tax; taxpayer submitted a protest to that effect. Two administrative hearings were conducted during which taxpayer explained the basis for its protest. This Letter of Findings results.

**DISCUSSION**

**I. Applicability of the Throw-Back Rule – Adjusted Gross Income Tax.**

The audit concluded that the receipts taxpayer obtained from sales to its out-of-state and foreign customers should be included in the numerator of the sales factor. The audit made this decision because it found that all of taxpayer's property, inventory, and payroll were located in Indiana and because taxpayer "do[es] not file tax returns in any other state." Taxpayer disagrees maintaining that the receipts earned from the out-of-state and foreign customers should not have been thrown-back to Indiana.

The audit determined that, for purposes of calculating taxpayer's Indiana tax liability, the receipts from sales to out-of-state customers and foreign customers should be thrown back to Indiana because the sales were made within jurisdictions where the taxpayer was not subject to another jurisdiction's income tax. The audit based its decision on 45 IAC 3.1-1-53(5) which states that "[i]f the taxpayer is not taxable in the state of the purchaser, the sale is attributed to [Indiana] if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state." Such sales are designated as "throw-back" sales. Id.

The basic rule is found at IC 6-3-2-2. IC 6-3-2-2(e) provides that "[s]ales of tangible personal property are in this state if... (2) the property is shipped from an office, a store, a warehouse, a factory, or other place of storage in this state and... (B) the taxpayer is not taxable in the state of the purchaser." IC 6-3-2-2(n) provides that "[f]or purposes of allocation and apportionment of income... a taxpayer is taxable in another state if: (1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax; or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not." Therefore, in order to properly attribute income to a foreign state, taxpayer must show that one of the taxes listed in IC 6-3-2-2(n)(1) has been levied against him or that the state has the jurisdiction to impose a net income tax regardless of "whether, in fact, the state does or does not." Id.

Therefore, whether or not Indiana can tax receipts an Indiana resident has received from non-Indiana customers depends on whether another jurisdiction subjects that same taxpayer to that foreign jurisdiction's own income tax. However, Congress passed a law which restricts the states' authority to tax income received from interstate business activities. The law is codified at 15 U.S.C.S. §§ 381 to 384 but is generally referred to as Public Law 86-272. Public Law 86-272 prohibits states from imposing a net income tax on an out-of-state taxpayer if that foreign taxpayer's only business activity within the state is the solicitation of sales. A state may not impose an income tax on income derived from business activities within that state unless those in-state activities exceed the "mere solicitation" of sales. 15 U.S.C.S. § 381(a), (c). The effect of the throw-back rule is to revert sales receipts back to the state from where the goods were shipped in those instances where 15 U.S.C.S. § 381 deprives the purchaser's own home state of the power to impose a net income tax. 45 IAC 3.1-1-64. In effect, 15 U.S.C.S. § 381 permits Indiana to tax out-of-state business, without violating the Commerce Clause and without the possibility of subjecting taxpayer to double taxation, because Indiana's right to tax those out-of-state activities is derivative of the foreign state's own taxing authority. In every sales transaction, at least one state has the authority to tax the receipts obtained from the sale of the tangible personal property; if the state wherein the sale occurred is forbidden to do so by 15 U.S.C.S. § 381, then the income is "thrown-back" to the originating state.

Taxpayer's argument is based on the premise that its activities outside Indiana exceed the solicitation activities described in 15 U.S.C.S. § 381(a). 15 U.S.C.S. § 381(a)(1) confers immunity from state income taxes on any taxpayer whose "only business activities" in that state consists of "solicitation of orders" for interstate sales. Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447, 2453 (1992). If taxpayer's activity in a particular state consists of more than the "solicitation of sales," then Indiana may not tax the income received from customers located within that particular foreign state.

Taxpayer does business by means of independent agents in numerous foreign states. According to taxpayer, its agents conduct the following activities:

The independent agents, solicit, secure, and accept orders for truck parts. According to taxpayer, the agent has the final authority to "accept" the orders; taxpayer's Indiana office will only intervene in an order acceptance if there has been a previous "problem with receivables."

The independent agents handle customer complaints.

The independent agents "get involved with collection issues if a customer is delinquent in paying its invoices."

The independent agents are involved with issues stemming from defective merchandise. The independent agents are authorized see that the defective item is repaired or returned. In addition, the independent agents become involved if a customer credit needs to be issued to the complaining customer.

In addition, taxpayer has provided correspondence from a number of its out-of-state independent sales agents to bolster its argument that the activities of those agents exceed the bounds of "mere solicitation." The correspondence describes how the agents deal with certain credit issues, provide customers with sales literature, become involved with delinquent customers, answer customer complaints, and act as taxpayer's "eyes, ears, and arms in [the salesperson's] defined territory." As one of the sales agents puts it, "We contact customers to sell [taxpayer's] products and perform all detail tasks necessary to complete the sale and continue the relationship successfully."

Public Law 86-272 does not define what constitutes "solicitation of orders." The Supreme Court concluded that the solicitation of orders "covers more than what is strictly essential to making request for purchases." Wrigley 112 S.Ct. at 2456. As such, some activities within the state may involve more than a direct request for the purchase of goods but, nonetheless, are still protected from state tax under Public Law 86-272. However, the Court in Wrigley drew a "clear line... between those activities that are entirely ancillary to requests for purchase--those that serve no independent business function apart from their connection to the soliciting of orders--and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." Id. Nevertheless, the Court also stated that "employing salesmen to repair or service the company's products is not part of the 'solicitation of orders,' since there is good reason to get that done whether or the not the company has a sales force. Repair and servicing may help to increase purchases; but it is not ancillary to requesting purchases, and cannot be converted into 'solicitation' by merely being assigned to salesmen." Id.

In addition, the Wrigley Court also held that Public Law 86-272 could protect any activity from state taxation if the activity qualified under a de minimis exception. Id. at 2457-58. To qualify for this de minimis exception, the court must consider the activities of the taxpayer within the state as a whole. Id. Specifically, "[W]hether in-state activity other than 'solicitation of orders' is sufficiently de minimis to avoid loss of the tax immunity conferred by [Public Law 86-272] depends on whether that activity constitutes a nontrivial additional connection with the taxing State." Id. at 2458.

There is no bright-line test to determine whether taxpayer's activities within the foreign state are entirely ancillary to the solicitation of orders from those activities that serve an independent business function. Id. at 2456-57. There is no bright-line test to determine whether taxpayer's activities – other than the solicitation of sales – come within the definition of "de minimis." Id. at 2458. The activities of its independent agents – handling complaints, dealing with credit problems, resolving problems stemming from defective merchandise – occur along a continuum between those activities which are plainly related to the solicitation of orders and those activities which are clearly ancillary to solicitation. "In the end, business activities conducted with a State must be considered on an individual basis." Kennametal, Inc. v. Commissioner of Revenue, 686 N.E.2d 436, 441 (Mass. 1997).

Taxpayer has provided information which demonstrates that its independent agents perform activities which are outside the textbook definition of "solicitation." However, the Department is unable to conclude that these activities – when considered as a whole – are such that these activities would constitute a waiver of Public Law 86-272 immunity and subject taxpayer to another state's taxing authority. Some of the activities noted by taxpayer – providing literature and acting as the taxpayer's "eyes and ears" – are activities closely related to the solicitation of customer sales. Other activities such as resolving problems related to defective merchandise or billing and shipping problems are either closely related to the solicitation of the original sale or are sufficiently de minimis that taxpayer could reasonably argue that it is not subject to that state's income tax.

In addition, although it is not dispositive on the question, it should be noted that there is no indication that taxpayer has been subjected to any other state's net income tax. The Indiana law states that Indiana may tax receipts from out-of-state sales if the foreign "state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not." IC 6-3-2-2(n)(2). However, in determining whether Indiana may or may not throw back these sales receipts, it is noteworthy that no other state has determined that taxpayer's activities with that foreign state abrogate taxpayer's Public Law 86-272 immunity. It may reasonably assumed that a foreign state – having presumably superior knowledge of taxpayer's activity within that particular state – is in a better position to judge whether taxpayer is subject to that state's own net income tax.

The audit was correct in concluding that the receipts from these sales should be thrown back to Indiana.

**A. Ohio Sales Income**.

Taxpayer maintains that there is "further support for nexus with Ohio." Taxpayer argues that its independent representative's activities inside Ohio bring taxpayer within the orbit of Ohio's income tax scheme. To that end, taxpayer recites from Ohio's "Information Release" stating that an entity – such as taxpayer – "does not have protection from [Public Law] 86-272 if the following activities are conducted in Ohio: having a sales representative or independent contractor conducting activities to establish or maintain the market for the entity; making repairs to the items sold; resolving customer complaints; accepting orders; handling collections; and issuing credits."

The Department defers to Ohio's interpretation of its own income tax laws. However, as the Ohio's Information Release states, "The limitations and extent of [Ohio's] jurisdiction to impose tax is an evolving area and this information release is not intended to be an all encompassing or all inclusive description of this subject." Personal Income Tax – Nexus Standards (Ohio Dept. of Taxation, Sept. 2001).

The Department agrees that taxpayer – by virtue of its independent agents – may bring itself within Ohio's taxing authority. However, a determination of whether taxpayer is or is not subject to that state's net income tax does not hinge on whether taxpayer's independent agents sell its truck parts to Ohio customers. "The immunity statute [Public Law 86-272] extends to the use of sales representatives, that is persons who are not employees but are independent contractors soliciting orders or making sales of tangible property for the out-of-state vendor." Jerome R. Hellerstein and Walter Hellerstein, State and Local Taxation: Cases and Materials 385 (7th ed. 2001).

Ohio's taxing authority is circumscribed by the same Public Law 86-272 limitations as any other state. In order for Ohio to tax these receipts, it must demonstrate that taxpayer's activities within the state exceed the solicitation of sales, that these activities are not simply ancillary to the sales solicitations, and that the activities go beyond the de minimis standard. There is little indication that taxpayer's Ohio activity exceeds these standards. Again, it is noteworthy that Ohio's taxing authority would seem to agree because there is no evidence that Ohio has deemed these receipts subject to Ohio's net income tax. There seems little likelihood that Ohio would have the authority to subject taxpayer to Ohio's income tax; taxpayer's Ohio sales receipts were correctly "thrown-back" to Indiana pursuant to IC 6-3-2-2.

**B. Michigan Sales Income**.

Taxpayer argues that its Michigan sales income should not have been thrown back to Indiana because it was subject to Michigan's Single Business Tax (MSBT). Accordingly, taxpayer argues that it "has independent and additional support for nexus with the State of Michigan."

The Department must disagree with taxpayer's conclusion that imposition – or the likelihood of imposition – of the MSBT precludes Indiana from throwing back its Michigan sourced sales receipts. IC 6-3-2-2(n) precludes the state from throwing back sales receipts in those states in which "taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege for doing business, or a corporate stock tax." As the Indiana Tax Court has stated, "The MSBT is a type of value added tax VAT." First Chicago NBD Corp. v. Dept. of State Revenue, 708 N.E.2d 631, 632 (Ind. Tax Ct. 1999). "Although taxable income is one portion of the tax base formula, *the MSBT is not measured by or based on income*." Id. at 634 (*Emphasis added*). "The law [Public Law 86-272] applies only to net income taxes... and does not apply to the general business of taxes of states that do not employ a net income measure, such as Michigan's Single Business Tax, which is a form of value-added tax." Hellerstein & Hellerstein at 389.

The Michigan activities of taxpayer's independent representatives may subject taxpayer to the MSBT, but that fact is irrelevant in determining whether Indiana may throw-back taxpayer's Michigan sourced sales receipts. The Michigan sales were correctly "thrown-back" to Indiana pursuant to IC 6-3-2-2.

**C. Foreign Sales Income**.

Taxpayer maintains that its sales receipts from Puerto Rico, Ecuador, and Mexico should not be thrown back to Indiana because, "P.L. 86-272 does not protect these sales from taxation in those countries."

For the purposes of determining whether a taxpayer is subject to the taxing jurisdiction of another state pursuant to 45 IAC 3.1-1-64, "[t]he term 'state' means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof." IC 6-3-1-25. Accordingly, the jurisdictions to which taxpayer here refers – Puerto Rico, Ecuador, and Mexico – fall within the definition of "state," and the receipts obtained from those three jurisdictions are properly considered as potentially subject to the throw-back rule.

Taxpayer may be correct in its assertion that Public Law 86-275 does not prevent a foreign jurisdiction from levying an income tax on the receipts taxpayer obtained from customers within those foreign jurisdictions. However, taxpayer has done nothing to demonstrate that it is subject to a net income tax in Puerto Rico, Ecuador, or Mexico. Accordingly, under IC 6-3-2-2, the receipts taxpayer obtained from its customers in Puerto Rico, Ecuador, and Mexico were properly thrown-back to Indiana.

**FINDING**

Taxpayer's protest is respectfully denied.

**II. Abatement of the Ten-Percent Negligence Penalty**.

According to taxpayer, it "had a position of substantial authority for not reflecting sales as 100 [percent] Indiana when the original returns were filed." As a result of the Department's own "incorrect application of the throw back rule, penalties should not be assessed."

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

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

The Department respectfully disagrees with taxpayer's argument that it was entirely justified in not reporting *any* of its out-of-state income and that its decision to do so was based upon "ordinary business care." The Department must decline the opportunity to abate the consequent penalty.

**FINDING**

Taxpayer's protest is respectfully denied.

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**DEPARTMENT OF STATE REVENUE**

0420020340.LOF

**LETTER OF FINDINGS NUMBER: 02-0340**
**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.

**ISSUES**

**I. Sales and Use Tax- Lump Sum Contracts**

**Authority**: IC 6-8.1-5-1 (b), IC 6-2.5-2-1, IC 6-2.5-3-2 (a), IC 6-2.5-1-1, 45 IAC 2.2-3-9 (e), 45 IAC 2.2-3-7.

The taxpayer protests the assessment of use tax on materials incorporated into its real property.

**II. Sales and UseTax- Computer Software**

**Authority**: IC 6-2.5-3-2 (a), Sales and Use Tax Information Bulletin 8, issued February 9, 1990.

The taxpayer protests the assessment of use tax on certain computer software.

**III. Sales and Use Tax-Payment of Tax to Another State**

**Authority**: IC 6-2.5-3-2(a), Sales Tax Information Bulletin #31, Section II-B, issued January 31, 1986.

The taxpayer protests the assessment of Indiana use tax on a sign after it had paid Kentucky sales tax.

**IV. Tax Administration- Penalty**

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

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

**STATEMENT OF FACTS**

The taxpayer is a professional limited liability corporation that built a new surgical facility in Indiana. After an audit, the Indiana Department of Revenue hereinafter referred to as the "department," assessed additional sales and use tax for the tax period 1999-2000. The taxpayer protested a portion of the assessment and penalty. A hearing was held and this Letter of Findings results.

**I. Sales and Use Tax-Lump Sum Contracts**

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).

Indiana imposes a sales tax on retail sales of tangible personal property in Indiana. IC 6-2.5-2-1. Indiana also imposes a complementary use tax on tangible personal property stored, used, or consumed in Indiana when the sales tax was not paid at the time of purchase. IC 6-2.5-3-2 (a). The department assessed use tax on the taxpayer's use of several items of tangible personal property used in the construction of the taxpayer's facility. The taxpayer protested these assessments.

Regulations clarify the applicability of sales and use tax to construction and improvements to real estate.

45 IAC 2.2-3-9 (e) provides:

Disposition subject to the use tax. With respect to construction materials a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of revenue when he disposes of such property in the following manner:

(1) He converts the construction material into realty on land he owns and then sells the improved real estate;

(2) He utilizes the construction material for his own benefit; or

(3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

For the purposes of the above Regulation, 45 IAC 2.2-3-7 defines contractor and construction material as follows:

(a) Contractors. For purposes of this regulation [45 IAC 2.2] "contractor" means any person engaged in converting construction material into realty. The term "contractor" refers to general or prime contractors, subcontractors, and specialty contractors, including but not limited to persons engaged n building, cement work, carpentry, plumbing, heating, electrical work, roofing, wrecking, excavating, plastering, tile and road construction.

(b) Construction material. For purposes of the regulation [45 IAC 2.2] "construction material' means any tangible personal property to be used for incorporation in or improvement of a facility or structure constituting or becoming part of the land on which such facility or structure is situated.

The department assessed use tax on a light signaling system; wire and peripheral equipment used to support the computers, telephones, time clocks, and voice-call system; an illuminated outdoor sign; a fire alarm system; a security system; and venetian blinds. If the department could segregate the actual cost of the tangible personal property from the cost of the labor, the tax was only assessed on the value of the tangible personal property. If the amounts could not be segregated, the department assessed tax on the total value of the invoice. The department considered each of these transactions the sale of tangible personal property subject to either the sales tax or the use tax. The taxpayer protested these assessments contending that they were lump sum contracts for improvements to real estate and the contractors owed the sales tax on the tangible personal property.

Installations including an extensive amount of wiring in the walls of real estate become part of the real estate itself and cannot be removed without significant damage to the real estate. The taxpayer provided substantial evidence that the contracts for the installation of the light signaling system; wire and peripheral equipment used to support the computers, telephones, time clocks, and voice-call system; fire alarm system; and security system were lump sum contracts for the incorporation into and improvement of real estate. Therefore, the contractors are responsible for paying the sales or use tax on the purchases of these items of tangible personal property rather than the taxpayer.

The illuminated outdoor sign and venetian blinds are, however, different. After installation, they retain their character as personal property. They can also be removed doing little damage to the real estate. The department has consistently held that the installation of such items is the sale of tangible personal property. The taxpayer owes the use tax on the amount of the materials in the contract for installation of the sign. The venetian blinds were installed for a single charge with no breakdown of labor and materials. As such, this transaction constitutes a unitary transaction. The use tax is due on the total cost of the unitary transaction for the installation of the venetian blinds. IC 6-2.5-1-1.

**FINDING**

The taxpayer's protest to the assessments on the venetian blinds and out-door sign is denied. The remainder of the protest is sustained.

**II. Sales and Use Tax- Computer Software**

**DISCUSSION**

The department also assessed use tax on the taxpayer's use of certain computer software equipment pursuant to IC 6-2.5-3-2 (a). The taxpayer also protested this assessment. The computer software in question is advertised on the internet to medical offices and surgery centers. It is a specialty, highly customized software with a very broad range of applications. The taxpayer argues that the $43,000.00 cost of the adaptations evidences the high degree of customization necessary to make the software work properly for the taxpayer.

Sales and Use Tax Information Bulletin 8, issued February 9, 1990, clarifies the application of the sales and use tax to computer software as follows:

(t)ransactions involving computer software are not subject to Indiana Sales or Use tax provided the software is in the form of a custom program <u>specifically</u> designed for the purchaser.

Information Bulletin 8 also states:

Pre-written programs, not specifically designed for <u>one</u> purchaser, developed by the seller for sale or lease on the general market in the form of tangible personal property and sold or leased in the form of tangible personal property are subject to tax irrespective of the fact that the program may require some modification for a purchaser's particular computer. Pre-written or canned computer programs are taxable because the intellectual property contained in the canned program is no different than the intellectual property in a videotape or a textbook.

The computer software in question was not designed specifically for the taxpayer. Rather, it is marketed to medical and surgery facilities across the nation. The department agrees that the software required substantial adaptations before it could be used by the taxpayer. Those adaptations, however, do not change the basic character of the software from taxable canned software to exempt software specifically designed for the taxpayer.

**FINDING**

The taxpayer's protest is denied.

**III. Sales and Use Tax-Payment of Tax to Another State**

**DISCUSSION**

The taxpayer protests the assessment of use tax on the use of an illuminated outdoor sign with pole. Previously in this Letter of Findings, the department denied the taxpayer's protest to the assessment of use tax on the outdoor sign as property installed pursuant to a lump sum contract for improvement to realty. Alternatively, the taxpayer contends that it does not owe the Indiana use tax because it paid the Kentucky sales tax on the sign. Alternatively, the taxpayer argues that it deserves a credit for the Kentucky sales tax paid.

The taxpayer accepted delivery of the sign in Indiana and the sale was completed here. Therefore, the retail transaction is subject to the Indiana sales and use tax rather than the Kentucky sales tax. The use of the items in Indiana is subject to the Indiana use tax pursuant to IC 6-2.5-3-2(a). The Indiana use tax is the tax that is properly due and owing.

The department's position concerning credit for sales taxes paid to other jurisdictions is clearly stated in Sales Tax Information Bulletin #31, Section II-B, issued January 31, 1986 as follows:

> A person is entitled to a credit against the Indiana use tax which is equal to the amount of sales tax, purchase tax, or use tax properly and validly paid to another state, territory, or jurisdiction of the United States for the acquisition of a particular item of property. No credit will be allowed if the tax was paid in error to another state and was not due that state.

In this case, the taxpayer owes Indiana use tax on the use of the sign and improperly paid the sales tax to Kentucky. Therefore, the taxpayer does not receive a credit for the sales tax paid to Kentucky.

**FINDING**

The taxpayer's protest is denied.

**IV. Tax Administration- Penalty**

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 failed to pay sales tax or self assess use tax on such clearly taxable items as office supplies and consumable surgical supplies. The taxpayer's inattention to its duty to pay these taxes constitutes negligence.

**FINDING**

The taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

11-20020374.LOF
11-20020375.LOF
11-20020376.LOF
11-20020377.LOF

**LETTER OF FINDINGS NUMBERS: 02-0374, 02-0375, 02-0376, 02-0377**
**Marion County Supplemental Auto Rental Excise Tax**
**For the Years 1998, 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.

**ISSUES**

**I. Marion County Supplemental Auto Rental Excise Tax**

**Authority:** IC 6-6-9.7-7

Taxpayer protests the imposition of Marion County Supplemental Auto Rental Excise Tax for 1998.

**II. Tax Administration-Penalty**

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

Taxpayer protests the imposition of the penalty for negligence.

**STATEMENT OF FACTS**

Taxpayer is a business engaged in renting cars, primarily for insurance replacement for stolen and damaged vehicles. Some of taxpayer's business was conducted from rental locations in Marion County. For taxable years 1998, 1999 and 2000, taxpayer did not report any rentals as subject to Marion County Supplemental Auto Excise Tax. Taxpayer was audited for the taxable years in question. During the audit, taxpayer was unable to substantiate to the auditor's satisfaction that several rentals were made for purposes of replacing cars subject to damage or theft. Thus, Department assessed additional tax and penalties with respect to the tax in 1998, 1999 and 2000. Taxpayer has protested the imposition of tax for 1998, and the penalties for all three years

**I. Marion County Supplemental Auto Rental Excise Tax**

**DISCUSSION**

Taxpayer protests the imposition of Marion County Supplemental Auto Rental Excise Tax for taxable year 1998. Under Ind. Code § 6-6-9.7-7, counties meeting the criteria set forth therein are permitted to implement a county supplemental auto rental excise tax for short-term (less than 30 days) rentals of automobiles. In 1997, the Marion County City-County Council implemented such a tax. Taxpayer claims that the imposition of the tax for 1998 was improper, due to the fact that the state rental excise tax forms for that year did not contain an entry for the new Marion County tax. Taxpayer has not provided additional information to substantiate that the tax was not in effect for the periods in question.

**FINDING**

Taxpayer's protest is denied.

**II. Tax Administration-Penalty**

Taxpayer also protests the imposition of a 10% penalty for negligence. Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC 6-8.1-10-2.1. The Indiana Administrative Code further provides:

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

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

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

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

45 IAC 15-11-2.

Taxpayer has claimed that it was not willfully negligent, and therefore should not be subject to tax. However, the test is not one of willful neglect, a standard tantamount to fraud. The standard for taxpayer negligence is one of meeting the standard of care expected of a normal taxpayer, either in terms of filing or recordkeeping. Taxpayer has not provided any further information with respect to its standard of care.

**FINDING**

Taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0420020495.LOF

**LETTER OF FINDINGS NUMBER: 02-0495**
**Sales Tax**
**Responsible Officer**
**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.

**ISSUES**

**1. Sales Tax-Imposition**

**Authority:** IC 6-8-1-5-1(b), IC 6-8.1-5-4(a), IC 6-2.5-8-1.

The taxpayer protests the imposition of sales tax.

**STATEMENT OF FACTS**

From 1998 through May, 2000, the taxpayer operated a sole proprietorship marketing prepaid telephone calling cards. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed sales taxes, interest and penalty against the taxpayer as sole proprietor of the business. The taxpayer protested the assessment of tax and penalty. A hearing was held and this Letter of Findings results.

**1. Sales Tax-Imposition**

**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). Taxpayers are required to "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).

The taxpayer purchased prepaid telephone calling cards from telephone service providers at a discounted rate. The taxpayer then sold these cards to various customers. The taxpayer never registered with the department as a registered retail merchant as required by IC 6-2.5-8-1. The taxpayer never collected sales tax. The taxpayer argued that she did not collect sales tax because her customers were all business operations such as convenience stores that then resold the cards and collected the sales tax. The taxpayer was not able, however, to produce documentation adequate to sustain her burden of proving that the department's assessment was incorrect.

**FINDING**

The taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0420020529.LOF

**LETTER OF FINDINGS NUMBER: 02-0529**
**Sales and Use Tax**
**Tax Year 1999**

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

**ISSUES**

**I. Sales and Use Tax-Imposition of Tax**

**Authority:** IC 6-8.1-5-1 (b), IC 6-2.5-3-2, IC 6-2.5-5-8, IC 6-2.5-5-6, IC 6-2.5-3-2(d).

The taxpayer protests the imposition of use tax on a truck.

**STATEMENT OF FACTS**

The taxpayer is a corporation with several lines of business including dealing in used automobiles. The taxpayer purchased a truck from another dealership on November 10, 1999. The taxpayer filed an ST108-E stating that the transaction was exempt from the sales tax because the taxpayer purchased the vehicle for resale in its regular course of business. Therefore, the taxpayer did not pay any sales tax at the time of the purchase. The taxpayer modified this vehicle by repainting it and changing accessories such as the running boards. The taxpayer used this vehicle as a demonstrator or model of the sorts of changes it could make to a vehicle in its automobile conversion business. The modified truck was shown to potential automobile conversion customers at the taxpayer's business site and at regional automobile and automobile conversion shows. The taxpayer sold the truck and properly collected and remitted sales tax on February 3, 2003. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed use tax, interest, and penalty on the taxpayer's use of this truck. The taxpayer protested the assessment. A telephone hearing was held and this Letter of Findings results.

**I. Sales and Use Tax-Imposition of Tax**

**DISCUSSION**

The department assessed use tax on the taxpayer's use of the truck from 1999 to 2003.

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).

Indiana imposes an excise tax, the use tax, on tangible personal property stored, used, or consumed in Indiana when no sales tax was paid at the time of purchase. IC 6-2.5-3-2. Since the taxpayer used the truck as a demonstrator for its automobile conversion business and did not pay sales tax at the time of purchase, the taxpayer owed use tax on the use unless it qualified for an exemption. The taxpayer argued that the use of the truck qualified for several exemptions.

The taxpayer first argued that the truck qualified for exemption as purchased for resale in the regular course of the taxpayer's business pursuant to IC 6-2.5-5-8. The taxpayer, however, used the truck as a model for the taxpayer's automobile conversion business for more than three years before the truck was resold. The taxpayer argued that he could find no law stating that a truck had to be sold in a certain amount of time to be exempt because it was purchased for resale. At the hearing, however, the taxpayer stated that during that time period the truck was primarily used as a demonstrator for the automobile conversion business. Therefore, the use of the truck did not qualify for exemption from sales or use tax as being purchased for resale. The department properly imposed tax on the taxpayer's use of the truck.

Alternatively, the taxpayer argued that the use of the truck qualified for exemption pursuant to IC 6-2.5-5-6 or IC 6-2.5-3-2(d). Since the sale took place in Indiana and the taxpayer used the truck in Indiana, the above cited exemption statutes do not apply in this situation.

**FINDING**

The taxpayer's protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0420020572.LOF

**LETTER OF FINDINGS NUMBER: 02-0572**
**Sales Tax**
**Responsible Officer**
**For the Years 1999-September 30, 2000**

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

**ISSUES**

**1. Sales 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), Slodov v. United States, 463 U.S. 238 (1978).

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

**2. Tax Administration-Penalty**

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

The taxpayer protests the assessment of penalty.

**STATEMENT OF FACTS**

The Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales taxes for the tax period 1999 through September 30, 2000 against the taxpayer as responsible officer of a corporation. 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**

The taxpayer purchased a 49 % interest in the corporation on August 17, 1990 as an investment. Although he was a director, the taxpayer was not involved in the day-to-day operations of the corporation. The other shareholder, as President and Secretary of the corporation, operated the corporation. Sometime during 2000, the taxpayer discovered that the other director had mismanaged the corporation and commingled corporate funds with his own personal funds and that the corporation was insolvent. On October 26, 2000, the taxpayer purchased the other director's interest in the corporation. At this time the taxpayer became responsible for the day to day operations of the corporation. The corporation collected but failed to remit sales taxes during the tax period January 1, 1999 through September 30, 2000. The corporation properly remitted all sales taxes collected after the tax period ending September 30, 2000.

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.

The taxpayer argues that although he was the person with the duty to remit the sales taxes to Indiana after October 26, 2000, he was not the person with the duty to remit the sales taxes to Indiana during the tax periods when the taxes were not properly remitted. Therefore, he argues that he is not personally responsible for the trust taxes that were not remitted prior to the time he became the responsible officer.

This argument is not persuasive. As the responsible officer after October 26, 2000, the taxpayer is deemed to have known that the trust taxes had not been properly remitted. As the person who made the fiscal decisions for the corporation, he determined which obligations to pay and which obligations to not pay. He chose not to remit the trust taxes due to Indiana during the period when he operated the corporation. Therefore he had the duty to remit those taxes and is personally responsible for those sales taxes not remitted to the state.

Alternatively, the taxpayer contends that he should only be held personally responsible to the extent that the corporation actually had funds at the time he became the responsible officer on October 26, 2000. The taxpayer bases this contention on the United States Supreme Court finding in Slodov v. United States, 463 U.S. 238 (1978). In that case, Dr. Slodov purchased the stock in a corporation whose previous owners had dissipated the corporate assets without remitting employee withholding trust taxes. The IRS brought an action to recover the trust taxes from Dr. Slodov personally. The United States Supreme Court held that Dr. Slodov could be held personally responsible only to the extent that the corporation had funds at the time it was purchased by Dr. Slodov. Similarly, in the instant case, the previous owner and manager of the corporation dissipated corporate funds and did not remit trust taxes. The taxpayer should only be held personally responsible for the payment of the trust taxes to the extent the corporation had funds available to pay the taxes when the taxpayer gained control. The taxpayer presented substantial evidence that the corporation had $12,249.21 in its accounts on the date of transfer of the corporation. Therefore, the taxpayer is personally responsible for remitting $12,249.21.

**FINDING**

The taxpayer's protest is sustained to the extent the assessment exceeds $12,249.21.

**2. 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 adequate evidence to sustain his burden of proof that he was not negligent in his failure to remit the assessed taxes.

**FINDING**

The taxpayer's protest is sustained.

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**DEPARTMENT OF STATE REVENUE**

02-20030225.LOF

**LETTER OF FINDINGS NUMBER: 03-0225**
**Gross Income Tax**
**For the Tax Years 1999, 2000, 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.

**ISSUES**

**I. Gross Income Tax-Small Business Exemption**

**Authority:** IC 6-2.1-2-2; IC 6-2.1-3-24.5; I.R.C. § 1361(b); I.R.C. § 1362(a).

Taxpayer protests imposition of gross income tax with respect to taxpayer's subsidiaries.

**II. Tax Administration-Penalty**

**Authority:** IC 6-8.1-10-1; 45 IAC 15-11-2.

Taxpayer protests the imposition of penalty for negligence.

**STATEMENT OF FACTS**

Taxpayer consists of a non-resident parent corporation (hereinafter referred to as "Parent"), with two wholly-owned subsidiary corporations and one largely-owned subsidiary corporation, with one of the wholly-owned subsidiaries and the largely-owned subsidiary (hereinafter referred to as "Subsidiaries") at issue. Parent, with thirteen individual shareholders, is a small business company, and thus would qualify for S-Corporation status upon proper election. For taxable years 1999, 2000, and 2001, Parent had not elected to be treated as an S-Corporation.

The Department conducted an audit for taxable years 1999, 2000, and 2001. As a result of the audit, Department assessed gross income tax with respect to the receipts of Subsidiaries, based on their gross income as a result of the conclusion that Subsidiaries were not small business companies. However, Parent's gross income was not subject to gross income tax.

**I. Gross Income Tax-Small Business Exemption**

**DISCUSSION**

As a general rule, non-resident corporate taxpayers are subject to gross income tax on their gross receipts derived from businesses and activities conducted in Indiana. Ind. Code § 6-2.1-2-2(a)(2) (repealed effective January 1, 2003). However, under Ind. Code § 6-2.1-3-24.5(b), a corporation which qualifies as a small business corporation is exempt from Gross Income Tax. For Gross Income Tax purposes, a small business corporation is defined as having the same definition that term has in I.R.C. § 1361(b). Ind. Code § 6-2.1-3-24.5(a).

Parent qualifies as a small business corporation within the statutory definition of I.R.C. § 1361(b)(1). However, Parent is not an S-Corporation due to the fact that it has not elected such status under I.R.C. § 1362(a).

Subsidiaries are not small business corporations due to the fact that the Subsidiaries have a corporate shareholder, which renders Subsidiaries ineligible for such status under I.R.C. § 1361(b)(1)(B), which limits the scope of permissible shareholders to various persons or entities, but generally does not permit ownership by another for-profit corporation.

Taxpayer maintains that, because the Parent is eligible for S-Corporation treatment within I.R.C. § 1361(b), Subsidiaries are eligible by virtue of I.R.C. § 1361(b)(3), which provides that domestic corporations wholly owned by an S-Corporation are disregarded as a separate entity, and treated as part of the parent S-Corporation for tax purposes. However, at the very least, such status requires the parent corporation elect to be treated as an S-Corporation, which Parent did not do in this case. Further, one of the Subsidiaries was not wholly owned by Parent, which rendered that company outside the definition provided by I.R.C. § 1361(b)(3). Thus, Subsidiaries were not small business corporations within the meaning of the statute, and gross income tax was properly assessed.

**FINDING**

Taxpayer's protest is denied.

**II. Tax Administration-Penalty**

**DISCUSSION**

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

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

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

(1) the nature of the tax involved;

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

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has presented sufficient information that the taxpayer acted with the level of reasonable care expected of a taxpayer, and accordingly the penalty should be waived.

**FINDING**

Taxpayer's protest is sustained.

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**DEPARTMENT OF STATE REVENUE**

04-20030230.LOF

**LETTER OF FINDINGS NUMBER: 03-0230**
**Sales & Use Tax**
**For the Calendar Years 2000 & 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 superceded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUE**

**I. Tax Administration – Penalty**

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

The taxpayer protests the negligence penalty.

**STATEMENT OF FACTS**

The negligence penalty was assessed on a Department audit conducted for the calendar years 2000 and 2001. The taxpayer failed to remit use tax on cards, software, gloves, wall display, candles, Kleenex, napkins, gift items, tote bags, folders, office forms, compact disc library, furniture, fragrance paks, clergy records, labels, decals, trays, and subscriptions. As such, an assessment was issued which assessed use tax on these purchases along with an assessment for negligence penalty.

The taxpayer is a funeral home located in Indiana.

**I. Tax Administration – Penalty**

**DISCUSSION**

The taxpayer requests the penalty be abated.

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.

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**DEPARTMENT OF STATE REVENUE**

0420030425.LOF

**LETTER OF FINDINGS NUMBER: 03-0425**
**Sales Tax**
**Responsible Officer**
**For the Years 2000-2001**

**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.

**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 an employee and Vice-President of a corporation that did not properly remit collected sales taxes to the state during the tax period 2000-2001. 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.

The corporation was a closely-held family-owned business. The taxpayer did not possess any ownership, nor was he a stockholder or investor in the company. He was not on the Board of Directors and never attended a Board of Directors' meeting. The taxpayer was hired by the corporation as a bargaining union sheet metal worker to be the coordinator of the industrial construction projects. Due to the success of the newly implemented programs, the taxpayer received a title-only promotion in 1998. The promotion was to Divisional Vice President of the commercial construction projects. His duties consisted of supervising and instructing the estimators and project managers for the commercial group. The taxpayer was required to conduct sales and marketing meetings and weekly project progress meetings. He reviewed the costs, posture and problem solving within the specific commercial group. The taxpayer did not have a corporate credit card, nor was he a signatory on any of the corporation's bank accounts. The taxpayer never ordered checks to be written. He could not and did not sign any checks for the corporation. It was never part of his duties to authorize or make payments of bills or taxes of any type.

The taxpayer provided significant documentation evidencing that he did not have the position within the corporate power structure, authority as an officer and employee, or control over finances that would give him the duty to remit the trust taxes to the state of Indiana. The taxpayer sustained his burden of proving that the department incorrectly assessed the corporation's sales tax liability against him personally.

**FINDING**

The taxpayer's protest is sustained.

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**DEPARTMENT OF STATE REVENUE**

02-20030450.LOF

**LETTER OF FINDINGS NUMBER: 03-0450**
**Adjusted Gross Income Tax**
**For the Years 1999, 2000, 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.

**ISSUES**

**I. Prospective Treatment of Taxpayer's Adjusted Gross Income Tax Liability**.

**Authority:** IC 6-8.1-3-3; IC 6-8.1-3-3(b); City Securities Corp. v. Dept. of State Revenue, 704 N.E.2d 1122 (Ind. Tax 1998).

If the Department determines that sales of software maintenance contracts are subject adjusted gross income tax, taxpayer maintains that it is entitled to prospective treatment of those determinations.

**II. Tax Administration - Penalty**

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

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

**STATEMENT OF FACTS**

Taxpayer consists of several corporations engaged in various businesses. As part of its businesses, taxpayer bundles computer software applications and hardware equipment packages, which are then resold. In addition, with respect to the packages, maintenance contracts are also sold. The contracts include software updates and technical service assistance. Most services are provided by the taxpayer in Indiana.

For purposes of adjusted gross income tax, taxpayer treated the receipts of the maintenance contracts as occurring in the state in which the customer used the software. Therefore, certain receipts were treated as out-of-state sales for adjusted gross income tax purposes. However, upon audit, Department treated the amounts received under the maintenance contracts as being sales of taxpayer in Indiana, and thus Indiana sales for apportionment in determining adjusted gross income tax.

Previously, taxpayer had protested the same issues with the Department. The Department previously sustained taxpayer's protest in a Letter of Findings. Taxpayer protests both the imposition of taxes and penalties by the Department, and requests prospective imposition of these taxes with respect to the transactions in controversy.

**I. Prospective Treatment of Taxpayer's Adjusted Gross Income Tax Liability**.

**DISCUSSION**

Taxpayer protests the Department's assessment of the adjusted gross income tax with respect to sales of software maintenance contracts where the services are performed in Indiana, but the software is used out of state.

Taxpayer had previously protested a Department assessment on the same issues, and the Department had sustained taxpayer's protest. The previous Letter of Findings had treated the sale of the maintenance agreements as sales of tangible personal property. For AGI purposes, these sales were out-of-state sales that were not included in the numerator of the Indiana sales factor. The Department has reconsidered this position and determined that the maintenance contracts are primarily the provision of services within Indiana, even if the service is provided for tangible personal property used outside Indiana. Thus, the sales of software maintenance which had previously been treated as non-Indiana sales were changed to Indiana sales for adjusted gross income tax under current Department interpretation.

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

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

In this case, taxpayer had claimed the sales of software maintenance contracts as non-Indiana sales were exempt in accordance with a Department Letter of Findings, and was entitled to rely on the previous Letter of Findings with respect to the issues protested therein, and therefore is not taxable for the years in question. However, for all tax years after the audit period, taxpayer is subject to adjusted gross income tax with respect to the software maintenance contracts.

**FINDING**

Taxpayer's protest is sustained, subject to the conditions listed above.

**II. Tax Administration-Penalty**

**DISCUSSION**

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC 6-8.1-10-2. In addition, 45 IAC 15-11-2(a) provides:

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

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

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

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has presented evidence that it reasonably relied on the Department's prior Letter of Findings with respect to the returns in question. Accordingly, the penalty for negligence is waived.

**FINDING**

Taxpayer's protest is sustained.

**DEPARTMENT OF STATE REVENUE**

04-20030451.LOF

**LETTER OF FINDINGS NUMBER: 03-0451**
**SALES AND USE TAX**
**For 2003**

**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 and Use Tax—Application to tangible personal property purchased in Indiana for use outside the state**

**Authority**: IC 6-2.5-3-2; IC 6-2.5-5-9(6); IC 6-2.5-5-15; IC 6-6-6.5-2; IC 6-6-6.5-3; IC 6-6-6.5-8(d); IC 6-6-6.5-9;

Taxpayer protests the imposition of use tax on an unregistered aircraft brought into Indiana for a period in excess of thirty days.

**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.

**STATEMENT OF FACTS**

Taxpayer is an Indiana company with its principal place of business in Indiana. Taxpayer, and its various affiliates, also have a business location in Connecticut and conduct business in all 50 states. Taxpayer purchased an aircraft in Arizona on June 19, 2003 and flew it to Indiana, where it remained for 13 days before its transfer and subsequent registration in Connecticut on September 30th, 2003. Taxpayer submitted an AE-1 exemption form dated October 1st, 2003. No sales or use tax was paid to Arizona, Indiana, or Connecticut. Indiana assessed use tax and registration fees against the aircraft and taxpayer now protests that the tax and registration fee were incorrectly applied to this transaction.

**DISCUSSION**

**I. Sales and Use Tax—Application to tangible personal property in Indiana that was purchased outside the state**

When taxpayer acquired this aircraft in Arizona, it brought the aircraft to Indiana and could have claimed an exemption from Indiana sales tax through IC 6-2.5-5-9(6). To take advantage of this statutory exemption, taxpayer had to fill out form AE-1. This form is used expressly for aircraft registered to Indiana residents and which are to be registered and/or titled outside the state of Indiana.

IC 6-6-6.5-2 and IC 6-6-6.5-3 establish the necessity of registration and set the parameters of this requirement. IC 6-6-6.5-2 states in relevant part;

Sec. 2. (a) Except as otherwise provided in this chapter, any resident of this state who owns an aircraft shall register the aircraft with the department not later than thirty-one (31) days after the purchase date.

…..

IC 6-6-6.5-3 also includes, in relevant part;

Sec. 3. (a) Any resident of this state who owns an aircraft, and any nonresident who has established a base in this state and bases an aircraft in this state for more than sixty (60) days, which is not exempt from registration under section 9 of this chapter, shall apply to the department for a certificate of registration for such aircraft. ….

As to the gross retail tax, IC 6-6-6.5-8(d) states:

A person shall pay the gross retail tax or use tax to the department on the earlier of:

(1) The time the aircraft is registered; or

(2) not later than thirty-one (31) days after the purchase date;

unless the person presents proof to the department that the gross retail tax or use tax has already been paid with respect to the purchase of the aircraft as proof that the taxes are inapplicable because of an exemption.

The exemption taxpayer seeks to claim is based on IC 6-6-6.5-9, which states:

Sec. 9. (a) The provisions of this chapter pertaining to registration and taxation shall not apply to any of the following:

….

(6) An aircraft owned by a resident of this state that is not a dealer and that is not based in this state at any time, if the owner files the required form not later than thirty-one (31) days after the date of purchase; and furnishes the department with evidence, satisfactory to the department, verifying where the aircraft is based during the year.

….

Taxpayer asserts that the submission of the AE-1 form, albeit late, conforms to the above statutory requirements. The form, correctly documenting the over 90 day lag between taxpayer's purchase of the aircraft and its registration in Connecticut, is not a talisman that can overcome the assessment by its mere appearance. The form comports to IC 6-6-6.5-9 by explicitly informing the taxpayer it must be filed within thirty (30) days after the purchase date. Regardless of the form's arrival time and the method of its presentation, the form as prepared by taxpayer would not provide an exemption under IC 6-6-6.5-9 inasmuch as it documents the taxpayer's failure to fall within the established guidelines for the exemption-i.e. purchasing and failing to register an aircraft in Indiana or elsewhere for more than 31 days and by establishing that the aircraft was not registered for more than 60 days after its purchase.

Taxpayer argues that the imposition of this tax in this fashion could result in a corporate resident of Indiana being taxed for the purchase, and use, of an aircraft in another state without the aircraft ever being based or brought into Indiana. Taxpayer's hypothetical is without merit. The imposition statute of the use tax, IC 6-2.5-3-2, explicitly states:

*(a)* An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property *in Indiana* if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction. *(Emphasis added)*

Taxpayer purchased an aircraft, brought the aircraft to Indiana, and failed to provide a valid exemption or to demonstrate the payment of sales or use tax or registration to another jurisdiction within the respective statutory limits. Despite its failure to file the required forms for Indiana or to register in another state in a timely fashion taxpayer asserts that the established statutory and regulatory procedures should be waived to permit it to operate as it sees fit, presumably paying taxes and filing forms only when taxpayer concludes it should. The Department declines to so find.

**FINDINGS**

The taxpayer is denied.

**DISCUSSION**

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

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 AE-1 exemption forms are quite clear in their function and application. The title on the form states, "Based out of state Certificate of Exemption for aircraft." Because the form's application was straightforward, the law was clear, and because taxpayer failed to use the form and therefore failed to follow instructions provided by the Department, the taxpayer was negligent.

**FINDINGS**

The taxpayer is denied.

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**DEPARTMENT OF STATE REVENUE**

0420030476.LOF

**LETTER OF FINDINGS NUMBER: 03-0476**
**Sales Tax**
**Responsible Officer**
**For the Tax Period July, 2001-December, 2001**

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

**ISSUES**

**1. Sales Tax-Responsible Officer Liability**

**Authority**: IC 6-2.5-9-3, IC 6-8.1-5-1(b).

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

**STATEMENT OF FACTS**

The Indiana Department of Revenue, hereinafter referred to as the "department," assessed sales taxes, interest and penalty against the taxpayer as a responsible officer of a corporation that did not properly remit sales taxes during the tax period July, 2001 through December, 2001. The taxpayer protested the assessment of tax and penalty. This Letter of Findings is based upon the documentation in the file.

**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.

The taxpayer provided significant documentation evidencing that he left his position with the corporation in 1997. Since the taxpayer was not an employee, officer, or member of the corporation from July, 2001 through December, 2001, the taxpayer cannot be held personally responsible for trust taxes that the corporation did not remit to the state.

**FINDING**

The taxpayer's protest is sustained.

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**DEPARTMENT OF STATE REVENUE**

0420040010P.LOF

**LETTER OF FINDINGS NUMBER: 04-0010P**
**Sales & Use Tax**
**For the month of March 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 superceded 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 March 2003.

The taxpayer is an out-of-state company.

**I. Tax Administration – Penalty**

**DISCUSSION**

The taxpayer requests the penalty be abated as the taxpayer's employee responsible for the tax filing had medical conditions that precluded the employee from filing the tax return on time.

The Department points out the taxpayer is responsible for tax compliance that includes the duties performed by the taxpayer's employees even if the employee has medical conditions that preclude the proper performance of tax duties.

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.

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**DEPARTMENT OF STATE REVENUE**

0320040022.LOF

**LETTER OF FINDINGS NUMBER: 04-0022**
**Withholding and Sales Tax**
**Responsible Officer**
**For the Tax Periods 1999 and December, 2001-December, 2002**

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

**ISSUES**

**1. Sales and Withholding Tax-Responsible Officer Liability**

**Authority**: IC 6-2.5-9-3, IC 6-8.1-5-1(b), IC 6-3-4-8(f).

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

**STATEMENT OF FACTS**

The Indiana Department of Revenue, hereinafter referred to as the "department," assessed sales taxes,withholding tax, interest and penalty against the taxpayer as a responsible officer of a corporation that did not properly remit sales taxes during the tax period 1999 and December, 2001 through December, 2002. The taxpayer protested the assessment of tax and penalty. A telephone hearing was held and this Letter of Findings results.

**1. Sales and Withholding 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.

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

The sales tax assessment for the period ending December 31, 1999 resulted from the department's audit of the corporation.

The audit deficiency resulted from sales taxes that were not collected but did not have the proper exemption certificates and use tax deficiencies. The use taxes were not held by the corporation in trust for the state. Therefore, the taxpayer is not personally responsible for the payment of the use taxes.

The sales taxes that were not collected, however, are considered trust taxes. As president during the audit period, the taxpayer is responsible for the payment of these taxes.

The taxpayer provided significant documentation evidencing that he resigned his position with the corporation in October, 2001 and sold his interest in the corporation in November, 2001. Since the taxpayer was not an employee, officer, or member of the corporation from December, 2001 through December, 2002, the taxpayer cannot be held personally responsible for the withholding trust taxes that the corporation did not remit to the state.

**FINDING**

The taxpayer's protest is sustained in part and denied in part.

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**DEPARTMENT OF STATE REVENUE**

03-20040030P.LOF

**LETTER OF FINDINGS NUMBER: 04-0030P**
**Withholding Tax**
**For the month of July 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 July 2003.

The taxpayer is a company located in Indiana.

**I. Tax Administration – Penalty**

**DISCUSSION**

The taxpayer requests the penalty be abated as the error was the result of the misinterpretation of the due date by a new employee. Furthermore, the taxpayer claims to have a very good payment history.

With regard to the payment history, the taxpayer has had another filing which was filed late due to changes in accounting personnel.

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. The taxpayer needs to ensure the taxpayer's employees are aware of filing requirements.

**FINDING**

The taxpayer's penalty protest is denied.

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**DEPARTMENT OF STATE REVENUE**

0420040044P.LOF

**LETTER OF FINDINGS NUMBER: 04-0044P**
**Sales and Use Tax**
**For the Years 1999-2001**

**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- 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 in the business of selling and servicing new and used vehicles. 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 assessment of penalty and a hearing was scheduled. The taxpayer submitted additional documentation for review in lieu of attending a hearing. This finding is based on the information in 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. 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 contends that its failure to pay the proper use tax was not due to negligence. The taxpayer supported this contention by submitting a previous audit to indicate that many of the deficiencies found in this audit were not considered deficiencies in the previous audit. However, this audit also included use tax assessments on clearly taxable items such as light bulbs, soft drinks, business cards, greeting cards, badges, magnets, and hand cleaner. Use tax was also assessed on the use of some of these items in the previous audit. The taxpayer's breach of its duty to pay sales tax at the time of purchase or self assess use tax on these items constitutes negligence.

**FINDING**

The taxpayer's protest is denied.