INDIANA DEPARTMENT OF INSURANCE
Bulletin 125
May 21, 2004
Instructions for Product Filings

This Bulletin is directed to all insurers, health maintenance organizations, risk retention groups, reciprocals, rating organizations, associations and all other entities making product filings with the Indiana Department of Insurance.

Effective July 1, 2004, Department of Insurance Bulletin 83 is withdrawn.

All entities making product filings with the Indiana Department of Insurance should refer to the rate and form filing instructions on the Department website, www.state.in.gov/idoi.

INDIANA DEPARTMENT OF INSURANCE
Sally McCarty, Commissioner

INDIANA DEPARTMENT OF INSURANCE
June 7, 2004
Bulletin 126
Applications for Personal Lines Coverage
By Returning Members of the Armed Services

This Bulletin is directed to all insurers writing automobile and homeowners' insurance in the State of Indiana.

Indiana Code § 27-1-22-26 is designed to protect individuals who are currently serving or have served in the armed forces during the six (6) months preceding an application for automobile insurance. This section of the insurance code prohibits insurers from setting the premium rate for a policy of motor vehicle insurance at an amount higher than the applicable rate set forth in the rating plan due to the fact that the individual has not been covered by motor vehicle insurance for a period of time. A violation of this section is an unfair and deceptive act or practice in the business of insurance under Indiana Code § 27-4-1-4.

Some members of the armed services have discontinued automobile insurance coverage in Indiana while on active duty overseas. This bulletin is to remind insurers of the requirement set forth in the statute and to caution insurers against penalizing returning members of the armed services for an interruption in coverage due to their military service.

If a returning service member who was a policyholder in good standing has had an interruption in automobile insurance coverage due to active military service, insurers should reinstate those policies as if there had been continuous coverage during the period of military service. Likewise, if the returning service member wishes to purchase a policy with a new insurer, the new insurer should treat the applying service member as if there had been continuous coverage during – and six (6) months following - a period of active military service.

The Department would like to see homeowners' insurers extend the same courtesies to their policyholders who are members of the armed services.

INDIANA DEPARTMENT OF INSURANCE
Sally McCarty, Commissioner

NATURAL RESOURCES COMMISSION
Information Bulletin #28 (First Amendment)
Easements on Department of Natural Resources Properties and Navigable Waters
I. Application and Purpose of Information Bulletin

(A) The department of natural resources owns properties throughout Indiana. The properties serve a variety of natural, cultural, economic, and recreational purposes. Missions of divisions within the department vary according to their statutory responsibilities. For example, a state forest may offer many of the same opportunities as a state park, but management on these two types of properties must also properly reflect differing priorities in the purposes they serve. Included among them are navigable waters that the state holds in trust for its citizens and for which the department has general charge.

(B) One management challenge faced by every type of department property is how properly to address easements. New or expanded easements are sought. Properties are acquired where easements were established before acquisition. Existing easements are modified or abandoned.

(C) In general, an easement is a right of use over the property of another. This information bulletin is directed to the right of use of another person over the property of the department (as opposed to an easement the department may enjoy over the property

of another). The term "easement" should be broadly construed to give liberal application to this information bulletin. As a result, the guidance may reasonably be applied to rights-of-way, licenses for the use of department lands, and similar interests. The information bulletin is intended to apply only to the department's proprietary functions with respect to these lands, however, and not to its regulatory functions. In other words, this information bulletin should not be viewed as providing guidance with respect to any licensing function, sanction, or other order that is subject to review under the administrative orders and procedures act (IC 4-21.5).

The purpose of the information bulletin is to set guidance for the management of easements on properties owned by the department, including navigable waters. The emphasis is upon requests for new or expanded easements, and what employees of the department should consider in making recommendations pertaining to those requests. Consideration is also given to the management of existing easements and to their modification or abandonment. In seeking to achieve the purpose of this information bulletin, the overall responsibilities of the department, as well as the unique missions of its divisions, provide a backdrop. An effort is also made to incorporate policies previously adopted by the natural resources commission relative to the management of easements.

II. History of Easement Policies Adopted by the Commission

(A) One of the major functions of the natural resources commission is to assist in implementing uniform policies with respect to natural and cultural resources. Important elements of this function are to provide policy guidance and to participate in management of properties owned or leased through the department of natural resources. In performing this function, the commission has previously adopted policy statements concerning the management of easements on department of properties.

(B) A notable statement by the commission was made in November 1966 with respect to utility lines. This statement suggested four basic principles:

1. The commission has authority, under proper circumstances, to approve the construction of utility transmission facilities on department properties and to approve the grant of an easement for their maintenance.
2. To the extent practicable, the placement of utility transmission facilities should use established corridors to accomplish the following purposes:
    (A) reduce the area of land required;
    (B) lessen the adverse impact upon the aesthetic qualities of the land; and
    (C) minimize physical damage to the land.
3. Reasonable fees and charges should accompany the approval of a utility easement, but fees and charges should be waived where the utility transmission facilities are being placed for the convenience of the department.
4. An easement should include a provision specifying that a utility is responsible for costs and damages if utility transmission facilities are later moved.

(C) In March 1971, the commission adopted a policy concerning parcels in private ownership that were landlocked as a result of public land acquisition for Monroe Lake. Although the terms of this policy are largely peculiar to the site, and beyond the scope of this information bulletin, three basic principles were also suggested by the policy:

1. The department should consider providing access to a person, who is landlocked as a result of acquisitions by a governmental entity, where the department is or later becomes responsible for land management.
2. The access should be developed so as not to conflict with any specialized use of the property designated by the department and so as to minimize the impact on aesthetic values.
3. Where the federal government has a special relationship to the land, resulting from its status as the lessor or as a condition of providing funding for property acquisition, the relationship must be considered in evaluating any request for an easement.

III. Policy Statement Regarding Easements on Department Properties

Lands managed by the department are held for the benefit of all the people of Indiana. The lands were ordinarily purchased with public funds or obtained through donations from citizens whose explicit or implicit desire was to enhance public enjoyment and education. The placement of easements makes land management more complex and more expensive. Facilities developed in association with easements reduce the natural, cultural, aesthetic, economic, and recreational values of these public lands. New or expanded easements are discouraged. Existing easements should be managed to minimize their adverse impacts. If the purpose for which an easement was approved no longer exists, the department should actively seek its formal termination.

IV. Process for Review of Requests for New or Expanded Easements

(A) Utilities and other interested persons periodically request new or expanded easements on properties owned by the department, including navigable waters. Even though new or expanded easements are generally discouraged, there are circumstances where approval is supportable. A person requesting an easement is responsible for providing information needed to fully evaluate and execute documentation to memorialize the easement. Examples of this information may include test results, natural or cultural resource reports, environmental assessments or environmental impact statements, fiscal analyses, real estate surveys, the preparation of documents appropriate for recordation, and any other documentation found necessary or appropriate by the department for the type of easement sought.

(B) Where a request for a new or expanded easement is received, employees of the department will prepare a report, for

consideration by the commission, recommending approval or denial. The division primarily responsible for managing the subject property, acting in consultation with the division of land acquisition and the department's legal section, provides the report. If the recommendation is for approval, the report should also describe conditions to accompany the easement.

(C) In determining whether to recommend approval or denial of an easement request, the following factors are considered:

1. Whether legal restrictions apply to the site that would make granting an easement illegal or impracticable. Example: The articles of dedication for a nature preserve, dedicated under IC 14-31-1, prohibit development of the type anticipated by the easement.

2. Whether resources might be particularly sensitive to disturbance. Examples: (A) The activity anticipated by the easement would damage a mussel bed. (B) The activity anticipated by the easement would likely threaten a population of animals or plants that are listed by the state or federal government as being threatened or endangered.

3. Whether other reasonable alternatives exist for the placement of the easement. Example: The easement could be located along an adjacent roadway rather than extended through a state forest, even though use of the roadway might provide a more circuitous route.

4. Whether denial of the easement would result in an unusual hardship to the applicant. Example: A rural utility cannot finance the placement of a line to serve private homeowners with potable water if the line must be made to circumvent a department property.

5. Whether the department will receive a benefit from development of the easement. Example: The easement will allow the location of a sanitary sewer to transport wastes, generated within a reservoir property, for processing by a municipal treatment plant.

6. Whether a legal obligation mandates the department to grant or modify an easement. Example: The terms of a deed granting title to the state or to the department require an easement be maintained in favor of a third party.

(D) If the division determines to recommend approval of a request for a new or expanded easement, the following factors are considered in determining conditions to include in the easement:

1. What are the best management practices to minimize the disturbance caused by any construction activities authorized by the easement. These practices should consider natural, cultural, economic, and recreational benefits that are derived from the land. Example: Erosion control techniques should be applied that are effective and compatible with site usage.

2. What are the best management practices to minimize future disturbance caused by maintenance activities for any use authorized by the easement. These practices should consider natural, cultural, economic, and recreational benefits that are reasonably foreseeable. Example: Maintenance of an easement should not conflict with uses anticipated for a state park according to its approved master plan.

3. Whether all legal requirements are met before an easement is granted. Example: The department's division of historic preservation and archeology has located each historic site or historic structure on the proposed easement. If the activity anticipated by the easement requires the alteration of an historic site or historic structure, the easement is conditioned upon approval for the alteration being received from the historic preservation review board before the alteration begins.

4. Whether all legal requirements are met with respect to the activity authorized by the easement. Example: The easement is conditioned upon approval for any construction activities within a floodway for which a permit from the department is required.

5. Whether the easement is described with sufficient particularity to support a clear understanding by current and future department employees, and by the person who holds the easement, of its application and limitations. Example: A plat and description suitable for recordation may be required.

6. Whether an easement is written as narrowly as is practicable to serve its stated purpose. Limitations on time, space, and beneficiaries are recommended. Examples: (A) With respect to time, where the person seeking the easement holds a life estate on land to which the department holds the remainder, the department would ordinarily grant the easement in gross. Also, an easement may be described to cover a limited duration. An easement shall be no longer than required to serve the intended purpose. Generally, the term shall not exceed 40 years. (B) With respect to space, the areas to be disturbed during construction activities are described in the easement to include no more than what is reasonably required for construction. (C) With respect to beneficiaries, the department would ordinarily grant an easement so as to prohibit the recipient from transferring the easement to another, granting use of the easement to another, or burdening the easement with a purpose other than specified in the easement. The department would reserve the right to grant an easement to another person or persons to use the same corridor. The easement would provide for the reversion of rights to the department if the recipient exceeded a limitation in, or otherwise violated the terms of, the easement.

7. Whether the amount of consideration for the easement has been determined to reasonably assure the department receives fair market value. In determining fair market value, the department shall consider economic factors as well as compensation for loss to natural and cultural resources caused by the construction and maintenance of the easement. The department may compare formulae and methodologies used for determining compensation for similar easements. The amount of compensation may be adjusted where a beneficiary of the easement is the state or a local governmental entity. A minimum fee of $500 is

established for an easement, although the fee does not apply if the sole beneficiary of the easement is the department. To assist in determining fair market value, reference may be made to the Standard Compensation Schedule in Part V of this Information Bulletin. Example: The department may require an applicant, for an easement to place fiber optics cable, to disclose the amount and terms of compensation the applicant provided for an easement to place fiber optics cable at other locations.

8. Whether every reasonable effort has been made to place a new easement within an existing utility corridor. Example: The department can require an easement to be located in a way that is less convenient and more costly to the person seeking the easement where an existing utility corridor could be used.

9. When there are particular legal requirements that must be met before the department determines to recommend approval, denial, or conditioning of an easement request, whether these requirements have been met. Example: The department shall review any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is filed, taking into account the nature and scope of the request. Any decision by the department to deny a request of this nature shall be in writing and supported by substantial evidence contained in a written record. An affected person may take administrative review and judicial review of a determination of this type, and the commission shall not act upon the easement until the review is final.

V. Standard Compensation Schedule

1. A standard easement fee is established for utilities for each linear foot as follows:

MAXIMUM EASEMENT WIDTH IN FEET	RATE PER FOOT
10	$2
15	$3
20	$4
30	$6
40	$8
50	$10
100	$20
200	$40

A width between the stated widths is assessed at the higher rate.

2. The standard fee for temporary right-of-way for construction is 50% of the rate per foot established in part 1.

3. The rates per lineal foot established in part 1 may be reduced by 15% for each of the following conditions that are met:

(a) A utility provides local service and the department is among those that are served.

(b) A utility stays within an existing easement corridor or existing roadway berms.

(c) A utility is not-for-profit and the line is for end-of-service distribution.

(d) Structures associated with the easement are buried.

4. The rates per lineal foot established in part 1 may be increased to 200% of the stated rate if construction begins without obtaining prior authorization from the department.

5. The standard fee for a utility cabinet or similar structure not exceeding a footprint of 400 square feet of cleared ground is $5,000.

6. The standard fee for a utility cabinet or similar structure, with a footprint exceeding 400 square feet of cleared ground, is $5,000 plus $10 per square foot of cleared ground exceeding 400 square feet.

7. A standard easement fee schedule is established for roadways as follows:

(a) For a roadway serving a single parcel, twice the rates established in part 1.

(b) For a roadway serving more than one but fewer than eight parcels, the same rate per parcel owner as established in part 1.

(c) For a roadway serving at least eight parcels, 60% of the rate per parcel owner as established in part 1.

(d) The rates established in this part may be increased to 200% of the stated rate if construction begins without obtaining prior authorization from the department.

(e) The department may also apply this schedule to easements for purposes other than roads, but it does not apply to utility easements.

VI. Rights of Entry

The director is authorized to approve a right of entry to conduct surveys or collect data in preparation for making an easement request. The right of entry may be conditioned as determined appropriate by the department to minimize damage to natural or cultural resources and to provide for public safety and convenience. Grant of a right of entry does not constitute or imply approval of the easement.

VII. Utility Line Crossings Beneath Navigable Waters

An easement is not required for a utility line crossing that meets each of the following requirements:

1. The utility line is placed entirely beneath the bed of a navigable waterway.

2. The department does not own the property on either side of the navigable waterway.
3. The utility line qualifies for a general license under 312 IAC 10-5.
4. The waterway is not a lake.
5. The crossing forms a straight line and is at an angle of between 45 degrees and 135 degrees from the shoreline.

If a person elects to place a utility crossing under this section, no property interest or right is established in favor of the person.

VIII. Emergency Construction Approvals

The director of the department and the commission chair are authorized to approve emergency construction activities in association with an existing or proposed easement where consideration of the approval during a regular meeting of the commission is impracticable. Following consultation by the director and the chair, correspondence showing the signature of either of them is sufficient to memorialize an emergency construction approval. An emergency construction approval does not constitute or imply approval of the easement. A person seeking an easement must yet request and obtain approval of the easement from the commission. If approval of the easement is not obtained, the person performing the emergency construction can be required to restore the site as nearly as practicable to its condition before construction.

IX. Effective Date and History of Information Bulletin

This information bulletin was approved by the commission during its regular monthly meeting of April 18, 2000 and became effective June 1, 2000. On the effective date, the bulletin was published in the Indiana Register at 23 IR 2327. The First Amendment was made by the commission during its regular monthly meeting of May 18, 2004 and became effective July 1, 2004.

LAND USE EASEMENT SUMMARY

State	ILLINOIS	KENTUCKY	MICHIGAN	OHIO
Land Use Instrument	License	License	Easement Deed	License
Types of Land Use	Utilities, access roads	Utilities, access roads	Utilities, access roads	Utilities, access roads
Term of Instrument	5-year renewable, or non-expiring	One year or specified; Renewable	Specified or indefinite	25 years; Renewable
Assignment of Instrument	Not specified	Non-transferable without written consent	Transferable only with written approval	Transferable only with consent
Reversion of Rights	Revokable	May terminate at any time; Access road – terminate upon transfer of property	Reverts when the use need ceases	Reverts at expiration of license
Restrictions on Access Roads		No multiple landowners over one access road – seek county adoption of road if needed	Allows multiple owners on access roads	Only licenses one owner for access road to limit development
Application Review Fee	None	None	$300 up to ¼ mile; $150 for each additional mile beyond ¼ mile	None
Annual Fee	Based on State formula tied to Consumer Price Index	Based on Forest Service fees or method determined as fair	None	None
One Time Fee	An option in place of annual fee	$100	See fee schedule below	$1,200
Other Compensation	None	None	Tree value lost of three rotations from that site	Value of trees removed
Other		Requires liability insurance for commercial utilities; Reduces or waives fees for non-profit utilities and end-of-line utilities	All utility lines will be buried whenever feasible	Fee is split between Landholding Division ($1000) and Real Estate Division ($200)

Michigan Utility Easement Fee per Linear Foot of Right-Of-Way

Right-of-way width Up to (feet)	Upper Peninsula	Northern Lower Peninsula	Southern Lower Peninsula

10	$0.60	$1.05	$1.50
15	$0.90	$1.60	$2.25
20	$1.20	$2.10	$3.00
30	$1.80	$3.15	$4.50
40	$2.40	$4.20	$6.00
50	$3.00	$5.25	$7.50
100	$6.00	$10.50	$15.00
Temporary right-of-way for short term construction			Above schedule x 50%
Utility cabinet sites up to 20 feet by 20 feet			$4,500

Appraisals may be used when the fee schedule would result in a charge less than the value of the rights conveyed. There is a minimum charge of $500 if the fee schedule would indicate less than that amount. All utility lines shall be buried whenever feasible. Where easements for above-ground utilities are approved, the charge will be 200% of the above schedule.

Michigan Private Road Easement Fee Schedule

Easement – single (minimum - $1,000)	Twice the rate of the Utility Fee Schedule Above
2 – 7 parcels sharing road; per parcel (easement)	The same rate as the Utility Fee Schedule Above per parcel owner (easement)
More than 7 parcels sharing road, per parcel (easement)	Sixty percent (60%) of the rate of the Utility Fee Schedule Above

NATURAL RESOURCES COMMISSION
Information Bulletin #36 (Second Amendment)
Effective July 1, 2004

Subject: Procedural Guidelines for the Interpretations of the Conservancy District Article (IC 14-33).

1. History

The development of conservancy districts is an increasingly active option for addressing a variety of land use issues at the local level. Freeholders within contiguous geographic areas may use a conservancy district to achieve a dependable drinking water supply, to provide for sewage collection and treatment, to improve flood control, to reduce soil erosion, or to achieve any of numerous other water-resource community goals, either singly or in combination. IC 14-33-1-1.

The determination whether to approve the establishment of a conservancy district and the primary responsibility for the oversight of an existing conservancy district rest with a circuit court where the district is located. IC 14-33-2-26. Management of the district itself is under the control of a board of directors, selected initially by the county commissioners and subsequently by the freeholders of the district. IC 14-33-5-11.

Important roles are also served by the natural resources commission at six crucial stages in the formation, management, and dissolution of conservancy districts. At two of the stages, hearings for public input are required. At the other four, hearings may be requested. These stages also provide the primary forums for the receipt and evaluation of scientific and technical data upon which the court adjudicates and the board manages. In the receipt and evaluation of technical data, the commission brings together reports and analyses of the department of natural resources, acting primarily through the division of water, and other state and local agencies. Most common among these are the department of environmental management, state department of health, and utility regulatory commission.

In 1996, a comprehensive commission policy was established for procedural functions relating to the formation and development of conservancy districts. [Information Bulletin #12, 19 IR 2801, superseded]. Four developments were identified by the commission in support of the policy:

First, the absence of a policy led to public uncertainty and discomfort, particularly among persons who oppose the formation of a conservancy district or who oppose the development of a project within an existing conservancy district. Concerns had been expressed that the conservancy district process should be re-evaluated to assure all citizens within the boundaries of a proposed or existing district would have meaningful access to the hearing processes.

Second, the complexity of the economic and environmental issues supported the need for a consistent policy. Not the least of these issues were the regulatory functions of the state agencies and their coordination with local governmental entities bearing upon the functions of conservancy districts.

Third, the natural resources commission and the department of natural resources had experienced a statutory evolution regarding hearing processes that had not yet been accommodated for conservancy district hearings. Most noteworthy was the development of the administrative orders and procedures act (IC 4-21.5) and the "sunset review" process for these agencies that resulted in 1990 and 1991 legislation.

The fourth development was the recodification of natural resources laws set forth in P.L.1-1995. The recodification resolved a statutory ambiguity relative to adding territory to conservancy districts. Compare IC 13-3-3-6(a) as recodified at IC 14-33-4-2(b). In part to address the ambiguity, the commission implemented Information Bulletin #6, published at 17 IR 1836 (April 1, 1994). With the recodification, Information Bulletin #6 was reconsidered and amended.

In response to these developments, Information Bulletin #12 provided guidelines for implementation of conservancy districts processes, where those processes were within the jurisdiction of the natural resources commission. A flexible guidance was designed to help the commission fully and fairly review pertinent issues. Responsibilities were identified and delegated to the commission's division of hearings, and to the department of natural resources, so as to foster better coordination among these and other pertinent agencies.

The primary purposes of Information Bulletin #36 are as follows: (1) refinement of the purposes previously addressed in Information Bulletin #12; (2) integration of the "contiguousness" analysis contained in Information Bulletin #6; (3) clarification of agency treatment of initiatives to add a purpose to an existing district; (4) inclusion of standards for determining whether a district qualifies for the purpose of flood prevention and control; and, (5) consideration of conservancy district elections.

The six crucial stages in which the commission serves are considered separately. These stages are as follows:

(1) consideration of technical issues prior to formation of a district;

(2) development of a district plan;

(3) development of a unit of work;

(4) addition of territory to an existing district;

(5) addition of a purpose to an existing district; and,

(6) dissolution of a district.

The natural resources commission on September 16, 2003 approved amendments to this information bulletin, for additions to conservancy districts in Hendricks County. These amendments were published in the Indiana Register and became effective on November 1, 2003. In 2004, the Indiana general assembly amended IC 14-33-4-2 by deleting the extraordinary requirements for Hendricks County. The legislation became effective July 1, 2004, and the information bulletin has been amended, consistently with the legislation, to remove these 2003 amendments.

2. Consideration of Technical Issues Prior to Formation of a District

A. Petition Referral

As provided in IC 14-33-2-17(b), after a court determines a petition to create a district is in proper form and bears the needed signatures, the petition is referred to the natural resources commission for a technical review. The issues for review are set forth in subsection (c) and include whether:

(1) the proposed district appears to be necessary;

(2) the proposed district holds promise of economic and engineering feasibility;

(3) the proposed district seems to offer benefits in excess of costs and damages (or, for water supply, sewage disposal, or water storage, whether the public health will be served);

(4) the proposed district proposes to cover and serve a proper area; and,

(5) the proposed district could be established in a manner compatible with similar governmental entities.

At least one public hearing is mandatory. An interested person has "the right to be heard. At the request of an interested person, the commission shall hold hearings at the county seat of a county containing land in the proposed district." IC 14-33-2-19(a). Notice of the hearing must be published in a "newspaper of general circulation in each county containing land in the proposed district." IC 14-33-2-19(b). The commission is also required to incorporate technical assistance from any state and local agency that might have jurisdiction over the subject-matter of the proposed district.

The information received at public hearing and from the agencies is incorporated in a factfinding report to the commission from its hearing officer. The factfinding report of the commission on the proposed district is prima facie evidence of the facts in all subsequent proceedings. IC 14-33-2-23. After receipt of the report from the commission, the court sets another hearing at which an opportunity for additional evidence is provided. IC 14-33-2-25.

Of the six stages under consideration, the initial stage has traditionally been the one most likely to evoke controversy. The petitioner is always represented by an attorney. Where there is a formal remonstrance to a proposed district, the remonstrants are likely to have legal representation. Attorneys participating in the process at this stage, most notably those representing remonstrants, have sometimes urged the full application of the administrative orders and procedures act. Key elements of that act are that all testimony must be given under oath, there is an opportunity for the cross-examination of witnesses, and there is a prohibition on substantive ex parte communications between a party and the administrative law judge (or, if applied to conservancy districts, the

hearing officer).

The administrative orders and procedures act does not appear to have direct application to the commission's role prior to formation of a district. Most notably, the act applies generally to agency "orders". The commission issues not an order but a factfinding report that the circuit court then utilizes as prima facie evidence. The court itself issues the order whether or not to create a conservancy district and does so only following a judicial hearing held after receipt of the commission's factfinding report. In addition, the application of the relatively formal processes of the administrative orders and procedures act appear unwieldy in relation to the informal public hearings before the commission's hearing officer; often these public hearings are attended by hundreds of participating citizens. Application of the administrative orders and procedures act may have a chilling effect upon public comment and inquiry at this preliminary stage. Finally, before the hearing date the hearing officer typically is only vaguely informed, if informed at all, of the identity of any remonstrants. The concept of party status is not generally well-defined at this stage, casting uncertainty on application of the prohibition against substantive ex parte communications.

On the other hand, fairness requires the full participation by remonstrants and by citizens seeking additional information, as well as by the petitioners, in this stage of the process. The development of a complete factfinding report is also supported by full participation by all citizens, particularly the freeholders to a proposed district. The process should be conducted in a manner which both is and has the appearance of being impartial. To these ends, the following guidelines are established:

(1) Referrals by a court for the technical review anticipated by IC 14-33-2-17(b) are directed to the following address:

Division of Hearings
Natural Resources Commission
Indiana Government Center South
402 West Washington Street, Room W272
Indianapolis, IN 46204-2739

(2) As soon as practicable after the receipt of the referral, the director of the division of hearings appoints a hearing officer. The hearing officer conducts actions appropriate to the preparation and submission to the commission of a recommended factfinding report. Included among these actions are the following:

(A) The hearing officer promptly provides a copy of the referral to the division of water of the department of natural resources, the department of environmental management, the state department of health, the utility regulatory commission, and any other agency determined by the hearing officer to have jurisdiction over the subject-matter of the referral. Accompanied by the referral is an invitation for comment as well as the address and telephone number of a contact person within the division of water. The address for the contact person is as follows:

Division of Water–Project Development
Department of Natural Resources
Indiana Government Center South
402 West Washington Street, Room W264
Indianapolis, IN 46204-2641

(B) The hearing officer confers with the court or the clerk of the court to determine, if in addition to the petitioners, a remonstrant or other party has entered an appearance as a party to the civil proceeding.

(C) The hearing officer forwards a copy of this nonrule policy document to each of the parties. Also included are the name, address, and telephone number of the contact person within the division of water who will coordinate technical reviews.

(D) If parties other than the petitioners have entered an appearance, the hearing officer promptly sets an informal conference of the parties. An invitation to participate is also made to division of water. During the informal conference, the hearing officer will attempt to develop a consensus for the conduct of the public hearing. If a consensus cannot be developed, the hearing officer determines the conduct of the hearing in accordance with the following principles:

1. A hearing is held in the county seat of a county containing land in the proposed district.

2. The process is conducted in the most informal manner practicable that also supports fairness and meaningful public participation.

3. If issues in dispute are identified during the informal conference which require expert testimony, or for which the hearing officer otherwise determines testimony should be under oath, a second hearing may be conducted. An opportunity for cross-examination shall be provided, the hearing recorded by a court stenographer or reporter approved by the commission, and the trial rules of discovery applied. The hearing officer provides written notice to the parties of any second hearing and also announces the time, date, and location of the second hearing during the initial public hearing. Unless otherwise agreed by the parties, the hearing officer makes every reasonable effort to conduct the second hearing so that a delay is not required in the submission of a recommended factfinding report to the commission.

(E) The hearing officer drafts and tenders to the commission a recommended factfinding report. A copy of the report is

forwarded to each party, to the division of water, to any agency that commented upon the proposed conservancy district, and to any other person requesting a copy. The hearing officer encloses with the report a notice of the time, date, and location when the commission is scheduled to act upon the recommended factfinding report.

(F) Following action by the commission, the hearing officer causes a copy of the factfinding report of the commission to be filed with the court and served upon the division of water, the parties, and any other person requesting a copy.

B. 'Contiguousness' of District Boundaries

As part of the factfinding report, the commission is required to determine and communicate to the court whether a proposed district would "cover and serve a proper area." IC 14-33-2-17(c)(5). Also, as provided in IC 14-33-2-22, the factfinding report must include "findings on the territorial limits of the proposed district."

Factors for determining appropriate district boundaries are set forth in IC 14-33-3-1. Among these factors is a requirement that "each part of the district is contiguous to another part." The statutory requirement of contiguousness forms an important element to the geographic requirements of the conservancy district chapter.

If lengthy but narrow boundaries are created to incorporate outlying areas into a district, problems could be posed to adjacent areas, particularly if residents of these areas are not allowed to enter the district. The establishment of a district with exclusive boundaries may hinder attempts by the residents to form a new district. These problems may be acute where a purpose of the district is to provide water supply or sewage disposal.

To establish a consistent and viable framework for determining what is "contiguous" within IC 14-33-3-1, the commission will apply the following:

As used in IC 14-33-3-1, "contiguous" will ordinarily be applied to require that each part of the district adjoin every other part. The requirement is not met where a district boundary is excessively long and narrow. What is excessively long and narrow will be evaluated on an individual basis and will more likely be a major concern for districts that would provide sewage disposal or water supply than for districts which would provide other services. Where the district would provide flood prevention and control, contiguousness will be applied to encourage a coordinated effort within a particular watershed.

An easement or other written license granted by the fee title holder to the district or proposed district may establish contiguousness. Where the district is to provide sewage treatment or water supply, freeholders must typically be provided an opportunity to connect to an adjacent line or to enter the district. As used in this paragraph, an "adjacent line" is one that is either (1) used to carry sewage and located within 300 feet of the freeholder's building; or (2) used to carry water supply and located on an easement or license that adjoins the freeholder's property. A petitioner must provide the division of water a copy of an easement or other written license that is used to establish contiguousness.

C. Review Standards for Purpose of Flood Prevention and Control

One purpose for which a conservancy district can be established is flood prevention and control. IC 14-33-1-1(a)(1). In order to receive a favorable determination by the commission under IC 14-33-2-17 for the purpose of flood prevention and control, the petitioners must show the district would accomplish at least one of the following functions:

(1) The removal of obstructions and accumulated debris from a waterway channel.
(2) The cleaning or straightening of a channel.
(3) The development of a new and enlarged channel.
(4) The construction or repair of dikes, levees, or other flood protective works.
(5) The construction of waterway bank protection.
(6) The establishment of a floodway.

All works for the purpose of flood prevention and control must be coordinated in design, construction, and operation according to sound and accepted engineering practice so as to effect the best flood control obtainable that complies with IC 14-28-1-29.

3. Development of a District Plan

Following the creation of a conservancy district by the circuit court, the district is required to establish a "district plan." As provided in IC 14-33-6-2, a "district plan consists of an engineering report that sets forth the general, comprehensive plan for the accomplishment of each purpose for which the district was established." The district plan includes physical and technical descriptions, maps, preliminary drawings, cost estimates based upon preliminary engineering surveys and studies, copies of agreements with other governmental entities, and works of improvement.

The board of directors is required to submit a district plan to the commission for its approval within 120 days after the appointment of the board members, unless a time extension is obtained from the commission. IC 14-13-6-3. "The commission may reject a plan or any part of a plan." IC 14-13-6-4(d). "After receiving the approval of the commission, the board shall file the district plan with the court." IC 14-13-6-5(a). Following the filing by the board of directors, the court sets the district plan for a hearing. IC 14-13-6-5(b).

The conservancy district statutory article does not address review of the "approval" process at the state agency level, but administrative reviews are addressed generally in IC 4-21.5 ("administrative orders and procedures act" or "AOPA"). Licenses are governed by AOPA, and included within the definition of "license" is any "approval" required by law. IC 4-21.5-1-8. The term

"license" is also defined in the statutory chapter governing the relationship of the natural resources commission and the department of natural resources to include an "approval" that may be issued by the department under Indiana law. IC 14-11-3-1(a).

Significant to the inclusion of "approval" within the definition of license contained in IC 14-11-3-1(a) is that "[n]otwithstanding any other law, the director shall issue all licenses." IC 14-11-3-1(b). A designee may act for the director in license issuance, but the designee must be a "full-time employee of the department" of natural resources. IC 14-11-3-1(c). The commission then acts as the "ultimate authority" for license determinations by the director or his designee. IC 14-10-2-3. "Ultimate authority" is defined in AOPA to mean the entity "in whom the final authority for an agency is vested by law." IC 4-21.5-1-15.

With this background, the following guidelines are established:

(1) The board of directors of a district submits any proposal for or pertaining to a district plan to the department's division of water.

(2) The division of water assists the board in identifying licenses likely to be required to implement the district plan. The division of water also coordinates with the department of environmental management and the state department of health concerning any comments pertaining to the development of a district plan.

(3) The division of water reviews and evaluates comments and alternative proposals to the district plan that may be submitted by other interested persons. The division of water shall consider only technical, engineering, and scientific issues necessary to the development of the district plan. The division may use facilitation or mediation to help resolve any conflict.

(4) The director of the division of water approves or disapproves the district plan. Notice of the agency action and the opportunity to seek administrative review under AOPA is provided to the board of directors and to any other person requesting a copy of the notice. The director of the division of water also acts upon any request to extend the time to file a district plan, and the same notification process applies. The division director shall encourage the board to file completed applications for any necessary license as soon as practicable after approval of a district plan.

(5) The commission's division of hearings conducts any administrative review sought under part (4). The commission is the ultimate authority for the department of natural resources under AOPA. Following the completion of administrative review, the division of hearings notifies the parties of the completion and that review of the commission order is subject to further action by the circuit court pursuant to IC 14-13-6-5(b).

4. Development of a Unit of Work

To implement a district plan, the board of directors of a conservancy district "shall order the preparation of the detailed construction drawings, specifications, and refined cost estimates.... The implementation may involve all or part of the works of improvement if the part constitutes a unit that:

(1) can be constructed and operated as a feasible unit alone; and

(2) can be operated economically in conjunction with other proposed works set forth in the district plan." IC 14-33-6-8(a).

"When the drawings, specifications, and cost estimates have been prepared to the satisfaction of the board [of directors], the board shall by resolution tentatively adopt and submit the drawings, specifications, and cost estimates to the commission for approval." IC 14-33-6-8(b). "Upon the receipt of the written approval," the board provides a "hearing on the drawings, specifications, and cost estimates at which any interested person must be heard." IC 14-33-6-9.

The process of the development of a unit of work is similar to that for the preparation of a district plan. An important distinction is no judicial hearing follows the commission approval. Within the context of the review process, the legislature may have envisioned the hearing by the board, following commission approval of the unit of work, serves as an informational rather than judicial or quasi-judicial process.

With this background, the following guidelines are established:

(1) The board of directors of a district submits to the division of water of the department of natural resources any proposals for or pertaining to a unit work.

(2) The division of water assists the board in identifying licenses likely to be required to implement the district plan. The division of water also coordinates with the department of environmental management and the state department of health concerning any comments pertaining to the development of a unit of work.

(3) The division of water reviews and gives due consideration to comments and alternative proposals to the unit of work which may be submitted by other interested persons. In performing this function, the division is limited to consideration of the design and construction of structures needed to implement the district plan. The division may use facilitation or mediation to help resolve any conflict.

(4) The director of the division of water approves or disapproves the unit of work. Notice of the agency action and the opportunity to seek administrative review pursuant to the administrative orders and procedures act is provided to the board of directors and to any other person requesting a copy of the notice. The director of the division of water also acts upon any request to extend the time by which to file a unit of work, and the same notification process applies. The division director shall encourage the board of a conservancy district to file completed applications for any necessary license as soon as practicable after approval of a unit of work.

(5) The commission's division of hearings conducts any administrative review sought under part (4). The commission is the ultimate authority for the department of natural resources. Following the completion of administrative review under AOPA, the division of hearings notifies the parties of the final agency action by the commission and outlines the process for obtaining judicial review. Also included in the notice is reference to the informal hearing before the board of directors pursuant to IC 14-33-6-9.

5. Addition of Territory to an Existing District

Ordinarily, territory may be added to an existing district according to either of two procedures. The procedures in these two circumstances follow distinct paths and are here viewed separately:

A. Additions Initiated with the Circuit Court

Pursuant to IC 14-33-4-2(b)(1), territory may be added according to the same procedure as is provided for the establishment of a district. A petition to add territory under this subdivision will be supported by the following guidance.

After a court determines a petition to add territory to a district is in proper form and bears the needed signatures, the petition is referred to the natural resources commission for a technical review. The issues for review include whether:

1. the proposed addition appears to be necessary;
2. the proposed addition holds promise of economic and engineering feasibility;
3. the proposed addition seems to offer benefits in excess of costs and damages (or, for water supply, sewage disposal, or water storage, whether the public health will be served);
4. the proposed addition proposes to cover and serve a proper area; and,
5. the proposed addition could be implemented in a manner compatible with similar governmental entities, most notably the existing conservancy district.

At least one public hearing is mandatory. The hearing officer will be selected and conduct the hearing essentially as provided to consider the establishment of a new district. An interested person has the right to be heard. The hearing will be held at the county seat of a county containing land in the proposed district. Notice of the hearing will be published in a newspaper of general circulation in each county containing land in the district and the proposed addition. The commission hearing officer will incorporate technical assistance from a state agency having jurisdiction over the subject matter of the district and the proposed addition.

Where territory is sought to be added to an existing district, the impact upon the district is often inconsequential. An addition may be relatively minor and involve only a small area with little or no measurable affect to the freeholders within the existing district. The hearing officer will consider and, following the completion of the public hearing or hearings, report to the director of the division of water as to the likely consequence to the district of the proposed addition. The director of the division of water is delegated authority to determine when the proposed addition of territory is de minimis and when its review by the commission is unlikely to be productive. When the division director makes such a determination, the hearing officer's report is forwarded directly to the court as the commission's factfinding report. This report is to be submitted within 30 days of receipt by the division of water of a completed petition to add territory to a district.

B. Additions Initiated with the Board of Directors

As provided in IC 14-33-4-2(b)(2), an addition of territory to an existing district may also be initiated by a board resolution. The resolution follows a petition by the majority of freeholders or the municipality in the area proposed to be added. The resolution and petition are filed with the court, and the court sets the matter for hearing. Notice of the hearing is sent to the natural resources commission and to the freeholders in the district and in the area proposed to be served by the additional territory. The notice to the commission should be forwarded to the division of hearings.

Upon receipt of the notice, the division of hearings will notify the division of water of the department of natural resources and other state agencies which appear to have jurisdiction over the subject of the addition. A conservancy district board wishing to apply IC 14-33-4-2(b)(2) is urged to communicate its wish to the division of hearings as soon as practicable so that expeditious technical discussions may be pursued with the appropriate state agencies. The recommendation is that this communication occurs at least 60 days prior to the setting of a hearing under IC 14-33-4-2(d). Adequate review is essential to a favorable comment by the commission to the court. The division director of the division of water is delegated authority by the commission to report favorably, to make recommendations to modify or condition the addition of territory, or to object to the addition of territory. See particularly IC 14-33-4-2(e).

6. Addition of a Purpose to an Existing District

A purpose may be added to an existing district in either of two ways. The same procedure may be used as is provided for the establishment of a district. IC 14-33-1-4(1). If this subdivision is applied, reference should be made to the process for the addition of territory pursuant to part 5A of this nonrule policy document.

In the alternative, IC 14-33-1-4(2) provides that the conservancy district board may add a purpose based upon a petition signed by at least 10% of the freeholders of the district. If the resolution is passed, the resolution and petition are filed with the county court and the court sets the matter for hearing. The court forwards to the commission the notice of hearing along with a copy of the resolution "at least 30 days before the date of hearing." IC 14-33-1-5.

Upon receipt of the notice, the division of hearings will notify the department's division of water and other state agencies that appear to have jurisdiction over the subject of the addition. A conservancy district board wishing to apply IC 14-33-1-4(2) is urged to communicate its wish to the division of hearings as soon as practicable so that expeditious technical discussions may be pursued with the appropriate state agencies. The recommendation is this communication occur at least 60 days before setting a hearing under IC 14-33-1-5(b). Adequate review is essential to a favorable comment by the commission to the court. The division director of the division of water is delegated authority by the commission to report favorably, to make recommendations to modify or condition the addition of territory, or to object to the addition of territory. See particularly IC 14-33-1-5(e).

7. Dissolution of a District

A conservancy district may be dissolved either because the district is "no longer of benefit" (IC 14-33-15) or because "construction of works of improvement has not begun within six (6) years after the district plan." (IC 14-33-16). Where works of improvement are not begun, there is no statutory participation by the natural resources commission; no procedural issue is presented. A district dissolved due to loss of benefit applies "the same procedure used to establish a district. The petition must set forth the change of circumstances that causes the district to lose the district's benefit." IC 14-13-15-1.

Because the process is essentially the same for the dissolution as for the establishment of a conservancy district, the same analysis applies to the development of an appropriate process. With this background, the following guidelines are established:

(1) Referrals by a court for the technical review anticipated by IC 14-33-15-1 are directed to the division of hearings.

(2) As soon as practicable after the receipt of the referral, the director of the division of hearings appoints a hearing officer. The hearing officer conducts actions appropriate to the preparation and submission to the commission of a recommended factfinding report. Included among these actions are the following:

(A) The hearing officer promptly provides a copy of the referral to the division of water of the department of natural resources, the department of environmental management, the state department of health, the utility regulatory commission, and any other agency determined by the hearing officer to have jurisdiction over the subject-matter of the referral. Accompanied by the referral is an invitation for comment as well as the address and telephone number of a contact person within the division of water.

(B) The hearing officer confers with the court or the clerk of the court to determine, if in addition to the petitioners, a remonstrant or other party has entered an appearance as a party to the civil proceeding.

(C) The hearing officer forwards a copy of this nonrule policy document to each of the parties. Also included are the name, address, and telephone number of the contact person within the division of water.

(D) If parties other than the petitioners have entered an appearance, the hearing officer promptly sets an informal conference of the parties. An invitation to participate is also made to division of water.

During the informal conference, the hearing officer will attempt to develop a consensus for the conduct of the public hearing. If a consensus cannot be developed, the hearing officer determines the conduct of the hearing in accordance with the following principles:

(1) A hearing is held the county seat of a county containing land in the district.

(2) The process is conducted in the most informal manner practicable which also support fairness and meaningful public participation.

(3) If issues in dispute are identified requiring expert testimony, or for which the hearing officer otherwise determines testimony should be under oath, a second hearing may be conducted. An opportunity for cross-examination shall be provided, the hearing recorded by a court stenographer or reporter approved by the commission, and the trial rules of discovery applied. The hearing officer announces the time, date, and location of the second hearing during the initial public hearing. Unless otherwise agreed by the parties, the hearing officer makes every reasonable effort to conduct the second hearing so that a delay is not required in the submission of a recommended factfinding report to the commission.

(4) The hearing officer determines whether either of the following matters are in issue: (a) whether the board has failed, within two years of establishment of the conservancy district, to produce satisfactory evidence of progress in the preparation of the district plan; or, (b) whether federal or state money, or both, contemplated in the petition for the establishment of the district, appears to be unavailable. See IC 14-33-15-2.

(E) The hearing officer drafts and tenders to the commission a recommended factfinding report. A copy of the report is forwarded to each party, to the division of water, to any agency that commented upon the conservancy district, and to any other person requesting a copy. The hearing officer encloses with the report a notice of the time, date, and location when the commission is scheduled to act upon the recommended factfinding report.

(F) Following action by the commission, the hearing officer causes a copy of the factfinding report of the commission to be served upon the division of water, the parties, and any other person requesting a copy.

8. Election of Board of Directors and Notice to Commission

Neither the natural resources commission nor the department of natural resources have jurisdiction over board elections. The

board of commissioners of the county appoints the board of directors for the new district within twenty (20) days after a court order establishing a district. IC 14-33-5-1. A person adversely affected by an action committed or omitted by the board may petition the court having jurisdiction over the district to enjoin or mandate the board. IC. 14-33-5-24.

The board chair is required by IC 14-33-5-17 to promptly notify the commission when board members are elected or appointed. The department's division of water maintains a database of conservancy districts and board members. By this Information Bulletin, the commission identifies the following address for the notice required by IC 14-33-5-17:

Division of Water–Project Development
Department of Natural Resources
Indiana Government Center South
402 West Washington Street, Room W264
Indianapolis, IN 46204-2641

Service at this address will also help assure the division of water's database is current. For more information see http://www.IN.gov/dnr/water/publications/pdf/con_dist_dir.pdf.

9. Application and Modification

This information bulletin is intended to be liberally construed in order to support efficient administration by the natural resources commission, acting in cooperation with other agencies, of its conservancy district responsibilities. Modifications to the document may be needed based upon experience or legislative changes. Suggestions for modification of the document are welcomed from the public and should be forwarded to the division of hearings at the address set forth previously. Send any suggestions to the address for the division of hearings shown above or by email to slucas@nrc.IN.gov.

NATURAL RESOURCES COMMISSION
Information Bulletin #44
Effective July 1, 2004
List of Beneficial Organisms Exempted from Licensure

Purpose: This information bulletin assists primarily in the administration of 312 IAC 18-3-15. The information bulletin may also be cross-referenced and incorporated by reference into other rules or documents.

A beneficial organism listed here is exempted from licensure under 312 IAC 18-3-15(d) or may be released under a general license. Unless the terms of a general license are specified in this information bulletin, however, the organism is exempted, or may be used only as a fishing bait, or domestic pet food (annotated as BPF) under this exemption. Annotated species include wax moth, and house cricket.

List Development and Modification: The department of natural resources developed the list based on the best current information available. The department will seek approval of modifications, from the natural resources commission, as additional data becomes available. The modifications will be set forth in amendments to this information bulletin.

For more information concerning a listed organism, or to suggest modifications to the listing, please contact the following:
Indiana Department of Natural Resources
Division of Entomology and Plant Pathology
402 West Washington Street, Room W290
Indianapolis, Indiana 46204
Telephone: (317) 232-4120

Qualification and Listed Organisms: For a beneficial organism to qualify under 312 IAC 18-3-15(d) for an exemption or general license, the organism must originate from cultures free of parasites and pathogens. Bacterial, fungal, or viral beneficial organisms registered by the United States Environmental Protection Agency and the Office of the Indiana State Chemist are exempted. In addition, the following are exempted:

Bacteria

Arthrobacter globiformis
Bacillus lentimorbus
Bacillus popillae
Bacillus thuringiensis
Bacillus thuringiensis var. *kurstaki*
Nosema necatrix
Pseudomonas fluorescens

Earthworms

Eisenia fetida (= *foetida*) (Manure Worm, Tiger Worm, Red Wiggler)

Eisenia hortensis (European Nightcrawler)
Lumbricus terrestris (Nightcrawler, Dew Worm)

Fungi

Entomophaga maimaiga
Gliocladium virens
Trichoderma harzianum

Insects

Ablerus clisiocampae
Aceratoneuromyia indica
Acheta domesticus (House Cricket) (BPF)
Adalia bipunctata (Twospotted Lady Beetle)
Agathis pumila (Larch Casebearer Parasitic Wasp)
Ageniaspis fuscicollis
Agraulis vanillae (Gulf Fritillary Butterfly)
Agrilus hyperici (St. John's Wort Beetle)
Amblyseius fallacis
Amblyseius swirskii
Anagrus epos
Anagrus spiritus
Anagyrus pseudococci
Anaphes flavipes
Anaphes iole (Fairyfly)
Anisopteromalus calandrae (Pteromalid Wasp Parasitoid)
Apanteles fumiferanae
Aphelinus abdominalis
Aphelinus fuscipennis
Aphidius colemani
Aphidius ervi (Lucerne Aphid Parasite)
Aphidius matricariae
Aphidoletes abietis
Aphidoletes aphidimyza
Aphthona cyparissiae (Brown Dot Leafy Spurge Flea Beetle)
Aphthona flava (Copper Leafy Spurge Flea Beetle)
Aphthona nigriscutis (Black Dot Spurge Flea Beetle)
Aphytis melinus (Red Scale Parasite)
Apion fuscirostre (Scotch Broom Seed Weevil)
Apion ulicis (Gorse Seed Weevil)
Apis mellifera (Honey Bee)
Arrhenophagus chionaspidis
Bangasternus orientalis (Yellow Starthistle Bud Weevil)
Bathyplectes anurus
Bathyplectes curculionis
Bathyplectes stenostigma
Blondelia nigripes
Brachymeria intermedia
Bracon hebetor
Bracon kirpatricki
Bracon pini
Bracon rhyacioniae (Pine tip moth parasitoid)
Calosoma sycophanta
Ceutorhynchus litura (Canada Thistle Stem Mining Weevil)
Chelonus annulipes
Chilocorus kuwanae
Chilocorus nigritus
Chrysolina quadrigemina (Klamathweed Beetle)

Chrysoperla carnea (Common Green Lacewing)
Chrysoperla comanche (Comanche Lacewing)
Chrysoperla rufilabris
Coccinella septempunctata (Sevenspotted Lady Beetle)
Coccinella transversoguttata (Transverse lady beetle)
Coccygomimus disparis
Coeloides dendroctoni
Coleomegilla quadrifasciata
Coleophora klimeschiella (Russian Thistle Casebearer)
Coleophora parthenica (Russian Thistle Stem Miner)
Copidosoma floridanum
Cotesia flavipes
Cotesia marginiventris
Cotesia melanoscelus
Cotesia plutellae (Diamondback Moth Parasite)
Cotesia rubecula
Cryptolaemus montrouzieri (Mealybug Ladybird, Australian Ladybird)
Cybocephalus nipponicus
Cycloneda ancoralis
Cyphocleonus achates (Knapweed Root Weevil)
Dacnusa sibirica
Danaus plexippus (Monarch Butterfly)
Delphastus pusillus
Deraeocoris brevis
Deraeocoris nebulosus
Diachasmimorpha longicaudata (Longtailed Fruitfly Parasite)
Diadegma insulare
Diaeretiella rapae (Cabbage Aphid Parasite)
Diaparsis carinifer
Dibrachoides dynastes
Dicyphus hesperus
Diglyphus isaea
Encarsia deserti
Encarsia formosa (Greenhouse Whitefly Parasite)
Encarsia inaron
Encarsia nr. Diaspidicola
Eretmocerus californicus
Eretmocerus eremicus
Eretmocerus mundus
Eriopis connexa
Eupeodes nuda
Exenterus amictorius
Exeristes comstockii
Feltiella acarisuga
Galerucella calmariensis (Loosestrife Leaf Beetle)
Galerucella pusilla (Golden Loosestrife Beetle)
Galleria mellonella (Wax moth or bee moth) (BPF)
Geocoris punctipes (Big-Eyed Bug)
Glypta fumiferana
Glyptapanteles flavicoxis
Glyptapanteles indiensis
Goniozus legneri
Harmonia axyridis (Asian Lady Beetle)
Harmonia yedoensis
Heraclides cresphontes (Giant Swallowtail Butterfly)

Hippodamia convergens (Convergent Lady Beetle)
Hippodamia tredecimpunctata (Spotted Amber Ladybird)
Horogenes punctorius
Hylobius transversovittatus (Root-Boring Weevil)
Hyperaspis binotata
Hyperaspis polita
Hyposoter ebeninus
Istocheta aldrichi
Itoplectis conquisitor
Larinus minutus (Lesser Knapweed Flower Weevil)
Larinus planus (Canada Thistle Bud Weevil)
Leptomastidea abnormis
Leptomastix dactylopii (Citrus Mealybug Parasite)
Leucoptera spartifoliella (Broom Twigminer)
Lindorus lophanthae (Purple Scale Predator)
Lonchaea corticis
Longitarsus jacobaeae (Ragwort Flea Beetle)
Lydella thompsoni (= *L. grisescens*)
Lydinolydella metallica
Lysiphlebus testaceipes (Greenbugs Aphid)
Macrocentrus ancylivorus (Oriental Fruit Moth Parasite)
Macrocentrus gifuensis
Macrolophus caliginosus
Mesoleius tenthredinis
Metaphycus helvolus (Black Scale Parasite)
Meteorus leviventris
Meteorus pulchricornis
Meteorus trachynotus
Microctonus aethiopoides
Microctonus colesi
Microlarinus lareynii (Puncturevine Stem Weevil)
Microlarinus lypriformis (Puncturevine Stem Weevil)
Microterys flavus
Microterys nietneri
Muscidifurax raptor (Raptor Fly Parasite)
Muscidifurax raptorellus
Muscidifurax zaraptor
Nanophyes brevis
Nanophyes marmoratus
Nasonia vitripennis (Jewel Wasp)
Nymphalis antiopa (Mourning Cloak Butterfly)
Oberea erythrocephala (Leafy Spurge Stem Boring Beetle)
Olesicampe benefactor
Ooencyrtus kuvanae
Ophyra aenescens (Black Garbage Fly)
Orgilus obscurator
Orius insidiosus (Insidious Flower Bug)
Orius tristicolor (Minute Pirate Bug)
Palexorista inconspicua
Papilio polyxenes (Black Swallowtail Butterfly)
Pediobius foveolatus (Bean Beetle Parasite)
Peristenus digoneutis
Phrydiuchus tau (Mediterranean Sage Root Crown Weevil)
Podisus maculiventris (Spined Soldier Bug)
Propylea quatuordecimpunctata (14-spot Ladybird Beetle)

Rhinocyllus conicus (Thistle Seedhead Weevil)
Rhyzobius lophanthae (Scale-Eating Ladybird)
Rodolia cardinalis (Vedalia Beetle)
Scolothrips sexmaculatus (Six-spotted Thrips)
Scymnus frontalis
Semiadalia undecimnotata
Spalangia cameroni
Spalangia corana
Spalangia endius
Spalangia nigroaenea
Sphenoptera jugoslavica (Bronze Knapweed Root Borer)
Spurgia esulae (Leafy Spurge Gall Midge)
Tenodera aridifolia sinensis (Chinese Mantid)
Tetrastichus incertus
Tetrastichus julius
Thanasimus dubius (Checkered Beetle)
Thripobius semiluteus (Greenhouse Thrips Parasite)
Tiphia popilliavora (Japanese Beetle parasitoid)
Tiphia vernalis (Spring Tiphia)
Trichogramma bactrae
Trichogramma brassicae
Trichogramma dendrolimi
Trichogramma evanescens
Trichogramma minutum (Minute Egg Parasite Wasp)
Trichogramma platneri
Trichogramma pretiosum
Trichogrammatoidea bactrae
Trichosirocalus horridus (Musk Thistle Rosette Weevil)
Tyria jacobaeae (Cinnabar Moth)
Urophora affinis (Banded Knapweed Gall Fly)
Urophora cardui (Canada Thistle Stem Gall Fly)
Urophora quadrifasciata (Knapweed Seedhead Fly)
Urophora sirunaseva (Yellow Star Thistle Gall Fly)
Vanessa atalanta (Red Admiral Butterfly)
Vanessa cardui (Painted Lady Butterfly)
Vanessa virginiensis (American Painted Lady Butterfly)
Xylocoris flavipes (Warehouse Pirate Bug)
Zeuxidiplosis giardi (St. John's Wort Midge)

Mites

Amblyseius barkeri
Amblyseius californicus
Amblyseius cucumeris
Amblyseius mckenziei
Galendromus annectans
Galendromus helveolus
Galendromus occidentalis (Western Predatory Mite)
Hypoaspis aculeifer
Hypoaspis miles
Iphiseius degenerans
Mesoseiulus longipes (Longipes Mite)
Metaseiulus occidentalis
Neoseiulus barkeri
Neoseiulus californicus (Californicus Mite)
Neoseiulus cucumeris
Neoseiulus fallacis (Fallacis Mite)

Neoseiulus setulus
Phytoseiulus macropilis
Phytoseiulus persimilis (Chilean Predatory Mite)
Pyemotes tritici (Straw Itch Mite, Fire Mite)
Typhlodromus pyri

Mollusks

Deroceras laeve (Marsh Slug)
Deroceras reticulatum (Grey Garden Slug)
Mesodon thyroides (Whitelip Globe Snail)
Neohelix albolabris (Whitelip Snail)
Rumina decollata (Decollate Snail)

Nematodes

Heterorhabditis bacteriophora
Heterorhabditis heliothedis
Heterorhabditis megidis
Neoaplectana carpocapsae
Neoaplectana glaseri
Steinernema carpocapsae (Mole Cricket Nematode)
Steinernema feltiae
Steinernema glaseri
Steinernema riobravis

Protozoa

Nosema locustae
Vairimorpha necatrix

Effective Date: The commission approved this information bulletin during a meeting held on May 14, 2004. The bulletin is effective July 1, 2004.

DEPARTMENT OF STATE REVENUE
AUDIT-GRAM NUMBER IR-023
May 7, 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

Sale of Tangible Personal Property with Services – Sales Tax

Authority: IC 6-2.5-4-1(e); IC 6-2.5-1-5; 45 IAC 2.2-4-1; Comm. Directive # 21; Comm. Directive #22; Comm. Directive #23; The Frame Station, Inc., Ind. Tax Ct., 2002; Eric Howland, Ind. Tax Ct., 2003

IC 6-2.5-4-1. Selling at Retail

(a) A person is a retail merchant making a retail transaction when he engages in selling at retail.

....

(e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

(1) the price of the property transferred, without the rendition of any service; and

(2)....any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect the property transferred before its transfer and which are separately stated on the transferor's records. [1980]

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser. [Effective March 18, 2004]

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

(a).... "gross retail income" means the total gross receipts, of any kind or character, received in a retail transaction....without any deduction for:

....

(4) delivery charges;

(5) installation charges [Effective January 1, 2004]

....

For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing.

(b) "Gross retail income" does not include...gross receipts attributable to:

....

(6) installation charges that are separately stated on the invoice, bill of sale, or similar document given to the purchaser. [Effective March 18, 2004]

I. GENERAL STATEMENT

All sales of tangible personal property [FN 1] are subject to sales tax. All sales of labor and services are exempt from sales tax. A transaction which includes both the sale of tangible personal property and the sale of related services is subject to tax if the service has been performed prior to the transfer of the property. Services performed after the transfer of the property are not subject to sales tax.

II. TRANSFER OF PROPERTY

The transfer of property occurs when the buyer: (1) agrees to buy property from a seller; (2) pays the purchase price; and, (3) takes ownership and possession of the property. [FN 2] "It is a general rule....that in case of sale of personal property, where any act remains to be done before the sale is complete, the title remains in the seller." [FN 3] Effective March 18, 2004, the transfer of tangible personal property in a retail transaction is deemed to occur after delivery.

III. SERVICES PERFORMED PRIOR TO THE TRANSFER OF PROPERTY

Indiana Code 6-2.5-4-1(e) permits the imposition of sales tax on otherwise non-taxable services when the services are performed with respect to property prior to the transfer of the property to the buyer. Labor and/or services performed prior to the transfer of property are considered to be part of a unitary transaction and subject to sales tax.

A "unitary" transaction includes all items of tangible personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated. [FN 4] Although this would appear to exempt any transaction in which the seller separately states the cost of labor and/or services, this is not the case. One must look to the "true object" of the transaction. What does a buyer intend to buy---an individual's skills or a tangible end result of those skills. [FN 5]

A retail unitary transaction exists when the transfer of the property and rendition of services are "inextricable and indivisible." [FN 6] A *retail unitary transaction* is taxable to the extent that income from the transaction represents "....service performed in respect to the property transferred *before its transfer* and which are separately stated on the transferor's records." [FN 7] (emphasis added)

The Indiana Tax Court has been consistent in rulings, where the property and related services are dependent on each other in order to provide the buyer with a viable end product, the total gross selling price is subject to sales tax. [FN 8] This is irrespective of the fact that the seller might separately state the charges for property and services on the buyer's invoice.

IV. SERVICES PERFORMED AFTER THE TRANSFER OF PROPERTY

Labor or services performed after the transfer of property to the buyer are not subject to sales tax. In those instances in which the buyer obtains title to the property and the seller is subsequently required to perform additional service on the property, no sales tax is due on the service performed after the transfer.

V. INSTALLATION CHARGES

Effective March 18, 2004 separately stated installation charges are not subject to sales tax. Installation charges included in the total selling price of tangible personal property are considered to be part of a unitary transaction and subject to the collection of sales tax.

[FN 1] IC 6-2.5-1-27 (effective January 1, 2004) defines tangible personal property as something that can be seen, weighed, measured, felt, or touched or in any other manner perceptible to the senses. The term includes electricity, gas, water, steam and prewritten computer software.

[FN 2] *The Frame Station, Inc.*, 771 N.E.2d 129 (Ind. Tax 2002)

[FN 3] *Farmer's Nat'l Bank of Sheridan v Coyner,* 88 N.E. 856, 858 (Ind. Ct. App. 1909)

[FN 4] IC 6-2.5-1-1(a)

[FN 5] *Accountants Computer Services, Inc. v. Kosydar,* 298 N.E.2d 519 (Ohio 1973)

[FN 6] *Martin Marietta,* 398 N.E.2d 1311 (Ind. Ct. App. 1979)

[FN 7] IC 6-2.5-4-1(e)

[FN 8] *The Frame Station, Inc.*, 771 N.E.2d 129 (Ind. Tax 2002); *Eric Howland,* 790 N.E.2d 627 (Ind. Tax 2003)

DEPARTMENT OF STATE REVENUE
AUDIT-GRAM NUMBER IR-026
May 7, 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

Freight Charges – Sales Tax & Gross Income Tax [FN 1]

Authority: IC 6-2.1-2-1(b)(2); IC 6-2.5-4-1(e); IC 26-1-1 to 9; 45 IAC 2.2-4-3; 45 IAC 1-1-33; 45 IAC 1.1-2-5(c) [1999]; Comm. Dir. #21; Comm. Dir. #22; Comm. Dir. #23; *Martin Marietta Corp.* Ind. Ct. App., 1979

IC 6-2.1-2-1. Definition "Selling at retail"....

....

(b)(2) [S]elling at retail includes only:

(A) The price of the property transferred.... and

(B) Any bona fide charges separately stated on the records of the transferor.... for.... delivery.... before the.... property is delivered to the transferee.... [1981]

IC 6-2.5-4-1 Selling at retail....

....

(e) [I]ncome received from selling at retail is only taxable.... to the extent.... (it).... represents:

(1) the price of the property transferred.... and

(2)....any bona fide charges.... for.... delivery.... in respect to the property transferred before its transfer and which are separately stated on the transferor's records. [1980]

For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser. [Effective March 18, 2004]

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

(a)...."gross retail income" means gross receipts....without any deduction for:

....

(4) delivery charges; [Effective January 1, 2004]

....

For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of the property, including, but not limited to transportation, shipping, postage, handling, crating, and packing. [Effective March 18, 2004]

I. GENERAL STATEMENT

For Gross Income Tax purposes prior to January 1, 2003, the sale of tangible personal property is subject to tax at the low rate. The sale of service is subject to tax at the high rate. Transactions which include both the sale of tangible personal property and the provision of a service must be analyzed to determine whether the service has been performed prior to or after transfer.

For Sales Tax purposes, prior to January 1, 2004, services performed prior to transfer of the property are subject to tax. Services performed after transfer of the property are not subject to tax.

Effective January 1, 2004, all charges for delivery, including transportation, shipping, postage, handling, crating and packing, are subject to sales tax regardless of shipping terms.

II. TAXABILITY OF FREIGHT CHARGES – PRIOR TO JANUARY 1, 2004

A. Freight Charge, "F.O.B. Destination"

1. Sales Tax – Any freight service charge is subject to Sales Tax.
2. Gross Income Tax – Subject to Gross Income Tax at the low rate.

B. Freight Charge, "F.O.B. Origin"

1. Sales Tax – Any freight service charge is not subject to Sales Tax.
2. Gross Income Tax – Subject to Gross Income Tax at the high rate.

C. Freight Charge, F.O.B. Point Unknown

If the place of delivery of the goods is unknown or ambiguous, the F.O.B. point is assumed by law [FN 2] to be the seller's place of business or "F.O.B. origin."

D. "Shipping and Handling"

Shipping and handling are additional charges made by a seller to compensate them for costs associated with preparing an item for shipment and shipment to the purchaser.

1. Sales Tax – The charge is subject to Sales Tax.
2. Gross Income Tax – Subject to Gross Income Tax at the low rate.

E. Delivery by Seller's Own Conveyance

Freight charges incurred for delivery in the seller's own conveyance are subject to the collection of sales tax. [FN 3] Freight charges for delivery made by common carrier should be evaluated according to F.O.B. designation.

F. Prepaid Freight

1. A freight charge stated as "prepaid" means the property is sold "F.O.B." origin and delivery is the responsibility of the seller only as an agent for buyer. Either with or without buyer's direction, seller agrees to negotiate, transact, and pay for the necessary freight service to deliver the buyer's property to the buyer's location provided the seller is reimbursed for the cost.
    a. Sales Tax – The prepaid charge is not subject to Sales Tax.
    b. Gross Income Tax – The reimbursement is not taxable to the seller.
2. If the stated charge for "Prepaid Freight" significantly [FN 4] exceeds the actual charge for freight incurred by the seller, the entire charge shall be treated as the seller's delivery service charge prior to transfer.

G. Services Performed at the Delivery Point

Taxability of the seller's charge for services performed at the delivery point [FN 5] will depend upon that point in time at which the property transfers as explained above.

III. POLICY CHANGES

A. Gross Income Tax: The Gross Income Tax was repealed effective January 1, 2003.

B. Sales Tax: Under IC 6-2.5-1-5(b)(4), effective January 1, 2004, delivery charges are defined to mean "....charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage, handling, crating, and packing." Delivery charges are subject to sales tax if:

1. the property is sold;
2. the property is taxable to the purchaser; and,
3. delivery is made by the seller or on behalf of the seller.

The statutory changes made in IC 6-2.5-4-1(e), effective March 18, 2004, have rendered the Tax Court decision in *Cowden and Sons Trucking, Inc.* invalid. Transportation companies [FN 6] will be required to register as retail merchants and collect sales tax on the entire charge [FN 7] when they purchase tangible personal property and deliver the property to customers.

[FN 1] The Gross Income Tax Act was repealed effective January 1, 2003.

[FN 2] Uniform Commercial Code, Sales, IC 26-1-2-308

[FN 3] LOF 97-0379; 99-0423; 01-0057; 01-0215

[FN 4] Differences in stated and actual charges are significant if they are consistently in excess of actual and imply a planned attempt at consequential profit.

[FN 5] e.g., charges for truck loading and unloading, installation of blocking material, pallet charges, services of seller's special handling equipment, demurrage, etc.

[FN 6] i.e., hauling companies

[FN 7] Cost of tangible personal property and separately stated hauling charge

DEPARTMENT OF STATE REVENUE
COMMISSIONER'S DIRECTIVE #24
July 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 only serve as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

SUBJECT: Elimination of Form ST-136A, Indiana Out-of-State Purchaser's Sales Tax Exemption Affidavit

I. INTRODUCTION

Effective July 1, 2004 the ST-136A Form is no longer an effective document for out of state purchasers to claim an exemption from Indiana sales tax for purchases in Indiana that would be exempt if purchased in their state of residence.

II. STATUTORY CHANGES

IC 6-2.5-13-1(d)(1) provides that when there is a sale of tangible personal property, the sale shall be sourced to the business location of the seller when the product is received by the purchaser at the business location of the seller.

III. ALTERNATIVE EXEMPTIONS

With the elimination of the ST-136A, an organization that is located out of state has several options to avail itself of a

legitimate exemption from the sales tax.

Form ST-104 is the form to be used by farmers purchasing tangible personal property to be used in direct production of agricultural products for sale. This form is to be used for a single purchase made at an Indiana merchant's location.

Form ST-106 is the form that is kept on record by the seller and is used by a person engaged in agriculture. This form is a blanket exemption certificate and is good for all exempt purchases made at a single location. The person engaged in agriculture can have the ST-106 on file at various locations if they make exempt purchases from several different sellers.

Form ST-105 is the general sales tax exemption certificate and is **NOT** to be used by a person engaged in agriculture, and is not valid for personal purchases. Only a person who has registered with the Department can use the ST-105 to purchase items exempt from the sales tax. Retailers, wholesalers or manufacturers can use the exemption certificate, if the item is purchased for resale. The certificate can be used for the purchase of manufacturing machinery, tools and equipment if the products are used directly in direct production. Nonprofit organizations can make exempt purchases using the ST-105, but the organization should be aware that many items are subject to sales tax even if they are purchased by a not-for-profit organization. For further information, please refer to Sales Tax Information Bulletin #10. Government units can make purchases exempt from the sales tax and are also required to complete an ST-105 when making purchases.

IV. REGISTRATION REQUIREMENTS OF THE DEPARTMENT

Persons desiring to make exempt purchases must register with the Department as a retail merchant by completing Form BT-1. This registration will provide the person or entity with a Taxpayer Identification Number (TID), which is required to make purchases exempt from the sales tax. Out of state persons can register with the Department and obtain a TID in order to make qualifying exempt purchases.

Registration can be accomplished through the Department's web site at www.IN.gov/dor or by contacting one of the district offices throughout the state.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
COMMISSIONER'S DIRECTIVE #25
July 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 only serve as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

SUBJECT: Elimination of Form ST-137, Certificate of Exemption for an Out-of-State Delivery of Motor Vehicle, Manufactured Home, Aircraft, Watercraft or Trailer to be Registered and/or Titled Outside the State of Indiana

I. INTRODUCTION

Effective July 1, 2004, the ST-137 Form is no longer an effective document for out of state purchasers to claim an exemption from Indiana sales tax for purchases of motor vehicles, manufactured homes, aircraft, watercraft or trailers to be titled or registered outside the State of Indiana.

II. STATUTORY CHANGES

Effective July 1, 2004, IC 6-2.5-3-5 has been amended to delete the language that denied credit against Indiana use tax for sales and use tax paid to another state on the purchase of vehicles, watercraft or aircraft.

Additionally, IC 6-2.5-5-15 has been repealed as of the same effective date. IC 6-2.5-5-15 allowed an exemption from sales and use tax on the purchase of motor vehicles, trailers, watercraft or aircraft to be taken out of state. Both of these provisions are contained in HEA 1365-2004.

These changes were implemented in response to a Tax Court case, Bradley J. Rhoade v. Indiana Department of State Revenue, 774 N.E.2d 1044 (Ind. Tax 2002), which declared the denial of a credit for sales and use tax paid to another state on the purchase of a vehicle was unconstitutional.

III. SCOPE OF CHANGE

The repeal of IC 6-2.5-5-15 only affects situations where the purchaser takes possession of the vehicle prior to taking the vehicle out of state.

This repeal does not affect out of state sales by Indiana dealers. For a sale of a vehicle to be considered out of state, the purchaser must take possession via delivery outside of Indiana. No exemption certificate is required when making an out of state sale. However, the sales contract must specify that the vehicle is to be delivered out of state and the dealer must maintain shipping

documentation to verify that the vehicle was delivered to the purchaser at a specific out of state location.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
Departmental Notice #2
June 1, 2004
Prepayment of Sales Tax on Gasoline

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

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

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

The prepayment rate of sales tax on gasoline for the six – (6) month period beginning July 1, 2004, is six and six-tenths cents ($.066) per gallon.

Using the most recent retail price of gasoline available (as required by IC 6-2.5-7-14(b)), the Department has determined the statewide average retail price per gallon of gasoline to be one dollar and twenty and two tenths cents ($1.228). The most recent retail price of gasoline available was based on data contained in the May 2004 Petroleum Marketing Monthly as published by the Energy Information Agency.

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

Period			Rate Per Gallon
July 1, 1994	to	December 31, 1994	2.9 cents
January 1, 1995	to	June 30, 1995	3.7 cents
July 1, 1995	to	December 31, 1995	3.3 cents
January 1, 1996	to	June 30, 1996	3.3 cents
July 1, 1996	to	December 31, 1996	3.4 cents
January 1, 1997	to	June 30, 1997	4.0 cents
July 1, 1997	to	December 31, 1997	3.9 cents
January 1, 1998	to	June 30, 1998	4.0 cents
July 1, 1998	to	December 31, 1998	2.9 cents
January 1, 1999	to	June 30, 1999	3.0 cents
July 1, 1999	to	December 31, 1999	2.4 cents
January 1, 2000	to	June 30, 2000	3.6 cents
July 1, 2000	to	December 31, 2000	4.6 cents
January 1, 2001	to	June 30, 2001	4.9 cents
July 1, 2001	to	December 31, 2001	4.9 cents
January 1, 2002	to	June 30, 2002	4.9 cents
July 1, 2002	to	December 31, 2002	3.2 cents
January 1, 2003	to	June 30, 2003	5.3 cents
July 1, 2003	to	December 31, 2003	6.6 cents
January 1, 2004	to	June 30,2004	6.5 cents
July 1, 2004	to	December 31, 2004	6.6 cents

Indiana Department of State Revenue

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

STATE OF INDIANA	)	
	)	SS: BEFORE THE STATE OF
COUNTY OF MARION	)	INDIANA DEPARTMENT OF
	)	STATE REVENUE
IN THE MATTER OF:	)	
	)	
SEVILLE SENIOR CITIZENS	)	
CORPORATION,	)	Docket Number: 29-2003-0411
	)	
PETITIONER	)	

FINAL ORDER

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

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

1. The Proposed Order issued on April 1, 2004, with respect to the above captioned Petitioner by Administrative Law Judge Bruce R. Kolb is hereby affirmed.
2. The Findings of Fact, Conclusions of Law, and Proposed Order issued on April 1, 2004, with respect to the above captioned Petitioner by Administrative Law Judge Bruce R. Kolb is hereby adopted as the Indiana Department of State Revenue's Final Order on this matter.
3. Appeals to this Order may be made pursuant to IC 4-21.5-3 *et seq*. and/or IC 4-21.5-5 *et seq*.

SO ORDERED THIS 28TH DAY OF APRIL, 2004

Kenneth L. Miller, Commissioner
Indiana Department of State Revenue

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #3
INCOME TAX
JULY, 2004
(Replaces Information Bulletin # 3, dated January, 2003)

DISCLAIMER: Information Bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules, and court decisions. Any information 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 in this Bulletin should only serve as a foundation for further investigation and study of the current law and procedures related to its subject matter.

SUBJECT: Payment of Indiana Estimated Tax by Individuals

REFERENCES: IC 6-3-4-4.1; IC 6-3.5-1.1-18; IC 6-3.5-6-22; IC 6-3.5-7-18; IC 6-8.1-3-3

INTRODUCTION:

Estimated income tax payments must be made by an individual who:

(1) receives income from which Indiana adjusted gross income tax, county adjusted gross income tax, county option income tax, or county economic development income tax, is not properly withheld; and

(2) Has an annual income tax liability described under subdivision (1), above, that is four hundred dollars ($400) or more.

Even if an individual does not meet these requirements, the individual may still make estimated payments to reduce the amount that will be due when the annual individual adjusted gross income tax return is filed.

I. METHODS FOR PAYMENT OF ESTIMATED TAX

Estimated Tax installment payments are due on April 15, June 15, September 15, and January 15 following the last month of

the tax year. A person filing on a fiscal year rather than calendar year basis should adjust the due dates to correspond with the appropriate voucher for the fiscal year. If the due date falls on a national or state holiday, Saturday, or Sunday, payment is timely if it is postmarked by the day following the holiday or Sunday.

Estimated Tax installment payments may be made by one of the following methods: using a pre-printed estimated tax voucher which is issued by the Department on an annual basis to taxpayers with a history of paying estimated tax; obtaining from the Department or downloading from the Department's web site www.IN.gov/dor a paper Form IT-40ES tax voucher; or by paying estimated tax electronically from the Department's web site www.IN.gov/dor.

While an installment payment cannot be changed once it has been made, future payments can be adjusted to reflect a change in the annual estimated tax due. Future installment payments are determined by subtracting the amount of the previous payments from the amount of the estimated payments not yet paid.

Any installment payment received after January 15 for the preceding tax year will be either returned to the taxpayer or credited against the taxpayer's liability for the following year.

II. CALCULATION OF THE QUARTERLY ESTIMATED PAYMENT

The following schedule should be used to determine the amount of estimated tax due:

A. Total Estimated Income for the Tax Year	A. _____
B. Total Exemptions x $1,000 (plus $1,500 per Qualifying Dependent for Tax Year)	B. _____
C. Amount Subject to Indiana Income Tax (Line A minus B)	C. _____
D. Amount of State Income Tax Due (Line C x.034)	D. _____
E. Amount of County Income Tax Due (Line C x County Tax Rate)	E. _____
F. Total Estimated Income Tax (Line D plus Line E)	F. _____
G. Estimated State and County Income Tax Withheld Plus Total of Other Credits	G. _____
H. Amount of Annual Estimated Tax Due (Line F minus Line G)	H. _____
I. Each Installment Amount Due (Line H divided by 4)	I. _____

III. PENALTIES

A taxpayer is subject to penalty for underpayment of estimated tax if the total state and county taxes due after credits exceeds four hundred dollars ($400). The taxpayer will not owe a penalty if each installment payment equals at least one-fourth of the required annual payment. The required annual payment is the lesser of:

(1) 90% of the tax shown on the current year return;

(2) 100% of the tax shown on the previous year return;

(3) 110% of the tax shown on the previous year's tax return if the taxpayer is not a farmer or fisherman and the Indiana adjusted gross income shown on a joint return is more than $150,000; or

(4) 110% of the tax shown on the previous year's tax return if the taxpayer is not a farmer or fisherman and the Indiana adjusted gross income shown on the return is more than $75,000 for a taxpayer who is either single or married and filing separately.

If the taxpayer is eligible for any of the exceptions to the penalty listed in (1), (2), (3), or (4) above, they must attach the Schedule IT-2210 to the individual income tax return showing that the exception has been met.

If a taxpayer's income is not received evenly during the year, the taxpayer can avoid penalty if the tax is paid in an amount at least equal to the annualized income installment by the due date of the installment. Schedule IT-2210A should be used to compute the annualized income installment amount. This schedule is available upon request or at the Department's Web Site (www.IN.gov/dor/). If a penalty is imposed for underpayment of estimated tax, the penalty is ten percent of the underpayment for that period.

IV. UNDERPAYMENT

The underpayment of an installment is the difference between the payment required for the installment (or the annual income statement, if applicable) and the amount paid. If a payment is made after the installment due date, the payment is considered to be made in the following installment period.

V. AVOIDING PENALTY FOR THE FOURTH INSTALLMENT

If a taxpayer files an annual individual adjusted gross income tax return and pays the entire tax due by January 31, the taxpayer will not receive a penalty for the installment payment due January 15. However, payment of the entire estimated tax liability or balance due with the fourth installment or with the filing of the return does not relieve the taxpayer from any penalty for failure to make prior estimated payments in a timely manner during the year.

VI. FARMERS AND FISHERMEN

A penalty is not imposed if:

(1) at least two-thirds of the taxpayer's annual gross income for the current year or preceding year is from farming or fishing;

(2) the taxpayer files Form IT-40 or Form IT-40PNR; and

(3) The taxpayer pays the entire tax due by March 1.

The taxpayer should attach Schedule IT-2210 to the income tax return and complete the portion of the return labeled "Farmers and Fishermen Only". If the farmer or fisherman does not file the return and pay the tax by March 1, the taxpayer should complete Schedule IT-2210 to determine if a penalty applies.
Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN # 10
SALES TAX
JULY 2004
(Replaces Bulletin #10 dated June 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: Application of Sales Tax to Nonprofit Organizations

REFERENCE: IC 6-2.5-5-21, IC 6-2.5-5-25, IC 6-2.5-5-26, 45 IAC 2.2-5-55, 45 IAC 2.25-56, 45 IAC 2.2-5-57, 45 IAC 2.2-5-58, 45 IAC 2.2-5-59, 45 IAC 2.2-5-60

INTRODUCTION

This bulletin discusses the application of Indiana sales/use tax to nonprofit organizations. This bulletin will discuss when sales tax must be collected by nonprofit organizations and when Indiana sales/use tax must be paid on purchases by nonprofit organizations.

REGISTRATION

When taxable retail sales are made by nonprofit organizations they must register with the Compliance Division, Nonprofit Section of the Indiana Department of Revenue and receive a Taxpayer Identification Number.

Nonprofit organizations needing sales/use tax exemption on qualified purchases, but not making retail sales, also must register with the Compliance Division, Nonprofit Section of the Indiana Department of Revenue and receive a Taxpayer Identification Number. The Taxpayer Identification Number may be used on sales tax exemption certificates (Form ST-105) when making qualified purchases, unless the organization has been classified as a "social" organization by the Internal Revenue Service. The organization's status for the sales/use tax purposes will appear on Form NP-1. Social organizations, including homeowner's associations, are not allowed to make purchases exempt from Indiana sales/use tax.

SALES BY QUALIFIED NONPROFIT ORGANIZATIONS

Sales of tangible personal property by qualified nonprofit organizations carried on for a total of not more than thirty (30) days in a calendar year and engaged in as a fund raising activity to raise funds to further the qualified nonprofit purposes of the organization are exempt from sales tax. The thirty (30) day rule applies to all sales by such organization and each day in which selling activities are conducted constitutes a "selling day" for purposes of determining whether a qualified nonprofit organization has conducted sales for more than thirty (30) days during any calendar year. This provision applies to social organizations as well as other qualified organizations.

If an organization conducts sales or fund raising activities during thirty-one (31) or more days in a calendar year (not necessarily consecutive), it is a retail merchant and must collect sales tax on all sales made during the calendar year. All organizations required to collect sales tax must register with the Department of Revenue and obtain a Retail Merchant Certificate in addition to registering as a nonprofit organization. A single application (Form BT-1) is used to register with the Indiana Department of Revenue for sales tax and food & beverage tax. A separate application is required for each business location. There is a $25 non-refundable application fee for a Retail Merchant's Certificate. Form BT-1 is available from any Department of Revenue District Office (located in most major Indiana cities), Tax Fax, the Internet, or the State Information Center.

Sales of periodicals, books, or other property that is intended primarily either for the organization's educational, cultural, or religious purposes or for improvement of the work skills or professional qualifications of the organizations' members, may be sold exempt throughout the year.

PURCHASES BY NONPROFIT ORGANIZATIONS

Purchases for Own Use

In order to qualify for sales tax exemption on purchases as a nonprofit organization, the following conditions must prevail:

1. The organization must be named or described in IC 6-2.5-5-21. This includes nonprofit organizations organized and operated

exclusively for one or more of the following purposes:

(a) Charitable
(b) Literary
(c) Civic
(d) Religious
(e) Educational
(f) Scientific
(g) Fraternal

2. Also, included are the following specifically named nonprofit organizations.

(a) Business Leagues
(b) Licensed Hospitals
(c) Cemetery Associations
(d) Monasteries
(e) Churches
(f) Parochial Schools
(g) Convents
(h) Pension Trusts
(i) Labor Unions

3. The organization is not operated predominantly for social purposes.

4. In order for a purchase by a nonprofit organization to qualify for exemption, the article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases for the private benefit of any member of the organization or for individuals, such as meals and lodgings, are not eligible for exemption. If a member of the organization purchases a meal or lodging, even if the member is to be reimbursed by the organization, the purchase is not exempt, and the member must pay sales tax at the time of purchase. Purchases used for social purposes are never exempt.

5. The fact that an organization is incorporated as a nonprofit corporation or is being exempted from tax by the Internal Revenue Service does not necessarily mean that purchases made by the nonprofit organization are exempt from sales/use tax.

Organizations, described above, that are registered with the Indiana Department of Revenue as a nonprofit organization may purchase exempt from Indiana sales/use tax purchases of tangible personal property primarily used in carrying out the nonprofit purpose of the qualified organization. To purchase tax exempt, the organization must complete and provide to the vendor a Form ST 105.

Purchases by Non-Indiana nonprofit organizations

Nonprofit organizations not registered with the Indiana Department of Revenue may not issue a general exemption certificate (Form ST 105) to Indiana suppliers. Nonprofit organizations not located in Indiana must pay the Indiana sales/use tax to the supplier and file a claim for refund using Form GA-110L. Copies of the sales invoices and a copy of the Federal Determination Letter must accompany the claim for refund. As an alternative, if the nonprofit organization is not located in Indiana, but is having a function, meeting or convention in Indiana, the organization may provide the Department with a copy of its Federal Determination Letter and advise the Department by letter the nature of the items for which exemption is requested and provide dates of the event. When the Department approves the nonprofit organization's request for exemption, the Department will issue to the nonprofit organization a letter to be provided to the vendor indicating that purchase is exempt from Indiana sales/use tax. Please allow a minimum of thirty (30) days to process an exemption letter request. Please mail the request to: Indiana Department of Revenue, Nonprofit Section, Room 203, Indiana Government Center North, 100 N. Senate Avenue, Indianapolis, IN 46204

Purchases for Resale

Tangible personal property purchased for resale by a nonprofit organization is eligible for sales tax exemption.

Purchases by Social Organizations

Purchases of tangible personal property to be used by organizations organized and operated predominantly for social purposes are not exempt. If over fifty percent (50%) of its expenditures are related to social activities, such as food and beverage services, golf courses, swimming pools, dances, parties, and other similar social activities, the organization will be considered to be predominantly organized and operated for social purposes. Homeowner Associations do not qualify for tax exempt status under Indiana law.

This bulletin applies only to the status of nonprofit organizations under the sales tax act. Nonprofit organizations are subject to the Adjusted Gross Income Tax Act on unrelated business income as defined in Internal Revenue Code Section 513.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #17
SALES TAX
JULY, 2004
(Replaces Bulletin #17 dated May, 2002)

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

SUBJECT: Application of Indiana Sales Tax to Cable or Satellite Television or Radio Service

REFERENCES: IC 6-2.5-4-11

All cable or satellite television companies and radio service providers must register as retail merchants and collect and remit sales tax on charges made for cable, satellite television or radio service. Sales tax does not apply to initial installation charges.

Cable and satellite television, and radio service companies must pay sales tax on their purchases of tangible personal property.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #28
SALES TAX
JULY, 2004
(Replaces Information Bulletin #28, dated December 1992)

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SUBJECT: Motor Vehicle Sales and Repairs

REFERENCES: IC 6-2.5-1-6, IC 6-2.5-2-2, IC 6-2.5-3-6**,** IC 6-2.5-5-15, 45 IAC 2.2-3-22, 45 IAC 2.2-5-22, 45 IAC 2.2-5-21

INTRODUCTION

The sale of any vehicle required by Indiana to be licensed for highway use shall be subject to the sales/use tax unless such purchase is entitled to a statutory exemption shown on Form ST-108E.

The selling price upon which the tax will be based will be the actual amount of consideration tendered for the vehicle after deducting all appropriate discounts and trade-in allowances. The deduction for a trade-in allowance applies only to vehicles traded in and does not apply to other property, either personal or real, which is traded for a vehicle.

I. TAXABLE SELLING PRICE

A manufacturer's rebate is not considered deductible for sales tax purposes. This is because the purchaser is not entitled to the rebate until the vehicle is sold. The purchaser is simply assigning in advance the cash rebate to the dealer as part of the purchaser's consideration in buying the vehicle. A documented manufacturer's rebate stipulates that the rebate must be assigned to the dealer by the purchaser and the dealer's gross retail income will reflect the amount of the rebate, therefore, the rebate would be considered taxable for sales tax purposes.

A manufacturer's price reduction is considered deductible for sales tax purposes. This is because the manufacturer is actually reducing the selling price of the vehicle. The dealer (seller) does not receive the amount of the price reduction as consideration.

A dealer's price discount is also considered deductible in determining the amount on which sales tax is charged. The selling price is reduced by the dealer's price discount. The dealer (seller) does not receive the amount of the price discount as consideration for the vehicle sale.

The selling price upon which the tax is based for purposes of calculating the sales tax is indicated by the following examples:

1.	Vehicle Sticker Price	$12,000
	Dealer Discount	$ 500
	Used Vehicle Trade	$ 4,000
	$1,000 Rebate Assigned as Down Payment by Purchaser	-0-

	Taxable Selling Price	$ 7,500
2.	Vehicle Sticker Price	$12,000
	Dealer Discount	$ 500
	Used Vehicle Trade	$ 4,000
	$1,000 Rebate Direct to Customer	-0-
	Taxable Selling Price	$ 7,500
3.	Vehicle Sticker Price	$12,000
	Dealer Discount	$ 500
	Used Vehicle Trade	$ 4,000
	Manufacturer Price Reduction (not rebate)	$ 1,000
	Taxable Selling Price	$ 6,500

Documentation fees for services performed after the transfer of the vehicle are not considered part of the sales price of the vehicle and therefore are not subject to tax. Transfer of the vehicle takes place when the purchaser takes possession and control of the vehicle and assumes the risk of loss, even though title has not yet been transferred. However, the dealer must maintain adequate records to show which services pertain to the fees charged and that the services were performed after the transfer of the vehicle.

II. PURCHASES FROM INDIANA DEALERS

If the vehicle is purchased from a registered Indiana Motor Vehicle Dealer, the dealer must collect the tax and provide to the purchaser completed Form ST-108 showing that the tax has been paid to him. If the purchaser claims exemption and no tax is collected by the dealer, the statement at the bottom of Form ST-108E must be completed and signed by the purchaser. Title applications on sales by registered dealers without a Form ST-108, completed by the dealer, will not be accepted. The ST-108 must be attached to the revenue copy of the title application by the license branch. Whenever a purchaser claims an exemption on Form ST-108E, the dealer must retain a completed exemption certificate.

Effective July 1, 2004 motor vehicles purchased in Indiana to be immediately registered or licensed for use in another state are subject to Indiana sales tax.

Motor vehicles leased in Indiana are subject to sales tax. The tax applies to the primary property location for each periodic payment if the lease requires recurring periodic payments.

III. INSTATE PURCHASES FROM PERSON OTHER THAN INDIANA DEALERS

If a vehicle is not purchased from a registered Indiana dealer, then the license branch must collect the use tax at the time of registration unless the purchaser is entitled to claim exemption from the tax for one of the reasons shown on Form ST-108E.

The license branch will compute the tax due based on the actual selling price of the vehicle if:

(1) The seller signs a written affidavit under penalty of perjury stating the actual selling price of the vehicle; and

(2) The buyer presents the affidavit to the license branch at the time of registration.

NOTE: The completion of BMV Form 15-ST will satisfy the written affidavit requirement. All other affidavits must be notarized before acceptance by license branches.

In the absence of an affidavit, the license branch shall compute the tax due based on the presumption that the selling price of the vehicle is the average retail value as shown in a nationally recognized used car guide for that particular vehicle's year, make, and model.

When the tax is collected by the license branch, no ST-108 is necessary; however, the amount of tax collected must be noted on the title application by the license branch.

If the purchaser claims an exemption on a vehicle not purchased from a registered dealer, the ST-108E must be completed by either the purchaser or the license branch and attached to the revenue copy of the title application by the license branch. The ST-108E must show the specific paragraph under which the exemption is claimed, and be signed at the bottom of the form by the purchaser.

Exemption from the sales tax will not be allowed except for the reasons listed on Form ST-108E.

IV. PURCHASES FROM OUT-OF-STATE SELLERS

New vehicles purchased by Indiana residents and brought immediately into Indiana to be titled and registered are entitled to a credit for state sales tax paid to the other state. Leased vehicles located in Indiana will be subject to sales tax based on the value of the periodic lease payment.

V. SHOP SUPPLIES

Consumable supplies, such as, masking paper and tape, sandpaper, buffing pads, rags, and cleaning supplies, used to repair and service motor vehicles are subject to use tax if purchased exempt from sales tax. The purchaser becomes the final user of such items because its customer does not become the owner of such consumable supplies. Although the dealer may charge the customer for such items, the items are not being sold to the customer in a retail transaction. Use tax should be self assessed and remitted by

the purchaser directly to the Department if such consumable supplies were purchased exempt from sales tax.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #28WC
SALES TAX
JULY 2004
(replaces Information Bulletin #28WC, dated September, 1990)

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SUBJECT: Indiana Sales or Use Tax on Watercraft

REFERENCE: IC 6-2.5

INTRODUCTION

The sale of any watercraft required to be registered by the State for use in Indiana shall be subject to the sales or use tax unless such purchase is entitled to one or more of the exemptions as provided on Form ST-108E.

The selling price upon which the tax will be based will be the actual amount of consideration tendered for the watercraft after deducting all cash discounts and trade-in allowances. The deduction for trade-in allowance applies only to watercraft traded in and does not apply to other property, either personal or real, which is traded for a watercraft.

I. TAXABLE SELLING PRICE

A manufacturer's rebate is not considered deductible for sales tax purposes. This is because the purchaser is not entitled to the rebate until the watercraft is sold. The purchaser is simply assigning in advance the cash rebate to the dealer as part of the purchaser's consideration in buying the watercraft. A documented manufacturer's rebate stipulates that the rebate must be assigned to the dealer by the purchaser and the dealer's gross income will reflect the amount of the rebate, therefore, the rebate would be considered taxable for sales tax purposes.

A manufacturer's price reduction is considered deductible for sales tax purposes. This is because the manufacturer is actually reducing the selling price of the watercraft. The dealer (seller) does not receive the amount of the price reduction as consideration.

A dealer's price discount is also considered deductible in determining the amount on which sales tax is charged. The selling price is reduced by the dealer's price discount. The dealer (seller) does not receive the amount of the price discount as consideration for the watercraft sale.

The selling price upon which the tax is based for purposes of calculating the sales tax is indicated by the following examples:

1.	Boat Sticker Price	$12,000
	Dealer Discount	$ 500
	Used Boat Trade	$ 4,000
	$1,000 Rebate Assigned as Down Payment by Purchaser	-0-
	Taxable Selling Price	$ 7,500
2.	Boat Sticker Price	$12,000
	Dealer Discount	$ 500
	Used Boat Trade	$ 4,000
	$1,000 Rebate Direct to Customer	-0-
	Taxable Selling Price	$ 7,500
3.	Boat Sticker Price	$12,000
	Dealer Discount	$ 500
	Used Boat Trade	$ 4,000
	Manufacturer Price Reduction (not rebate)	$ 1,000
	Taxable Selling Price	$ 6,500

Documentation fees for services performed after the transfer of the watercraft are not considered part of the selling price of the watercraft and therefore are not subject to tax. Transfer of the watercraft takes place when the purchaser takes possession and

control of the watercraft and assumes the risk of loss, even though title has not yet been transferred. However, the dealer must maintain adequate records to show which services pertain to the fees charged and that the services were performed after the transfer of the watercraft.

II. PURCHASES FROM INDIANA DEALERS

If the watercraft is purchased from a registered Indiana dealer, the dealer must collect the tax and provide to the purchaser a completed Form ST-108 showing that the tax has been paid to the dealer. If the purchaser claims exemption and no tax is collected by the dealer, the statement at the bottom of Form ST-108E must be completed and signed by the purchaser. Whenever a purchaser claims an exemption on Form ST-108E, the dealer must retain a completed exemption certificate.

Effective July 1, 2004, watercraft purchased in Indiana to be registered or licensed for use in another state are subject to Indiana sales tax.

III. INSTATE PURCHASES FROM PERSONS OTHER THAN INDIANA DEALERS

A watercraft which is not purchased from a registered Indiana boat dealer, requires the Bureau of Motor Vehicles to collect the use tax at the time of registration unless the purchaser is entitled to claim exemption from the tax for one of the reasons shown on the reverse side of Form ST-108E.

The Bureau of Motor Vehicles will compute the tax due based on the actual selling price of the watercraft if:

(1) The seller signs a written affidavit under penalties of perjury stating the actual selling price of the watercraft; and

(2) The buyer presents such affidavit to the Bureau of Motor Vehicles at the time of registration.

In absence of an affidavit, tax due will be computed based on the presumption that the selling price of the watercraft was the highest book value for that particular watercraft year, make and model.

If the purchaser claims exemption on a watercraft not purchased from a registered dealer, the ST-108E must be completed by the customer and attached to the Department's copy of the title application. The ST-108E must show the specific paragraph under which the exemption is claimed, and be signed at the bottom of the form by the purchaser.

IV. SALES OF WATERCRAFT TO BE TRANSPORTED AND TITLED OR REGISTERED OUTSIDE OF INDIANA

If a person purchases a watercraft from an Indiana watercraft dealer and intends to transport the watercraft outside of Indiana, the watercraft is subject to sales tax as of July 1, 2004. If the person purchases the watercraft from someone other than a dealer and does not present the watercraft to be titled or registered in Indiana, no formal paperwork is necessary.

V. PURCHASES FROM OUT-OF-STATE SELLERS

Watercraft purchased out-of-state by Indiana residents and brought into Indiana to be registered are subject to Indiana use tax. This includes documented vessels registered with the U. S. Coast Guard. The tax will be based upon the bill-of-sale or other proof of purchase. Credit will be provided for sales and use tax paid to another state if the watercraft is required to be titled, registered or licensed in Indiana.

Out-of-state purchases of boats from dealers or individuals may be registered with the Bureau of Motor Vehicles, Watercraft Registration Titling Section.

VI. BOAT TRAILERS

The Indiana Sales and use tax applies to sales of boat trailers. The tax will be collected by the registered boat dealer at the time of purchase. If the trailer is purchased from someone other than a registered boat dealer, then the tax will be collected by the Bureau of Motor Vehicles at the time the trailer is registered for highway use. If a person plans to claim an exemption for the trailer, ST-108E should be completed.

Kenneth L. Miller

Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #51T
SALES TAX
JULY 2004
(Replaces Information Bulletin #51T dated January 2003)

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SUBJECT: Telecommunication Services

REFERENCES: IC 6-2.5-4-6; IC 6-2.5-4-13; IC 6-2.5-5-13; IC 6-8.1-15

Telecommunication Services

IC 6-2.5-4-6 subjects a wide range of intrastate telecommunication services to sales tax. The statute states that a person is a retail merchant making a retail transaction when the person provides intrastate telecommunication service. Telecommunication service is defined as the transmission of messages or information by or using wire, cable, fiber-optics, laser, microwave, radio, satellite, or similar facilities. It is not required that the person furnishing such service be a public utility for the service to be subject to sales tax.

HEA1114-2004, effective March 9, 2004, provides that if charges for telecommunication services that are not taxable are aggregated with charges that are taxable, the charges for the nontaxable services are exempt from the sales tax if the provider can reasonably identify the charges not subject to the sales tax from the service provider's books and records kept in the regular course of business.

A person is a retail merchant making a retail transaction when the person sells a prepaid telephone calling card at retail, a prepaid telephone authorization number at retail, or reauthorizes either of the above.

Effective August 1, 2002 a standardized method for calculating taxes, charges, and fees levied on wireless telephone service was established. The method is that all fees are charged and taxed based on the customer's place of primary use.

Example 1

Company A provides cellular phone service. Company A is not a public utility. Company A is required to collect and remit sales tax on its cellular service. The statute imposes sales tax on the transmission of messages or information by microwave, radio, satellite, or similar facilities. Cellular communications are covered by the statute and the statute does not require that a person be a public utility.

Value Added Services

Value added services in which computer processing applications are used to act on the form, content, code, or protocol of the information for purposes other than transmission are not telecommunication services and are therefore not subject to sales tax.

Example 2

Company B is a local telephone service provider. Company B provides several additional services and service enhancements to its customers. These include: call waiting, caller ID, call forwarding, distinct ringing, and voice mail. Company B's local phone service is subject to sales tax. However, not all of the additional services will be subject to sales tax if separately stated on the customer's monthly bill. Call waiting, caller ID, call forwarding, distinct ringing, and similar service enhancements are acting upon the transmission itself and do not affect the information contained in the transmission. These services or enhancements are therefore subject to sales tax. Voice mail and similar services are value added services which utilize computer processing applications to act upon the information for purposes other than transmission. The main distinction between voice mail and the other services is that the other services enhance the telecommunication service itself rather than provide a distinct non-telecommunication service. Therefore, voice mail and similar services are not telecommunication services under the statute and not subject to sales tax if separately stated on the customer's monthly bill. These charges must be separately stated or they will be subject to tax as part of a taxable unitary transaction.

The voice mail service should not be confused with the transmission of voice mail messages. Company B must pay sales or use tax on the intrastate transmission of the messages unless Company B's purchase of telecommunication services is exempt from sales tax. (See Example 6.)

Example 3

Company C is a local convenience store that offers to fax customer's documents for a fee. This charge is not subject to sales tax. Company C is not providing telecommunication services, rather, Company C is providing a service whereby it digitizes a document and sends it to its intended destination using a telecommunication service. Company C is the end user of the telecommunication service and must pay sales tax on any intrastate transmissions.

Example 4

Company Z provides access to a computer database. Customers of Company Z access the database over telephone lines using a modem. Company Z charges its customers for the amount of time they are connected to the database. Company Z is not required to collect sales tax on its charges. Company Z is providing a value added service that is not subject to sales tax. The use of the telephone line to provide the service is subject to sales tax.

Public Utilities

The sale of telecommunication services to public utilities or any provider of telecommunication services are not subject to sales or use tax.

Example 5

Company D provides local telephone service to Company W. Company W is a public utility providing water service to the community. The sale of local telephone service to Company W is not subject to sales tax because Company W is a public utility.

Example 6

Company E provides cellular phone service to Company D. Company D provides local telephone service to Company E.

Neither transaction is subject to sales tax because each is selling a telecommunication service to another provider of a telecommunication service.

Example 7

Company B is a local telephone service provider. Company B offers voice mail service to its customers. This service is not taxable. (See Example 2.) However, the fact that the voice mail service is not subject to tax does not exempt the use of telecommunication service in furtherance of that service. In this case, Company B is a telecommunication service provider and therefore its purchase or use of telecommunication service is exempt even when used in furtherance of a non-taxable service. If Company B was not a telecommunication service provider or a public utility, it would be required to pay sales or use tax on its purchase of telecommunication service in furtherance of its voice mail service.

Tangible Personal Property

A telecommunication service provider is not making a retail transaction subject to sales or use tax when it provides, installs, constructs, services, or removes tangible personal property which is used in connection with the furnishing of the telecommunication service.

Example 8

Company F is a paging services provider. Company F is not a public utility. The paging service is a telecommunication service and subject to sales tax. Company F provides its customers with a pager as part of the service. If there is a single charge for the service, then only that portion attributable to air time is subject to sales tax. The portion attributable to the providing of the pager itself is exempt. If Company F charges separately for air time and rents the pager, then both charges will be subject to sales tax. The difference being that providing only tangible personal property is exempt. In the latter case, the pager is rented not provided. (**Note**: Public utilities are not retail merchants making retail transactions when they lease or rent tangible personal property to another. Therefore, this analysis does not apply to public utilities. If the telecommunication service provider is a public utility, the charge for tangible personal property will be exempt unless the tangible personal property is being sold to the customer.)

The way that Company F contracts with its customers will determine whether Company F will pay sales or use tax when it purchases the pagers. If Company F charges separately for the pagers, it may purchase them exempt for resale or rental. However, if Company B provides the pagers as part of the service and does not charge separately for the pagers, it must pay sales or use tax on the purchase price of the pagers. (For additional information on purchases by telecommunication service providers see Example 10.)

Miscellaneous Charges

Charges for installing or servicing tangible personal property related to telecommunication service are not subject to sales tax.

Example 9

Company B is a local telephone service provider. Company B charges customers for initial hook-up and an additional charge if any labor is needed to physically connect the customer. The hook-up charge is subject to sales tax because it is a charge for telecommunication service. The charge for labor necessary to physically connect the customer is not taxable since it is not a charge for a telecommunication service.

Company B also offers a service whereby it will maintain the phone lines within the customer's house for a fixed monthly fee. This charge is not for telecommunication service and is therefore not subject to sales tax.

Any parts used in providing these services are not subject to sales tax if provided by Company B. (See Example 8.)

Purchases by Telecommunication Service Providers

Transactions involving acquisition of tangible personal property by telecommunication service providers are exempt from sales tax if the property is classified as central office equipment, station equipment or apparatus, station connection, wiring, or large private branch exchanges according to the uniform system of accounts which was adopted and prescribed for the utility by the Indiana Utility Regulatory Commission. Mobile telecommunications switching office equipment and radio or microwave transmitting equipment, including, towers and antennae are also exempt. If the provider is not subject to the control of the Indiana Utility Regulatory Commission, then the exemption applies to any property similar to that mentioned above.

Example 10

Company B is a local telephone service provider. Company B is subject to the authority of the Indiana Utility Regulatory Commission. Company B will look to the uniform system of accounts for local telephone companies to determine whether property it leases or purchases is subject to sales or use tax.

Example 11

Company F is a paging services provider. Company F rents space on a local tower for its antenna. The rental charges are not subject to sales tax. The purchase or rental of the antenna is also exempt from sales tax.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
SEVILLE SENIOR CITIZENS CORPORATION
DOCKET NO. 29-2003-0411

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER

An administrative hearing was held on Wednesday, January 28, 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.

At hearing Petitioner's counsel requested time to file briefs. A continuance was granted in order for each side to file legal briefs. Petitioner's brief was received on March 11, 2004. The Department's Brief was received on March 23, 2004.

Petitioner, Seville Senior Citizens Corporation, was represented by Donald H. Dunnuck, of Dunnuck and Associates, 114 South Walnut Street, Muncie, IN 47305. Mr. Dunnuck was assisted by Amanda C. Dunnuck, Attorney at Law. Steve Carpenter appeared on behalf of the Indiana Department of State Revenue.

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

REASON FOR HEARING

On September 29, 2003, the Petitioner's charity gaming license was suspended for three (3) years, and Petitioner was assessed civil penalties in the amount of $11,750. The Petitioner protested in a timely manner.

FINDINGS OF FACTS

1) The Indiana Department of Revenue Criminal Investigation Division conducted an investigation of the Petitioner beginning on August 13, 2003. (Record at 9).

2) On August 13, 2003 the Department's investigators went to Petitioner's premises where an allowable bingo event was in progress. (Record at 9).

3) The Department's investigators entered Petitioner's building and made contact with Mona Gregory. (Record at 10).

4) The president of Petitioner's organization is Mona Gregory. (Record at 69).

5) Ms. Gregory escorted the Department's investigators to a game room off of the bingo area. (Record at 10).

6) Eighteen (18) video gaming machines were located in a room adjacent to the area used by the Petitioner for bingo. (Record at 10).

7) The Department's investigator observed a basket of pulltabs in the room containing the video gaming machines. (Record at 14).

8) The Department's investigator observed Ruth Seifert in the room containing the video gaming machines. (Record at 14).

9) Ruth Seifert told the Department's investigator that she sold pulltabs to the bingo patrons who enter the room and that she was responsible for paying the winners. (Record at 14).

10) Pull tabs were being sold to Petitioner's patron in the "game room." (Record at 14).

11) The Department's investigator observed a pull tab game called "Elevens" in the game room. (Record at 14).

12) The room containing the video gaming machines was open seven days a week from 4pm to 9pm including the times when the Petitioner was conducting charity gaming. (Record at 15).

13) An open and unlocked door separated the Petitioner's location from the adjacent room containing the video gaming machines. (Petitioner's Exhibit 73).

14) Petitioner stated that the door was open to allow the patrons in the gaming room access to the restrooms. (Record at 73).

15) The room containing the video gaming machines had a door which leads to a hallway at the end of which was a common area containing the restrooms. (Petitioner's Exhibit #8).

16) Petitioner had "No Tipping" signs posted in the area where the bingo games were conducted. (Record at 17).

17) "No Tipping" signs were not posted in the room containing the video gaming machines. (Record at 17).

18) Petitioner's charity gaming license was not posted. (Record at 18).

19) According to the Department's investigator, Ms. Seifert was not listed as a worker or operator on Petitioner's charity gaming license application. (Record at 19).

20) Petitioner's financial records show a sixteen thousand dollar ($16,000) donation. (Record at 21).

21) Mona Gregory and Bob Teeters, the alleged owner of the video gaming machines, split the money collected from the machines. (Record at 34).

22) Mona Gregory was asked by Petitioner's counsel during direct examination, "Okay, and do you have an agreement with Mr. Teeters concerning monies paid to you?" She responded under oath, "Yes." Petitioner's counsel then asked, "And tell the Hearing Officer what that agreement is." Ms. Gregory still under oath replied, "I volunteered back there and then whatever

the machines made Mr. Teeters would donate that to my senior citizens." (Record at 71-72).
23) During questioning by the administrative law judge Mona Gregory stated, "I volunteered for Mr. Teeters and in return he donated to the Seville Senior Citizens half of whatever the gameroom made and then I took it as a donation." (Record at 88).
24) Mona Gregory stated under oath that she informed the Department of two additional workers. These individuals were Michelle Burton and Ruth Seifert. (Record at 80).
25) Mona Gregory stated that she did not give Mr. Teeters a receipt for his tax records regarding the sixteen thousand dollar ($16,000) donation. (Record at 88).
26) Mona Gregory is listed as an operator on Petitioner's license. (Record at 92).
27) Petitioner sought to prove that the video gaming machines were a game of skill.
28) Petitioner hired a private investigator, to conduct an experiment on one of the machines at issue, in order to prove that it is a game of skill and not chance. (Record at 64).
29) The video gaming machines at issue are called Cherry Masters.
30) Cherry Master is a coin-operated video machine in which the player inserts money and presses a button. The video screen displays images that rotate in separate independent vertical lines, slow, and then stop. If a combination of images matches horizontally, vertically, or, in some cases, diagonally, the operator will receive credits. The Cherry Master also has a "stop" button that permit the player to control the length of time the images rotate before stopping. (Record at 62-63 and Petitioner's Exhibit #1).
31) The machines at issue display odds of winning. (Petitioner's Exhibit #2).
32) Petitioner's private investigator manipulated the inner workings of the machine in order to conduct his experiment. (Record at 65-66).
33) Petitioner's private investigator failed to use a control in his experiment. (Record at 66).
34) Petitioner's private investigator was not familiar with the concept of a RNG or random number generator, nor did he know anything about how the machines work. (Record at 67).
35) The lack of knowledge on the part of Petitioner's private investigator and his inability to conduct a proper experiment made his claims and the results of his experiment mere speculation at best.
36) The machines at issue do not constitute a game of skill.
37) On September 29, 2003, the Petitioner's charity gaming license was suspended for three (3) years, and Petitioner was assessed civil penalties in the amount of $11,750.

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, IC 4-32-8-5).
3) IC 4-21.5-3-25(b) provides in pertinent part, "The administrative law judge shall regulate the course of the proceedings in conformity with any prehearing order and in an informal manner without recourse to the technical, common law rules of evidence applicable to civil actions in the courts…"
4) IC 4-21.5-2-26(a) states, "The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exemption to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence."
5) "[B]ecause Pendelton's interest in his insurance license was a property interest…a preponderance of the evidence would have been sufficient." Pendelton v. McCarty, 747 N.E. 2d 56, 65 (Ind. App. 2001).
6) "It is reasonable…to adopt a preponderance of the evidence standard…." Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind.App. 1993).
7) 45 IAC 18-1-18 states, "'Conduct prejudicial to the public confidence in the department,' as used in this article and in IC 4-32-1 means ***conduct that gives the appearance of impropriety***, including the failure to file tax returns, conducting a gaming event without a license, sports betting, ***operating a gambling device***, using or possessing a computer or other technologic aid, as defined in section 16 of this rule, or any other activity illegal under IC 35-45-5-1 et seq." (Emphasis added).
8) 45 IAC 18-2-4 states in pertinent part, "A readable photocopy of a license is required to be prominently displayed at the facility where the event is being held. The original license must be available for inspection upon the request at all times. In addition to the photocopy, a legible sign of adequate dimension must be prominently posted during an event giving the name of the qualified organization, license number, and the expiration date of the license…"
9) 45 IAC 18-3-2(i) provides in pertinent part, "A legible sign of adequate dimension must be prominently posted during an event stating that the operator and workers are not allowed to accept tips."
10) Pursuant to IC 4-32-6-24, ""Worker" means an individual who helps or participates in any manner in preparing for, conducting, assisting in conducting, cleaning up after, or taking any other action in connection with an allowable event under

this article."

11) 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).

12) IC 4-32-9-4 states, "(a) Each organization applying for a bingo license, special bingo license, charity game night license, raffle license, door prize drawing license, or festival license must submit to the department a written application on a form prescribed by the department.

(b) The application must include the information that the department requires, including the following:

(1) The name and address of the organization.

(2) The names and addresses of the officers of the organization.

(3) The type of event the organization proposes to conduct.

(4) The location at which the organization will conduct the bingo event, charity game night, raffle event, door prize event, or festival.

(5) The dates and times for the proposed bingo event or events, charity game night, raffle event, door prize event, or festival.

(6) Sufficient facts relating to the organization or the organization's incorporation or founding to enable the department to determine whether the organization is a qualified organization.

(7) The name of each proposed operator and sufficient facts relating to the proposed operator to enable the department to determine whether the proposed operator is qualified to serve as an operator.

(8) A sworn statement signed by the presiding officer and secretary of the organization attesting to the eligibility of the organization for a license, including the nonprofit character of the organization.

(9) Any other information considered necessary by the department."

13) IC 4-32-9-16.5 provides in pertinent part, "A qualified organization that receives ***ninety percent (90%) or more of the organization's total gross receipts from any events licensed under this article*** is required to donate sixty percent (60%) of its gross charitable gaming receipts less prize payout to another qualified organization that is not an affiliate, a parent, or a subsidiary organization of the qualified organization." (Emphasis added).

14) IC 35-45-5-1 states, "…"Gambling device" means:

(1) ***a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance***;

(2) ***a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation***;

(3) a mechanism, furniture, fixture, construction, or installation designed primarily for use in connection with professional gambling;

(4) a policy ticket or wheel; or

(5) a subassembly or essential part designed or intended for use in connection with such a device, mechanism, furniture, fixture, construction, or installation.

In the application of this definition, an immediate and unrecorded right to replay mechanically conferred on players of pinball machines and similar amusement devices is presumed to be without value…" (Emphasis added).

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

(1) engages in pool-selling;

(2) engages in bookmaking;

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

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

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

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

16) "'Gambling device' is defined as 'a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance,' as well as 'a mechanism that, when operated for a consideration, does not return the same value or property for the same consideration upon each operation.'" 2001 Op. Att'y Gen 9 (2002).

17) The court in Maillard held that because the quarter slide machine did not always return the same value or property for the same consideration upon each operation, the machine was "a mechanism by the operation of which a right to money or other property may be credited, in return for consideration, as the result of the operation of an element of chance," therefore, it was found to be a gambling device prohibited by statute. State v. Maillard, 695 N.E.2d 637, 641 (Ind. Ct. App. 1998), transfer denied by Cain v. Maillard, 706 N.E.2d 173 (Ind. 1998).

18) IC 4-32-12-1(a) provides in pertinent part, "The Department may suspend… an individual …for any of the following: (1) Violation of a provision of this article or of a rule of the department..."

19) IC 4-32-12-3 states, In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following:

(1) Suspend or revoke the license.

(2) Lengthen a period of suspension of the license.

(3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.

(4) Impose an additional civil penalty of not more than one hundred dollars ($100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

1) A common misconception is that the conduct of gaming by an exempt organization is a charitable activity. There is nothing inherently charitable about gaming. The conduct of gaming is no different than any other trade or business carried on for profit. The fact that an organization may use the proceeds from its gaming to pay for the expenses associated with the conduct of its charitable programs will not make the gaming a charitable activity.

2) Petitioner had "No Tipping" signs posted in the area where the bingo games were conducted. Petitioner did not violate the provision of 45 IAC 18-3-2.

3) The Petitioner failed to have a readable photocopy of its license prominently displayed. In addition to the photocopy, a legible sign of adequate dimension must be prominently posted during an event giving the name of the qualified organization, license number, and the expiration date of the license. This constitutes a violation of 45 IAC 18-2-4.

4) The eighteen (18) Cherry Master video gaming machines are gambling devices as defined in IC 35-45-5-1.

5) Petitioner's president, who was listed as an operator, and at least one of its workers admitted to working in the room containing the video gaming machines and where pull tabs were sold illegally. Petitioner's president admitted to accepting money, on behalf of the charity, from the illegal video gaming machines. Petitioner also allowed its patrons free and unfettered access to the illegal video gaming machines. These activities constitute conduct prejudicial to the public confidence in the department. This constitutes a violation of 45 IAC 18-1-18.

6) In order for IC 4-32-9-16.5 to apply to a qualified organization it must first receive ninety percent (90%) or more its total gross receipts from any events licensed under this article. That means in computing the total gross receipts of a qualified organization only those amounts from events licensed by the department are included. However, money received by an organization from illegal gaming activities is subject to taxation at the state and federal level, will jeopardize its federal and state exemption status and is also evidence of criminal activity.

7) Petitioner did not violate the provisions of IC 4-32-9-16.5.

8) Petitioner's serious violations were sufficient to warrant a three (3) year suspension of its charity gaming license.

9) The Department is hereby ordered to adjust the civil penalties in accordance with the above findings.

PROPOSED ORDER

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

The Petitioner's appeal is sustained in part and denied in part. Petitioner had "No Tipping" signs posted in the area where the bingo games were conducted. The Petitioner failed to have a readable photocopy of its license prominently displayed. This constitutes a violation of 45 IAC 18-2-4.The eighteen (18) Cherry Master video gaming machines are gambling devices as defined in IC 35-45-5-1. Petitioner's president and at least one of its workers admitted to working in the room containing the video gaming machines and where pull tabs were sold illegally. Petitioner's president admitted to accepting money, on behalf of the charity, from the illegal video gaming machines. Petitioner also allowed its patrons free and unfettered access to the illegal video gaming

machines. These activities constitute conduct prejudicial to the public confidence in the department. This constitutes a violation of 45 IAC 18-1-18. Petitioner did not violate the provisions of IC 4-32-9-16.5. Petitioner's serious violations were sufficient to warrant a three (3) year suspension of its charity gaming license

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

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

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

Dated: _____ _____

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
HAMMOND LODGE 570
LOYAL ORDER OF MOOSE, INC.
DOCKET NO. 29-2004-0036

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED DEPARTMENTAL ORDER

An administrative hearing was held on Tuesday, March 16, 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, Hammond Lodge #570, was represented by Gregory Francis, David Coppage, and Norman Chumley. 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 Departmental Order.

REASON FOR HEARING

On January 5, 2004, the Petitioner's charity gaming license was suspended for two (2) years, and Petitioner was assessed civil penalties in the amount of seven thousand dollars ($7,000). The Petitioner protested in a timely manner.

FINDINGS OF FACTS

1) The Indiana Department of Revenue Criminal Investigation Division conducted an investigation of the Petitioner beginning in August of 2003. (Record at 9).

2) The Department's investigator observed minors participating in Petitioner's gaming activity. (Record at 11).

3) Petitioner allowed an individual identified on their license as a worker to call bingo. (Record at 13).

4) Petitioner allowed Glenda Holloway to act as an operator without having been a member of Petitioner's organization for requisite amount of time. (Record at 13).

5) Petitioner signed a lease agreement with the Lake County Board of Commissioners to lease space at the Lake County Fairground to conduct charity gaming from August 7 to August 9, 2003. (State's Exhibit D).

6) Another licensed entity signed a lease to conduct gaming from August 1, 2003 to August 4, 2003. (State's Exhibit D).

7) In August of 2003 the calendar week at issue began on Sunday the 3rd and ended on Saturday the 9th.

8) On January 5, 2004, the Petitioner's charity gaming license was suspended for two (2) years, and Petitioner was assessed civil penalties in the amount of seven thousand dollars ($7,000).

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) IC 4-21.5-3-25(b) provides in pertinent part, "The administrative law judge shall regulate the course of the proceedings in conformity with any prehearing order and in an informal manner without recourse to the technical, common law rules of evidence applicable to civil actions in the courts…"

4) IC 4-21.5-2-26(a) states, "The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence

may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exemption to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence."

5) "[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).

6) "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).

7) 45 IAC 18-1-27 states, " 'Location' means the street address and mailing address. It cannot include a post office box and is not connected by a common roof or wall with another structure where gaming activities occur."

8) 45 IAC 18-1-30 provides, " 'Operator' means a member of a qualified organization who is:

(1) an Indiana resident;

(2) in good standing with the department; and

(3) in addition to the forgoing [sic., foregoing], the following individuals are also operators

(A) A bartender licensed with the alcohol and tobacco commission if the bartender sell only pull-tabs, tip boards, or punchboards.

(B) Any person who accounts for money received at the charity gaming event.

(C) Any person who keeps records of the charity gaming event.

(D) Any person who announces the letter-number combination at a bingo event.

9) 45 IAC 18-3-2(D) states, "Only one (1) organization can conduct an event on the same day at the same location. An organization is limited to three (3) allowable events in a calendar week. An organization cannot lease its premises to another qualified organization if this would result in more than three (3) events being held on such premises during a calendar week. Unless otherwise authorized by the department, and organization is limited to one (1) allowable event each day…"

10) IC 4-32-9-4 states, "(a) Each organization applying for a bingo license, special bingo license, charity game night license, raffle license, door prize drawing license, or festival license must submit to the department a written application on a form prescribed by the department.

(b) The application must include the information that the department requires, including the following:

(1) The name and address of the organization.

(2) The names and addresses of the officers of the organization.

(3) The type of event the organization proposes to conduct.

(4) The location at which the organization will conduct the bingo event, charity game night, raffle event, door prize event, or festival.

(5) The dates and times for the proposed bingo event or events, charity game night, raffle event, door prize event, or festival.

(6) Sufficient facts relating to the organization or the organization's incorporation or founding to enable the department to determine whether the organization is a qualified organization.

(7) The name of each proposed operator and sufficient facts relating to the proposed operator to enable the department to determine whether the proposed operator is qualified to serve as an operator.

(8) A sworn statement signed by the presiding officer and secretary of the organization attesting to the eligibility of the organization for a license, including the nonprofit character of the organization.

(9) Any other information considered necessary by the department. (Emphasis added).

11) IC 4-32-9-20(b) states, "A facility may not be rented for more than three (3) days during a calendar week for an allowable event."

12) IC 4-32-9-28 provides, "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.

13) IC 4-32-9-34 states, "(a) Except as provided in subsection (b), ***the following persons may not play or participate in any manner in an allowable event:***

(1) An employee of the department.

(2) ***A person less than eighteen (18) years of age***.

(b) A person less than eighteen (18) years of age may sell tickets or chances for a raffle." (Emphasis added).

14) 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).

15) IC 4-32-9-4 states, "(a) Each organization applying for a bingo license, special bingo license, charity game night license, raffle license, door prize drawing license, or festival license must submit to the department a written application on a form prescribed by the department.
(b) The application must include the information that the department requires, including the following:
(1) The name and address of the organization.
(2) The names and addresses of the officers of the organization.
(3) The type of event the organization proposes to conduct.
(4) The location at which the organization will conduct the bingo event, charity game night, raffle event, door prize event, or festival.
(5) The dates and times for the proposed bingo event or events, charity game night, raffle event, door prize event, or festival.
(6) Sufficient facts relating to the organization or the organization's incorporation or founding to enable the department to determine whether the organization is a qualified organization.
(7) The name of each proposed operator and sufficient facts relating to the proposed operator to enable the department to determine whether the proposed operator is qualified to serve as an operator.
(8) A sworn statement signed by the presiding officer and secretary of the organization attesting to the eligibility of the organization for a license, including the nonprofit character of the organization.
(9) Any other information considered necessary by the department."

16) IC 4-32-12-1(a) provides in pertinent part, "The Department may suspend… an individual …for any of the following: (1) Violation of a provision of this article or of a rule of the department..."

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

CONCLUSIONS OF LAW

1) A common misconception is that the conduct of gaming by an exempt organization is a charitable activity. There is nothing inherently charitable about gaming. The conduct of gaming is no different than any other trade or business carried on for profit. The fact that an organization may use the proceeds from its gaming to pay for the expenses associated with the conduct of its charitable programs will not make the gaming a charitable activity.

2) The Petitioner allowed minors to participate in its charity gaming activities in violation of IC 4-32-9-34.

3) Petitioner allowed an individual identified on their license as a worker to call bingo, a violation of 45 IAC 18-1-30(3)(D).

4) Petitioner allowed Glenda Holloway to act as an operator without having been a member of Petitioner's organization for the requisite amount of time a violation of IC 4-32-9-28.

5) Petitioner signed a lease agreement with the Lake County Board of Commissioners to conduct charity gaming from August 7 to August 9, 2003 at the Lake County Fairground. Another organization had also signed a lease to conduct charity gaming from August 1, 2003 to August 4, 2003. Therefore, starting the week of August 3rd 2003, charity gaming was to be conducted at the Lake County Fairgrounds on five (5) days that week, a violation of IC 4-32-9-20(b).

PROPOSED DEPARTMENTAL ORDER

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

The Petitioner's appeal is denied in whole.

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 DEPARTMENTAL ORDER SHALL BECOME THE FINAL ORDER OF THE INDIANA

DEPARTMENT OF STATE REVENUE UNLESS OBJECTIONS ARE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE THE ORDER IS SERVED ON THE PETITIONER.

Dated: _____

_____

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

02970146.LOF

LETTER OF FINDINGS NUMBER: 97-0146 ITC
GROSS INCOME TAX
For Years 1990 to 1993

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

ISSUES

I. Gross Income Tax – Application to out-of-state Taxpayer for sales to distributors.

Authority: 45 IAC 1-1-120 (1)(b); IC 6-2.1-2-2 (a) 2

Taxpayer protests subjecting income from sales to distributors to Gross income tax.

II. Gross Income Tax – Application to out-of-state Taxpayer for sales through franchisees.

Authority: 45 IAC 1-1-120 (1)(b); 45 IAC 1-1-49(1) & (2); IC 6-2.1-2-2 (a) 2; IC 6-2.1-3-3; *Tyler Pipe Industries v. Washington State Department of Revenue*, 483 U.S. 232 (1987)

Taxpayer protests subjecting income from sales through franchisee and franchisee's dealers to Gross income tax.

III. Gross Income Tax – Application to Optional Maintenance and Warranty Contracts

Authority: IC 6-2.1-2-2 (a) (2)

Taxpayer protests taxation of income from sales of an optional warranty and maintenance contract.

IV. Adjusted Gross Income Tax – Royalty Income

Authority: IC 6-3-1-20

Taxpayer protests characterizing foreign royalty income as business income.

V. Adjusted Gross Income Tax – Net Operating Losses

Authority: IC 6-3-2-2.6

Taxpayer protests the auditor's calculation of net operating losses.

VI. Gross Income Tax – Direct Sales

Authority: 45 IAC 1-1-120 (1)(b)

Taxpayer protests taxation of income from direct sales into State of Indiana.

STATEMENT OF FACTS

The taxpayer is an out of state corporation which sells residential, light commercial, and large customized heating and air conditioning systems both nationally and internationally. One special product division (hereinafter "Special division") of taxpayer's business makes direct sales into Indiana; however, the majority of taxpayer product sales within Indiana are made by two of taxpayer's product divisions. One division (hereinafter "distributor division") sells the product to distributors who in turn sell the product to independent retail dealers; the other division (hereinafter "franchise division") sells the product through franchisees and franchisees' subcontractors. Taxpayer's franchise division enters into a single contract with franchisees for the franchisees to directly or indirectly sell, install, maintain, service, and advertise taxpayer's products throughout Indiana. Franchisees and their subcontractors can also sell extended warranty and service contracts on behalf of the taxpayer with the product sales.

DISCUSSION

I. Gross Income Tax – Application to out-of-state Taxpayer for sales to distributors.

Taxpayer was assessed the tax based on IC 6-2.1-2-2(a)(2), which imposes the gross income tax on "gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." The tax being assessed is based on the income to taxpayer from sales generated by orders to its out of state distributor division by independent distributors and shipped from various out of state assembly plants or distribution centers to the independent distributors by common or contract carrier

This activity constitutes an in-shipment of taxpayer products and is exempt from taxation under 45 IAC 1-1-120 (1) (b) *(repealed in 1998)* which states in relevant part:

(1) Nontaxable in-shipments

.....

(b) Sales made by a nonresident who has a business situs or business activities within the State, but the situs or activities are not significantly associated with the sales,

Any sales by taxpayer that originated at a taxpayer operation located in Indiana were reported by taxpayer. The remaining income is exempt.

FINDINGS

Taxpayer's protest is sustained.

II. Gross Income Tax – Application to out-of-state Taxpayer

Taxpayer was assessed the tax based on IC 6-2.1-2-2(a)(2), which imposes the gross income tax on "gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." The tax being assessed is based on income received from the sale by taxpayer's franchise division of products manufactured out of state and installed within and outside of the state by taxpayer franchisees and/or the franchisee's subcontractors based in Indiana.

45 IAC 1-1-120(2)(a) defines an in-shipment of goods as taxable if the sales were channeled through or connected with an Indiana business situs. 45 IAC 1-1-49(1) & (2) defines a business situs as:

.... including but not limited to, the following:

(1) Use, occupancy or operation of an office, shop, construction site, store, warehouse, factory, agency route or other place where the taxpayer's affairs are carried on;

(2) Performance of services;

Taxpayer enters into a single contract with each of its franchisees not only for sales and delivery of its product, but also for installation, warranty repair, servicing, and advertising of taxpayer's name and product line. While taxpayer asserts the lack of an agency relationship between it and its franchisees, taxpayer fails to distinguish its sales from the performance aspects of its activities within this state. Indeed, in the franchise agreement, the taxpayer requires franchisee distributors to:

(e) Assume full responsibility either through your own organization, an independent servicing organization, or that of your dealers, *for prompt efficient servicing, at reasonable charges to any end-user having Products installed in your area regardless of who sold or installed such Products*. In connection with this you shall cause your servicing dealers to maintain adequate repair and service shop facilities. You shall additionally have them send the appropriate personnel to schools as [taxpayer] may provide to be trained in the servicing of these Products and assume full responsibility for training service personnel of your dealers. You shall also require your dealers to maintain adequate installation and service records, specifically their customers' names and addresses, the model and serial numbers of equipment sold, summaries of service calls, and you shall also maintain such records for your own sales. (*Emphasis added*.)

Taxpayer's concern is not only with the delivery of products to Indiana, but, as is indicated in the italicized material, taxpayer requires its franchisees to provide ongoing product service, maintenance, advertising, and repair for any taxpayer product.

Taxpayer further asserts that the imposition of these taxes violates IC 6-2.1-3-3, which states:

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

The Supreme Court affirms the constitutionality of states imposing gross income taxes on out-of-state franchisers in *Tyler Pipe Industries v. Washington State Department of Revenue*, 483 U.S. 232 (1987). The facts in *Tyler* parallel the taxpayer's situation, "Tyler maintains no office, owns no property, and has no employees residing in the State of Washington. Its solicitation of business in Washington is directed by executives who maintain their offices out-of-state and by an independent contractor located in Seattle," *Tyler*, U.S. 232 at 249. The Supreme Court quoted in affirming the Washington State Supreme Court's finding that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for sales," *Tyler*, U.S. 232 at 250. This standard was satisfied because the "sales representatives perform any local activities necessary for maintenance of Tyler Pipe's market and protection of its interests," *Tyler*, U.S. 232 at 251. Again, taxpayer's requirements of its franchisees and their dealers require far more than the delivery of a product, instead extending to honoring warranty relationships, servicing taxpayer products, training franchisee employees, advertising, and maintaining market sales records. The Court requirements for nexus are met.

Therefore, income derived from transactions involving the delivery of products, the performance of installation, maintenance, and warranty work, and the maintenance of trained staff and commercial locations with taxpayer's name in Indiana, represents taxable Indiana source income; however, income to taxpayer from franchises located outside of the state is not taxable.

FINDINGS

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

III. Gross Income Tax – Application to Optional Maintenance and Warranty Contracts

DISCUSSION

Taxpayer's initial argument is that the sale of optional maintenance and warranty contracts by its franchisees and franchisees' subcontractors are part of interstate sales and are thus exempt. Please refer to the second issue for an analysis of the argument.

Taxpayer was assessed the tax based on IC 6-2.1-2-2(a)(2), which imposes the gross income tax on "gross income derived from

activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." The tax being assessed is based on the income to taxpayer from the sale of maintenance and warranty contracts within the state by taxpayer franchisees' and the franchisees' dealers. The contracts, as noted in the Summary of Audit Report, pages 7 & 8, involve service and maintenance work by the franchisees and the franchisees' subcontractors.

Taxpayer's primary argument was based on Sales Tax Information Bulletin #2, August 1991. This states:

Optional warranties and maintenance agreements are not subject to tax because the purchase of the warranty or maintenance agreement is the purchase of an intangible right to have the property supplied and there is no certainty that the property will be supplied. *However, if the agreement includes a charge for property to be periodically supplied, the agreement would be subject to tax.* (Emphasis added)

Taxpayer failed to address the relevance of a Sales Tax Bulletin to a Gross tax application. Additionally, as the emphasized section notes, if the warranty included a charge for property to be periodically supplied-as the taxpayer's maintenance contracts require- it was still a taxable transaction. Consequently the taxation of the agreement income stands.

Additionally, taxpayer notes that the auditor used sales data for one year to calculate the tax for the audits three years. To quote from the audit report, "Service Contract Revenue: Taxpayer supplied the 1993 amount and requested that it be used for the period 1990-92." Inasmuch as the amount in question was mutually agreed on during the audit, there is no question of law presented and no change is required.

FINDINGS

Taxpayer's protest is denied.

IV. Gross Income Tax – Royalty Income

DISCUSSION

Taxpayer is engaged in international marketing of its products. For various cultural reasons, taxpayer alters its name and product to fit the overseas market. Taxpayer argues that these changes alter the nature of its business enough to remove the overseas income from the definition of business income found in IC 6-3-1-20, which states:

Sec. 20 The term "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitutes integral parts of the taxpayer's regular trade or business operations.

All royalties in question arise from international transactions within taxpayer's trade. As taxpayer notes in their appeal, their domestic trademark includes a "specific reference to 'American' [which] has been found to be sensitive in other countries," and "differentiated national markets reflect disparate local architectural preferences, construction regulations and especially the very different cultural attitudes in matters of personal hygiene." Thus, aside from these accommodations for foreign sensibilities, these activities are within the purview of taxpayer's trade and business operations.

Taxpayer does note that a different subsidiary exists that has no similar domestic U.S. product line. Inasmuch as the wholly owned subsidiary still consists of taxpayer managed tangible and intangible property; the auditor's conclusion that it was integral to taxpayer's trade and business operations will stand.

FINDINGS

Taxpayer's protest is denied.

V. Gross Income Tax -Net Operating Losses

DISCUSSION

Taxpayer asserts that IC 6-3-2-2.6(b) requires its net operating losses be increased by its recognized nonbusiness income and its foreign source dividend deduction. Taxpayer agrees that the auditor's initial calculation of the net operating loss amounts was correct as required by IC 6-3-2-2.6(b), but objects to auditor's refusal to add the foreign source dividends to the net operating loss denominator.

IC § 6-3-2-2.6 allows domestic dividends received to be included in the net operating loss base by reference to Internal Revenue Code Sec: 172, but the statute does not include foreign source dividends in the net operating loss base. IC 6-3-2-2.6(a) requires a four- (4) step process to calculate the net operating loss. Step 2 requires the calculations from IC 6-3-2-2.6(b) used by both the auditor and taxpayer to calculate a net operating loss amount. Step 3 requires; Enter the larger of zero (0) or the amount determined under STEP TWO. Inasmuch as the totals from step 2 are negative numbers, zero (0) is larger and was thus entered by the auditor, computationally reflecting the omission of the foreign source dividend loss by the statute's exclusive use of IRS Code Sec: 172 for the net operating loss base calculation.

Taxpayer also noted a possible conflict with IC 6-2.1-3-3, which applies to Constitutional exemptions from gross income tax and the Foreign Commerce Clause of the U.S. Constitution. The gross income tax issue was addressed under the discussion of Issue II, please refer to the analysis related to it. The Foreign Commerce Clause deals with improper assessment of taxes, not the calculation of net operating losses; accordingly, it is not controlling on this issue.

FINDINGS

Taxpayer's protest is denied.

VI. Gross Income Tax – Direct Sales

DISCUSSION

Taxpayer asserts that the auditor erroneously picked up sales as taxable because he confused the acronym "RPG" with "UPG" and identified sales from an out-of-state office to Indiana customers as taxable for gross income tax purposes. The sales from an out-of-state office to Indiana customers constitute an in-shipment of taxpayer products and would be exempt from taxation under 45 IAC 1-1-120 (1)(b), which states in relevant part:

(1) Nontaxable in-shipments

.....

(b) Sales made by a nonresident who has a business situs or business activities within the State, but the situs or activities are not significantly associated with the sales.

FINDINGS

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04-990457.LOF

LETTER OF FINDINGS NUMBER: 99-0457
Sales/Use Tax
For the Years 1992-1998

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. Tax Administration - Best information available

Authority: Ind. Code § 6-2.5-4-4; Ind. Code § 6-8.1-5-1; Ind. Code § 6-8.1-5-4

Taxpayer protests the Department's assessment of sales tax with respect to Indiana sales at auctions, based on auditor reliance on prior year income tax returns.

II. Tax Administration - Penalty

Authority: Ind. Code § 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 was an operator of a motel for several years. Taxpayer did not file sales tax returns or remit sales tax for any of those years. The Department audited taxpayer for sales tax during the period in question. Taxpayer had claimed a sales tax exemption based on rentals of motel rooms for longer than thirty days. When auditor requested to review taxpayer's records with respect to the potential sales tax, taxpayer stated that the records had been destroyed upon sale of the motel. As a result, taxpayer was assessed sales tax based on income tax returns filed by taxpayer for the prior years.

I. Tax Administration-Best information available

DISCUSSION

In general, if a person rents real estate to a person for less than thirty (30) days, the person is considered to make a retail sale. Ind. Code § 6-2.5-4-4 (a). If the rental period is greater than 30 days, the person is not making a retail sale. *Id.* Here, the crucial question for taxability of the motel rentals is the length of visitors' stays, and whether taxpayer can verify that renters stayed for greater than 30 days.

Ind. Code § 6-8.1-5-4(a) states that:

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

In addition, Ind. Code § 6-8.1-5-1(a) states that the Department can compose tax based on the best information available to the Department.

In this case, the best information available to the Department was the taxpayer's income tax returns for the years in which taxpayer filed income tax returns. For the other taxable years, the auditor used an average of the income from the years in which taxpayer filed returns. From this, the auditor determined that the taxpayer's sales were those reported as income on the taxpayer's income tax returns, or estimated to be income. "[T]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom

the proposed assessment is made", Ind. Code § 6-8.1-5-1(b), though such presumption is rebuttable by taxpayer. *Id.* Taxpayer argues that the last four years of the motel's operation constituted rentals exempt from sales tax. At the designated time of the hearing, taxpayer was called three times, but did not answer his telephone on any of those occasions. Further, the very information that taxpayer could have used to show the length of visitors' stays was not presented to the Department.

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. Ind. Code § 6-8.1-10-2.1. 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 relates that taxpayer is not a sophisticated taxpayer. While the Department is aware of this, a basic duty of care exists for all taxpayers, from individuals of the most modest means to the largest corporations. That duty is one of knowledge of tax laws, knowledge of payment and filing deadlines, and record keeping of one's own business and personal affairs sufficient to retrace their prior financial transactions as necessary for a reasonable period of time. To impute less of a duty is to allow for carelessness or even intentional ignorance to be a defense-something that no effective legal system can permit. If a taxpayer is not certain of the scope of that duty, professional advice and even the occasional question to the Department is available. Taxpayer apparently sought professional advice prior to the operating the business; however, the advice appeared to ignore a long-standing statute. Taxpayer's reliance on that advice in the face of a clearly contrary statute was negligent for the first three years of the period.

For the last four years of the period, taxpayer maintains that it was not subject to the tax based on its change of operations to longer-term rentals. While appropriate facts and circumstances may exist in similar cases for a waiver, particularly in the case of an isolated transaction out of many, taxpayer has not made such a showing in this case.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02990561P.LOF

LETTER OF FINDINGS NUMBER: 99-0561P
Tax Administration—Penalty
For the Years 1986-1996

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

ISSUES

I. Tax Administration—Penalty

Authority: 45 IAC 15-11-2

Taxpayer protests the 10% negligence penalty.

STATEMENT OF FACTS

The penalty was proposed in the first instance because the auditor determined taxpayer had reported zero sales subject to Indiana's gross income tax for certain tax years and seriously underreported sales in other tax years. Taxpayer was aware of its duty to report such sales. Taxpayer argues that it had no intent deprive the Department of the revenue owed. Rather, taxpayer stated that the reason for the non-reporting and underreporting was due to accounting errors and misinterpretations of Indiana's corporate gross income tax statutes and regulations.

I. Tax Administration—Penalty

DISCUSSION

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

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

The Department finds the taxpayer did not act with reasonable care. Taxpayer freely admits mistakes were made, but argues it did not act in a willfully negligent manner. Taxpayer outsourced its tax compliance and audit functions to a big name accounting firm. When a taxpayer relies on the expertise of an outside firm to secure the accuracy and completeness of its tax compliance and audit functions, taxpayer accepts the results, signs off on them, and presents them as true. If the accounting firm made mistakes and/or errors, taxpayer's recourse is against the accounting firm, not the State of Indiana. The Department denies taxpayer's request to abate the 10% penalty assessment.

FINDING

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

DEPARTMENT OF STATE REVENUE

02-990599P.LOF

LETTER OF FINDINGS NUMBER: 99-0599P
Gross Income & Adjusted Gross Income Tax
For the Years 1995, 1996, 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. Tax Administration - Penalty

Authority: Ind. Code § 6-8.1-10-2.1; 45 IAC 15-11-2.

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

STATEMENT OF FACTS

Taxpayer is a corporation engaged in heating, ventilation and air conditioning manufacturing and sales. Taxpayer was purchased by another company in 1995 and has since operated as a subsidiary of the company. The company assumed that the taxpayer's inventory was on consignment and therefore exempt by taxpayer's construction of Indiana case law; however, upon Department audit, company learned that the inventory was for sale to Indiana customers. Therefore, for taxable year 1995, taxpayer was assessed gross income tax and penalty. Further, upon Department audit, it was discovered that taxpayer had rented an Indiana warehouse but that the rental expense was not part of taxpayer's apportionment factors due to an error that predated the acquisition. As a result, for taxable years 1996 and 1997, taxpayer was assessed adjusted gross income tax and penalty. All other issues have been resolved with the exception of the penalty, which taxpayer protests.

I. Tax Administration - Penalty

DISCUSSION

Taxpayer protests the imposition of the ten percent (10%) negligence penalty for all taxes that the Department has imposed. 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. Ind. Code § 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 provided sufficient information to establish that taxpayer exhibited reasonable care under the circumstances and therefore the penalty should be waived.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04-990652.LOF

LETTER OF FINDINGS NUMBER: 99-0652
SALES/USE TAX
For Years 1996 and 1997

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

ISSUES

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

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

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

II. Sales/Use Tax – Credit for sales tax previously paid

Authority: None

Taxpayer requests credit for sales tax previously paid for which the taxpayer provides documentation to prove such payment.

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

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

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

STATEMENT OF FACTS

Taxpayer is in the business of selling trees, shrubbery, plants, flowers, and landscaping materials. Taxpayer designs landscape plans for customers and will complete the installation of all materials or will sell the materials to the customers for them to plant. Taxpayer has installed a greenhouse and grows plants for sale.

Audit revealed that taxpayer failed to document transactions that would show that it paid the appropriate tax on certain items. These items were picked up on audit, and taxpayer was assessed tax appropriately. Where records were missing or incomplete, the auditor used the best information available to estimate an appropriate amount of sales that would be subject to tax.

Taxpayer claims that it has documentation to prove it has paid sales tax in some circumstances. Taxpayer protests the best

information available audit because, in its view, the auditor grossly overestimated taxpayer's retail sales.

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

DISCUSSION

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. IC 6-8.1-5-1(a). Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. IC 6-8.1-5-4 (a). A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times. IC 6-8.1-5-4 (c). The notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC 6-8.1-5-1(b).

For 1996 and 1997, taxpayer failed to report the correct amount of taxable sales. Taxpayer had destroyed the sales invoices and monthly sales recap sheets after sales tax returns were completed. With the help of taxpayer's accountant, those records were reconstructed and the information was used to base the assessment for sales tax.

A sample month of June 1999 was used to calculate the amount of exempt sales. The percentage for that month was determined to be 11.31%, and this percentage was applied to the tax years in question. Taxpayer protests the application of this percentage as inappropriate on two bases:

1) Taxpayer only had the facilities to sell items at retail for a fraction of the audit period. Therefore, in taxpayer's eyes, it didn't have the capacity to make the sales the auditor claimed it made, and that the income from that time period must have been derived from service (exempt) activities.

2) The month of June 1999 was a statistically misleading month, as taxpayer's retail sales were abnormally high when compared to any other month during that year.

3) The auditor failed to account for labor-related sales, such as mowing, in arriving at taxpayer's estimated retail sales.

Taxpayer has provided the Department with records that show that a building used for equipment storage was converted into a retail shop in 1997. That year, taxpayer also had a greenhouse built that would have increased taxpayer's retail sales. Taxpayer stipulates that the shop was not fully operational until some time in 1998, but cannot substantiate that claim with evidence.

Taxpayer has also provided the Department with a sample of sales-related statistics, primarily from the 2000 tax year. Taxpayer contends that these statistics show that more than 11.31% of its sales are exempt from sales tax.

Taxpayer must overcome the burden of proving that the Department's *prima facie* evidence of a valid claim. To do so, the taxpayer must show that the Department's basis for evaluating the taxpayer's sales is wrong. Several factors should be considered in determining the best possible method of determining the sales for a taxpayer that fails to maintain adequate records.

In the case at hand, it seems prudent that, for a landscaping firm to have retail sales, that firm would greatly be aided by having a showroom to display its wares. It would also greatly benefit the firm to have a greenhouse in which to grow plants and from which those plants may be sold. Under the circumstances, it seems relevant that taxpayer did not have either of those until some point in the middle of the audit period. Taxpayer's estimated sales should reflect that fact.

In an industry that is as seasonally dependent as the landscaping industry, this would imply the need to take the good with the bad – i.e. look at the winter months along with the summer months. To take the sales of a landscaping firm during June and apply the factors derived from that month and apply it to January is unreasonable.

FINDINGS

The taxpayer is sustained, subject to audit review, to the extent that it can show that its lack of retail operations affected its retail income during the audit period, and to the extent that it can show that the Department's use of the June 1999 sales figures is misrepresentative.

II. Sales/Use Tax – Credit for sales tax previously paid

Taxpayer has delivered to the Department documents that show sales tax was previously paid on items for which it was assessed use tax. Credit shall be given for those items for which the Department has been provided substantial documentation.

FINDINGS

The taxpayer is sustained.

III. 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.

In spite of the fact that taxpayer has raised several good points with regards to the best information available estimates, and despite the fact that taxpayer has substantiated some of its claims that it has paid sales tax on items purchased for which the auditor could previously locate no such records, the fact remains that, if not for taxpayer's failure to properly keep records, the audit would not have had to have been completed on a best information available basis. Reasonable care would also dictate that a taxpayer would keep records of sales tax paid for several years after its sales tax returns had been filed.

FINDINGS

The taxpayer is respectfully denied.

DEPARTMENT OF STATE REVENUE

04-20020010.LOF

LETTER OF FINDINGS NUMBER: 02-0010
STATE GROSS RETAIL TAX
For Years 1998 to 2000

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

ISSUES

I. Gross Retail Sales Tax – Application of sales tax to payments for leased tangible personal property.

Authority: 45 IAC 2.2-4-27

Taxpayer protests the assessment of sales tax on payments made for leased tangible personal property.

II. Gross Retail Sales Tax – Assessment of sales tax on real property.

Authority: IC § 6-8.1-5-4

Taxpayer protests the assessment of sales tax on lease payments for real property.

III. Tax Administration – Waiver of Penalty

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

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

STATEMENT OF FACTS

Taxpayer is primarily engaged in business as a motor fuel distributor and retailer. Taxpayer owns and operates retail mini marts along with a fuel distributorship. Taxpayer sells gasoline, diesel oil, furnace oil, kerosene, motor oil, and special fuels. Taxpayer also sells grocery items and sundry items. At the time of the audit all of taxpayer's business was in Indiana. Taxpayer protested the adjustments made based on taxpayer's leasing of equipment of one of their Indiana mini marts from a bank. These items included all of the store fixtures and fuel dispensing equipment. Taxpayer maintained it had paid sales tax on the initial purchase of these items and that some of these items constituted real property.

DISCUSSION

I. Gross Retail Sales Tax – Application of sales tax to payments for leased tangible personal property.

Adjustments were made based on taxpayer's leasing of equipment of one of their Indiana mini marts from a bank. These items included all of the store fixtures and fuel dispensing equipment. The assessment was based on 45 IAC 2.2-4-27 which subjects rented or leased equipment to sales tax just as the equipment would have been subject to sales tax in an equivalent sales transaction.

Taxpayer argues that the equipment in question was originally purchased by the taxpayer and was purchased subject to sales tax. The taxpayer then entered into a financing agreement with the bank, apparently in the form of the aforementioned property transfer and lease back, to improve their cash flow for normal operating expenditures. Taxpayer cites no statute, regulation, or case to establish a basis for the department to ignore the documented arrangements between the bank and taxpayer. While taxpayer asserts that this is merely a case of form over substance, the Department would note that this financial arrangement has federal and state tax ramifications for both the bank and the taxpayer, for example the lease explicitly grants the bank the tax benefits for the depreciation and amortization deductions for the property. Unilateral equitable adjustments by the Department for one party in a single area would permit both taxpayer and the bank to classify the financial activity in a contradictory fashion, maximizing the tax benefit to both parties and circumventing procedural safeguards. The Department declines to countenance this activity.

FINDINGS

Taxpayer's appeal is respectfully denied.

II. Gross Retail Sales Tax – Assessment of sales tax on real property.

Taxpayer argues that a substantial portion of the items purchased consisted of real property. Taxpayer contends that the

inferences resulting in assessment were not properly drawn. This issue revolves around the burden of proof in an audit situation, which IC § 6-8.1-5-4 defines as:

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

Taxpayer provided further detail as to the percentage and type of items that it considered real property. Inasmuch as the taxpayer's original contention that sales tax was paid on the purchase of these items and the lease agreement in question specified the materials leased as service station equipment, there appeared to be a basis for granting a reduction in the department's assessment for those items sufficiently identified as real property. However, a review of the documents provided by the taxpayer- consisting of a portion of the lease with a selective and incomplete list of items acquired- is an unacceptable basis for the Department to revise its assessment.

FINDINGS

Taxpayer's appeal is denied.

III. Tax Administration – Waiver of Penalty

DISCUSSION

Finding the liabilities were "due to negligence," IC 6-8.1-10-2.1 (a)(3), the Department imposed a ten percent penalty. The term "negligence" is defined in 45 IAC 15-11-2 (b), pertinently:

> "Negligence" on behalf of a taxpayer is defined as the failure to use 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.

Taxpayer entered into an agreement that explicitly requires the remittance of sales tax and failed to do so without any regulatory or statutory justification. No waiver of the penalty is appropriate.

FINDINGS

The taxpayer's appeal is denied.

DEPARTMENT OF STATE REVENUE

0220020020.LOF

LETTER OF FINDINGS NUMBER: 02-0020
Corporate Income Tax
For the Tax Years 1996-1999

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

ISSUE

I. Tax Administration-Penalty

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

STATEMENT OF FACTS

The Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional corporate income tax, interest, and penalty for the tax years ending June 30, 1996 through June 30, 1999 on the taxpayer.

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 failed to file an amended Indiana return when its federal return was amended. The taxpayer also reported net receipts rather than gross receipts from a sale on its gross income tax return. Further, for adjusted gross income tax purposes, the taxpayer deducted losses and intercompany receipts even though it filed separately from its related Indiana corporations. These

breaches of the taxpayer's duties to file accurate returns and pay the appropriate amount of tax to the state constitutes negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220020022.LOF

LETTER OF FINDINGS NUMBER: 02-0022
Corporate Income Tax
For the Years 1996-1999

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. Corporate Income Tax - Unitary Relationship

Authority: IC 6-8.1-5-1 (b) *Container Corporation of America v. Franchise Tax Board.*, 463 U.S. 159,103 S.Ct. 293 (1983).; *Allied-Signal, Inc. v. Director, Division of Taxation,* 504 U.S. 768, 112 S.Ct. 2251 (1992), *ASARCO, Inc. v. Idaho State Tax Comm'n,* 458 U.S. 307 (1982).

The taxpayer protests the department's determination that it is not a unitary business.

II. Corporate Income Tax - Business Income

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

The taxpayer protests the department's determination that its partnership distributive income is not business income.

III. Corporate Income Tax - Net Operating Loss Carryback and Carryforward

Authority: IC 6-3-2-2.6, IC 6-3-2-2.

The taxpayer protests the department's disallowance of net operating loss carryback and carryforward.

STATEMENT OF FACTS

The Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional income tax, interest, and penalty for the tax years ending June 30, 1996 through June 30, 1999 on three related corporations. To identify the taxpayers in the three cases, they have been denoted "taxpayer 1, taxpayer 2, and taxpayer 3." The taxpayer at issue here is taxpayer 1. The three related taxpayers formed two partnerships which own and operate two corporations providing ambulance services in Indiana, "ambulance 1 and ambulance 2."

A Delaware corporation which provides ambulance and fire services throughout the nation is the parent corporation of the consolidated group including the three taxpayers and the Indiana ambulance service corporations. Taxpayer 1 is a limited partner in the partnership owning and operating ambulance 1. Taxpayer 2 is the general partner in the partnership between taxpayer 1 and taxpayer 2 which owns and operates ambulance 1. Taxpayer 2 is also the general partner and taxpayer 3 is the limited partner in the partnership which owns and operates ambulance 2. This partnership including taxpayer 1 as a limited partner was formed on December 25, 1995 and the taxpayer became a 99% limited partner as outlined in the partnership agreement with the contribution of cash and property. Prior to the formation of the partnership, the taxpayer was operating the ambulance operation and reporting its gross receipts as a regular "C" corporation. The department has reduced the amount of partnership income distributed to the taxpayer as this amount was reduced for federal tax purposes, which results in a refund to the taxpayer. However, the department has also reclassified the distributions from the ambulance partnership to the taxpayer as nonbusiness income or loss because the department asserts that the taxpayer does not maintain a unitary relationship with the ambulance partnership. As a result, the department will not allow the taxpayer to utilize its losses as NOL deductions in past or future years. The taxpayer filed NOL carryback refund claims to utilize the NOL generated in the year ended June 30, 1997. The department has denied these refund claims due to its reclassification of the distributions. The taxpayer protested this reclassification and denial of refund on three grounds. First the taxpayer claims that it is a unitary relationship. Secondly, the taxpayer contends that even if it is not considered a unitary relationship, the income is business income. Finally, the taxpayer argues that non business income net operating losses can be carried back and forward. A hearing was held and this Letter of Findings results.

I. Corporate Income Tax - Unitary Relationship

DISCUSSION

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

The taxpayer protests the department's determination that the taxpayer does not maintain a unitary relationship with the related

corporations. The determination of whether or not a unitary relationship exists in a partnership of corporations depends on 45 IAC 3.1-1-153(b) as follows:

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

Therefore, in order to be considered a unitary operation, the taxpayer must demonstrate that the relationship between itself and the partnership meet the established standards of a unitary relationship.

The Supreme Court has considered the issue of a unitary relationship in several cases and with several analyses. The one essential characteristic in each of the cases is day-to-day operational control.. *Container Corporation of America v. Franchise Tax Board.*, 463 U.S. 159,103 S.Ct. 293 (1983).; *Allied-Signal, Inc. v. Director, Division of Taxation,* 504 U.S. 768, 112 S.Ct. 2251 (1992), *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982). To establish that the taxpayer has a unitary relationship with the partnership, the taxpayer must establish that it has operational control of the partnerships or that management of the partnerships is centralized with the taxpayer.

The taxpayer argues that it qualifies as a unitary relationship because it has officers and directors in common with the other corporation in the partnership, the consolidated group of companies has an Operations Manager who is responsible for the Indiana operations, there are monthly meetings of regional presidents, the corporations in the consolidated group use economies of scale in purchasing insurance and servicing of debt, and functional integration by centralized accounting and human resource benefits. These do not, however, indicate that the taxpayer has operational control of the day-to-day operations of the partnership as required by the Supreme Court.

Rather, the taxpayer is the limited partner and the other corporation is the general partner in a limited partnership. Taxpayer's argument ignores the general legal principal that a limited partnership is one in which the general partners control the business. Limited partners such as the taxpayer "contribute capital and share profits but who cannot manage the business and are liable only for the amount of their contribution." *Black's Law Dictionary,* p. 1142 (7th ed. 1999).

Along with general legal principals, the partnership agreement submitted by the taxpayer contradicts the taxpayer's arguments. Item 6 of the partnership agreement states as follows:

> The General Partner shall have the full, exclusive and complete power to manage and control the business and affairs of the Partnership, all of the rights and powers provided to general partnerships under the laws of the State of Delaware, as well as any other rights and powers necessary to accomplish the purpose of this

Thus, the contract establishing the relationship of the entities indicates that general partner completely controls the actions and policies of the taxpayer. Since all authority and control is invested in the general partner, the business relationship cannot be unitary.

FINDING

The taxpayer's protest is denied.

II. Corporate Income Tax - Business Income

DISCUSSION

The department did not consider the taxpayer's derivative income from the partnership business income. The taxpayer argues that even if the taxpayers and the Indiana partnerships are not unitary in nature, the separately allocated partnership loss is still business income or loss, just from a different trade or business than that of the corporate partner. The taxpayer bases this argument on 45 IAC 3.1-1-153 as follows:

> ... (c)If the corporate partner's activities and the partnership's activities do not constitute a unitary business... the corporate partner's share of the partnership income attributable to Indiana shall be determined as follows:
>
> (1) If the partnership derives business income from sources within and without Indiana, the business income derived from sources within Indiana shall be determined by a three factor formula...
>
> (2) If the partnership derives business income from sources entirely within Indiana, or entirely without Indiana, such income shall not be subject to formula apportionment.
>
> ... (e)After determining the amount of business income attributable to Indiana under subsection (c), the corporate partner's distributive share of such income shall be added to the corporate partner's other business income apportioned to Indiana and its nonbusiness income, if any, allocable to Indiana, in determining the corporate partner's total taxable income.

Reading these regulations together, the taxpayer argues that in Indiana a business conglomerate can be considered not a unitary concern and still have business income. The taxpayer reads these regulations and infers from the phrase "added to the corporate partner's other business income" (emphasis added) to mean that the partnership's distributive income is automatically considered business income. The taxpayer errs in this conclusion.

The Indiana Tax Court addressed this issue in *Hunt Corporation v. Indiana Dept. of State Revenue*, 709 N.E.2d 766 (Ind. Tax Ct. 1999). In *Hunt* the Court determined that a corporate partner's income from a corporate partnership should be determined by apportionment of that income at the corporate partner level when the corporate partner and the corporate partnership have a unitary relationship. The Court stated at page 776 as follows:

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

The Court's reasoning is clear. All of a corporate partner's income from a corporate partnership that has a unitary relationship with that partner is business income; all of a corporate partner's income from a partnership with a non-unitary relationship is non-business income. In this case, it has been determined that the corporate partners in the corporate partnership do not have a unitary relationship. Therefore the income of the individual corporate partners is not business income.

FINDING

The taxpayer's protest is denied.

III. Corporate Income Tax - Net Operating Loss Carryback and Carryforward

DISCUSSION

Alternatively, the taxpayer contends that nonbusiness income or loss which is allocated to Indiana can be carried back and forward as a net operating loss in Indiana pursuant to IC 6-3-2-2.6 as follows:

... the amount of a taxpayer's net operating losses that are derived from sources within Indiana shall be determined in the same manner that the amount of the taxpayer's income derived from sources within Indiana is determined, under section 2 of this chapter, for the same taxable year during which each loss was incurred.

"Section 2 of this chapter" refers to IC 6-3-2-2, which defines "adjusted gross income derived from sources within Indiana." Section 2 provides Indiana's general rules for attribution of income among states, whether the income is business or nonbusiness income. The last paragraph of IC 6-3-2-2 provides "In the case of nonbusiness income described in subsection (g), only so much of such income as is allocated to this state under the provisions of subsections (h) through (k) shall be deemed to be derived from sources Indiana. Therefore it is clear that a nonbusiness loss allocated to Indiana is included in the computation of the net operating loss carried to another year.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0220020102.LOF

LETTER OF FINDINGS NUMBER: 02-0102
Corporate Income Tax
For the Years 1996-1999

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. Corporate Income Tax - Unitary Relationship

Authority: IC 6-8.1-5-1 (b) *Container Corporation of America v. Franchise Tax Board.*, 463 U.S. 159,103 S.Ct. 293 (1983).; *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 112 S.Ct. 2251 (1992), *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982).

The taxpayer protests the department's determination that it is not a unitary business.

II. Corporate Income Tax - Business Income

Authority: IC 6-8.1-5-1 (b), 45 IAC 3.1-1-153, *Hunt Corporation v. Indiana Dept. of State Revenue*, 709 N.E.2d 766 (Ind. Tax Ct. 1999).

The taxpayer protests the department's determination that its partnership distributive income is not business income.

III. Corporate Income Tax - Net Operating Loss Carryback and Carryforward

Authority: IC 6-3-2-2.

The taxpayer protests the department's disallowance of net operating loss carryback and carryforward.

STATEMENT OF FACTS

The Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional income tax, interest, and penalty for the tax years ending June 30, 1996 through June 30, 1999 on three related corporations. To identify the taxpayers in the three cases, they have been denoted"taxpayer 1, taxpayer 2, and taxpayer 3." The taxpayer at issue here is taxpayer 1. The three

related taxpayers formed two partnerships which own and operate two corporations providing ambulance services in Indiana, "ambulance 1 and ambulance 2."

A Delaware corporation which provides ambulance and fire services throughout the nation is the parent corporation of the consolidated group including the three taxpayers and the Indiana ambulance service corporations. Taxpayer 1 is a limited partner in the partnership owning and operating ambulance 1. Taxpayer 2 is the general partner in the partnership between taxpayer 1 and taxpayer 2 which owns and operates ambulance 1. Taxpayer 2 is also the general partner and taxpayer 3 is the limited partner in the partnership which owns and operates ambulance 2. This partnership including taxpayer 1 as a limited partner was formed on December 25, 1995 and the taxpayer became a 99% limited partner as outlined in the partnership agreement with the contribution of cash and property. Prior to the formation of the partnership, the taxpayer was operating the ambulance operation and reporting its gross receipts as a regular "C" corporation. The department has reduced the amount of partnership income distributed to the taxpayer as this amount was reduced for federal tax purposes, which results in a refund to the taxpayer. However, the department has also reclassified the distributions from the ambulance partnership to the taxpayer as nonbusiness income or loss because the department asserts that the taxpayer does not maintain a unitary relationship with the ambulance partnership. As a result, the department will not allow the taxpayer to utilize its losses as NOL deductions in past or future years. The taxpayer filed NOL carryback refund claims to utilize the NOL generated in the year ended June 30, 1997. The department has denied these refund claims due to its reclassification of the distributions. The taxpayer protested this reclassification and denial of refund on three grounds. First the taxpayer claims that it is a unitary relationship. Secondly, the taxpayer contends that even if it is not considered a unitary relationship, the income is business income. Finally, the taxpayer argues that non business income net operating losses can be carried back and forward. A hearing was held and this Letter of Findings results.

I. Corporate Income Tax - Unitary Relationship

DISCUSSION

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

The taxpayer protests the department's determination that the taxpayer does not maintain a unitary relationship with the related corporations. The determination of whether or not a unitary relationship exists in a partnership of corporations depends on 45 IAC 3.1-1-153(b) as follows:

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

Therefore, in order to be considered a unitary operation, the taxpayer must demonstrate that the relationship between itself and the partnership meet the established standards of a unitary relationship.

The Supreme Court has considered the issue of a unitary relationship in several cases and with several analyses. The one essential characteristic in each of the cases is day-to-day operational control.. *Container Corporation of America v. Franchise Tax Board.*, 463 U.S. 159,103 S.Ct. 293 (1983).; *Allied-Signal, Inc. v. Director, Division of Taxation,* 504 U.S. 768, 112 S.Ct. 2251 (1992), *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982). To establish that the taxpayer has a unitary relationship with the partnership, the taxpayer must establish that it has operational control of the partnerships or that management of the partnerships is centralized with the taxpayer.

The taxpayer argues that it qualifies as a unitary relationship because it has officers and directors in common with the other corporation in the partnership, the consolidated group of companies has an Operations Manager who is responsible for the Indiana operations, there are monthly meetings of regional presidents, the corporations in the consolidated group use economies of scale in purchasing insurance and servicing of debt, and functional integration by centralized accounting and human resource benefits. These do not, however, indicate that the taxpayer has operational control of the day-to-day operations of the partnership as required by the Supreme Court.

Rather, the taxpayer is the limited partner and the other corporation is the general partner in a limited partnership. Taxpayer's argument ignores the general legal principal that a limited partnership is one in which the general partners control the business. Limited partners such as the taxpayer "contribute capital and share profits but who cannot manage the business and are liable only for the amount of their contribution." *Black's Law Dictionary,* p. 1142 (7th ed. 1999).

Along with general legal principals, the partnership agreement submitted by the taxpayer contradicts the taxpayer's arguments. Item 6 of the partnership agreement states as follows:

> The General Partner shall have the full, exclusive and complete power to manage and control the business and affairs of the Partnership, all of the rights and powers provided to general partnerships under the laws of the State of Delaware, as well as any other rights and powers necessary to accomplish the purpose of this

Thus, the contract establishing the relationship of the entities indicates that general partner completely controls the actions and policies of the taxpayer. Since all authority and control is invested in the general partner, the business relationship cannot be unitary.

FINDING

The taxpayer's protest is denied.

II. Corporate Income Tax - Business Income

DISCUSSION

The department did not consider the taxpayer's derivative income from the partnership business income. The taxpayer argues that even if the taxpayers and the Indiana partnerships are not unitary in nature, the separately allocated partnership loss is still business income or loss, just from a different trade or business than that of the corporate partner. The taxpayer bases this argument on 45 IAC 3.1-1-153 as follows:

> ... (c)If the corporate partner's activities and the partnership's activities do not constitute a unitary business... the corporate partner's share of the partnership income attributable to Indiana shall be determined as follows:
>
> (1) If the partnership derives business income from sources within and without Indiana, the business income derived from sources within Indiana shall be determined by a three factor formula...
>
> (2) If the partnership derives business income from sources entirely within Indiana, or entirely without Indiana, such income shall not be subject to formula apportionment.
>
> ... (e)After determining the amount of business income attributable to Indiana under subsection (c), the corporate partner's distributive share of such income shall be added to the corporate partner's other business income apportioned to Indiana and its nonbusiness income, if any, allocable to Indiana, in determining the corporate partner's total taxable income.

Reading these regulations together, the taxpayer argues that in Indiana a business conglomerate can be considered not a unitary concern and still have business income. The taxpayer reads these regulations and infers from the phrase "added to the corporate partner's other business income" (emphasis added) to mean that the partnership's distributive income is automatically considered business income. The taxpayer errs in this conclusion.

The Indiana Tax Court addressed this issue in *Hunt Corporation v. Indiana Dept. of State Revenue*, 709 N.E.2d 766 (Ind. Tax Ct. 1999). In *Hunt* the Court determined that a corporate partner's income from a corporate partnership should be determined by apportionment of that income at the corporate partner level when the corporate partner and the corporate partnership have a unitary relationship. The Court stated at page 776 as follows:

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

The Court's reasoning is clear. All of a corporate partner's income from a corporate partnership that has a unitary relationship with that partner is business income; all of a corporate partner's income from a partnership with a non-unitary relationship is non-business income. In this case, it has been determined that the corporate partners in the corporate partnership do not have a unitary relationship. Therefore the income of the individual corporate partners is not business income.

FINDING

The taxpayer's protest is denied.

III. Corporate Income Tax - Net Operating Loss Carryback and Carryforward

DISCUSSION

Alternatively, the taxpayer contends that nonbusiness income or loss which is allocated to Indiana can be carried back and forward as a net operating loss in Indiana pursuant to IC 6-3-2-2.6 as follows:

> ... the amount of a taxpayer's net operating losses that are derived from sources within Indiana shall be determined in the same manner that the amount of the taxpayer's income derived from sources within Indiana is determined, under section 2 of this chapter, for the same taxable year during which each loss was incurred.

"Section 2 of this chapter" refers to IC 6-3-2-2, which defines "adjusted gross income derived from sources within Indiana." Section 2 provides Indiana's general rules for attribution of income among states, whether the income is business or nonbusiness income. The last paragraph of IC 6-3-2-2 provides "In the case of nonbusiness income described in subsection (g), only so much of such income as is allocated to this state under the provisions of subsections (h) through (k) shall be deemed to be derived from sources Indiana. Therefore it is clear that a nonbusiness loss allocated to Indiana is included in the computation of the net operating loss carried to another year.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04-20020318.LOF

LETTER OF FINDINGS NUMBER: 02-0318
SALES/USE TAX
For Years 1998 and 1999

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

ISSUES

I. Sales/Use Tax – Transfer of property to an exempt not-for-profit organization

Authority: None

Taxpayer protests the imposition of gross retail tax on items purchased that were subsequently turned over to a not-for-profit organization for no consideration.

II. Sales/Use Tax – Equipment used in farming

Authority: IC 6-2.5-5-2

Taxpayer protests the imposition of gross retail tax on items purchased for use in farming.

III. Sales/Use Tax – Equipment used in constructing public roadways

Authority: IC 6-2.5-5-7

Taxpayer protests the imposition of gross retail tax on items used in constructing roadways for a county municipality.

STATEMENT OF FACTS

Taxpayer is for-profit real estate developer located in Indiana. Taxpayer has purchased many items exempt from gross retail tax under the assumption that these items were exempt either as items transferred to a homeowner's association or as used in farming.

I. Sales/Use Tax – Transfer of property to an exempt not-for-profit organization

DISCUSSION

Several of the items picked up on audit as being subject to unpaid gross retail tax are contended, by taxpayer, to have been transferred to an exempt not-for-profit organization. Taxpayer believes that, because this organization would have been able to purchase said items exempt from gross retail tax, it should also be able to purchase those same items in an exempt manner. Taxpayer states that it acts as an agent for the exempt organization.

However, taxpayers may not use the exemptions of other entities; therefore, only the exempt entity may purchase items and be exempt from gross retail tax.

FINDINGS

The taxpayer is respectfully denied.

II. Sales/Use Tax – Equipment used in farming

DISCUSSION

Taxpayer claims that other items picked up on audit were purchased for use in farming. Transactions involving agricultural machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for his direct use in the direct production, extraction, harvesting, or processing of agricultural commodities. IC 6-2.5-5-2(a). According to IC 6-2.5-5-2(b), transactions involving agricultural machinery or equipment are exempt from the state gross retail tax if:

(1) The person acquiring the property acquires it for use in conjunction with the production of food or commodities for sale;

(2) The person acquiring the property is occupationally engaged in the production of food or commodities which he sells for human or animal consumption or uses for further food or commodity production; and

(3) The machinery or equipment is designed for use in gathering, moving, or spreading animal waste.

Taxpayer claims that, in its business, it purchases equipment used for farming and development. Taxpayer claims that the equipment is used for the maintenance of fields. It claims that it is in business with farmers with whom it participates in crop sharing along with sharing in the rent and expenses.

The fact that taxpayer claims no revenues from agricultural activities tends to show that taxpayer is not itself engaged in any of the activities enumerated in IC 6-2.5-5-2(b). Regardless of whether or not taxpayer shares in the revenues and expenses of farming with those who actually tend the fields, the fact remains that taxpayer itself does not do any farming. Taxpayer again is trying to avail itself of the exemptions of a third party, and again there is no exemption to the gross retail tax.

FINDINGS

The taxpayer is respectfully denied.

III. Sales/Use Tax – Equipment used in constructing public roadways

DISCUSSION

Taxpayer claims that certain items picked up on audit were used to construct roadways, curbs, paving, and drainage that were subsequently turned over to the county, which maintains them. Under IC 6-2.5-5-7, transactions involving tangible personal property are exempt from the state gross retail tax if:

(1) The person acquiring the property is in the construction business;

(2) The person acquiring the property acquires it for incorporation as a material or integral part of a public street or of a public

water, sewage, or other utility service;

(3) The public street or public utility service into which the property is to be incorporated is required under a subdivision plat, approved and accepted by the appropriate Indiana political subdivision; and

(4) The public street or public utility is to be publicly maintained after its completion.

Taxpayer is a real estate development group. While these groups may not directly engage in construction activities, by their very nature such groups are involved to some degree in the business of constructing homes. Therefore, taxpayer meets the first part of the statute.

Taxpayer has put into issue only those items incorporated into the roads, curbs, paving, and drainage, and these items pass the second portion of the statute. Taxpayer has provided the Department with documentation that shows that the public streets into which the property was incorporated was required under a subdivision plat, approved and accepted by an appropriate Indiana political subdivision. And finally, taxpayer has provided the Department with documentation that the public street is to be publicly maintained after its completion.

Having met all four of the requirements of the statute, taxpayer is entitled to the exemption for any items for all tangible personal property incorporated into these streets.

FINDINGS

The taxpayer is sustained.

DEPARTMENT OF STATE REVENUE

04-20020396.LOF

LETTER OF FINDINGS NUMBER: 02-0396
Gross Retail Tax
For Years 1994—1999

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

ISSUE

I. Gross Retail Tax—Personal Computers

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-7; 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 tax on sales of personal computers.

STATEMENT OF FACTS

Taxpayer markets personal computers, selling them to many resellers for ultimate sales to consumers and selling to corporations and other entities that use personal computers for internal purposes. According to the auditor, multiple sales and large dollar amounts to any one particular customer did not necessarily indicate a resale situation. The auditor's examination of the taxpayer's listing of sales by customer resulted in the assessment of gross retail tax on sales for which no evidence of exemption was provided. Taxpayer timely protested, supplying the Department with additional documentation, some of which the auditor accepted to reduce taxpayer's liability.

The current posture of the protest is as follows. Taxpayer is presently in bankruptcy and has an appointed bankruptcy trustee. The trustee has the authority to pursue the adjudication/settlement of this gross retail tax liability and has requested that the Department issue a Letter of Findings based on the best information available in the file to ascertain taxpayer's gross retail tax liability in the State of Indiana. Additional facts will be supplied as required.

I. Gross Retail Tax—Personal Computers

DISCUSSION

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 is the property was acquired in a retail transaction." 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.

According to the original audit's projection agreement for the tax years at issue, taxpayer's original liability, based on records tendered to the auditor, was ascertained according to the best information available to the auditor. Taxpayer then filed a protest, submitting additional documentation, mainly exemption certificates. The auditor reviewed the supplemental documentation and arrived at a current gross retail tax liability. Pursuant to an agreement between the Indiana Department of Revenue and taxpayer's bankruptcy trustee, the taxpayer's gross retail tax liability is based upon the figure the auditor arrived at after reviewing the supplemental documentation. A penalty assessment of 10%, plus statutorily imposed interest, will be added to the bill sent to taxpayer.

FINDING

Taxpayer's protest concerning the assessment of gross retail tax on the sale of personal computers to consumers is sustained to the extent that correct documentation has been provided.

DEPARTMENT OF STATE REVENUE

0220020499;0320020500.LOF

LETTER OF FINDINGS: 02-0499; 02-0500
Indiana Withholding Tax and Corporate Income Tax
For the Years 1993 Through 2000

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

ISSUE

I. Income Received by Out-of-State Manufacturer – Adjusted Gross Income Tax and Withholding Tax.

Authority: 15 U.S.C.S. § 381; 14 U.S.C.S. § 381(a), (c); Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992); IC 6-3-2-1; IC 6-3-2-2(a); 45 IAC 3.1-1-38; 45 IAC 3.1-1-38(4); Schering-Plough Healthcare Products Sales Corp. v. Commonwealth, 805 A.2d 1284 (Pa. Commw. Ct. 2002).

Taxpayer argues that because it is an out-of-state vendor and because its Indiana activities do not exceed the "mere solicitation" standard, it is not subject to Indiana corporate adjusted gross income tax and, for the same reason, it was not responsible for withholding income tax.

STATEMENT OF FACTS

Taxpayer is an out-of-state manufacturer. Taxpayer maintains an Indiana force of four resident sales persons.

In addition, taxpayer has a 79 percent interest in a related, out-of-state company which manufactures tools. Related company does not have an Indiana sales force. Instead, taxpayer's four Indiana salespersons represent both taxpayer and related company in this state. The four salespersons sell both taxpayer's products and related company's tools.

Related company pays taxpayer for the salespersons' services by means of a "cost-sharing arrangement." According to the audit report, the cost sharing arrangement is "calculated based on a formula originally developed by the taxpayer from the gross sales of the taxpayer and [related company]. The taxpayer is reimbursed through an annual management charge. An intercompany receivable/payable account is used to accomplish the reimbursement. Monies are transferred as the taxpayer deems necessary."

During the period under audit review, taxpayer did not file Indiana tax returns on the ground that its Indiana activities did not exceed the mere solicitation standard set out in Public Law 86-272.

The Department of Revenue (Department) conducted an audit review of taxpayer's business records and – in short – determined that taxpayer's activities exceeded the mere solicitation standard. The audit review determined that taxpayer should have been paying corporate income taxes during 1990 through 1992 because – during those three years – taxpayer operated as a "C" corporation. The audit review determined that taxpayer should have been withholding individual income taxes on behalf of its shareholders during 1993 through 2000 because – during those eight years – taxpayer was operating as an "S" corporation, and its income flowed directly through to taxpayer's shareholders. Accordingly, the audit review concluded that taxpayer owed additional income and withholding taxes and proposed an assessment of those taxes. The taxpayer disagreed, submitted a protest to that effect, an administrative hearing was held during which taxpayer explained the basis for the protest, and this Letter of Findings results.

DISCUSSION

I. Income Received by Out-of-State Manufacturer – Adjusted Gross Income Tax and Withholding Tax.

IC 6-3-2-1 imposes a tax on the adjusted gross income derived from "sources within Indiana." IC 6-3-2-2(a) provides that adjusted gross income derived from sources within Indiana includes "income from doing business in this state." IC 6-3-2-2(a).

45 IAC 3.1-1-38, in interpreting IC 6-3-2-2(a), provides that for apportionment purposes a taxpayer is "doing business" in Indiana if it operates a business enterprise or activity in Indiana including, but not limited to:

(1) Maintenance of an office or other place of business in the state
(2) Maintenance of an inventory of merchandise or material for sale distribution, or manufacture, or consigned goods
(3) Sale or distribution of merchandise to customers in the state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution
(4) Rendering services to customers in the state
(5) Ownership, rental or operation of a business or of property (real or personal) in the state
(6) Acceptance of orders in the state
(7) Any other act in such state which exceeds the mere solicitation of orders so as to give the state nexus under P.L. 86-272 to tax its net income.

15 U.S.C.S. § 381 (Public Law 86-272) controls those occasions in which Indiana may properly impose a tax on the net income, derived from sources within that state, on foreign (out-of-state) taxpayers. 15 U.S.C.S. § 381 establishes the minimum standard for the imposition of a state income tax based on the solicitation of interstate sales. Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447, 2453 (1992). 15 U.S.C.S. § 381 prohibits a state from imposing a net income tax on a foreign taxpayer if the foreign taxpayer's only business activity within that 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 business activities exceed the mere solicitation of sales. 15 U.S.C.S. § 381(a), (c).

Taxpayer is a foreign corporation and receives money when its four Indiana salespersons sell taxpayer's products to Indiana customers. If taxpayer's Indiana activities were limited to selling its products, taxpayer – and by extensions its shareholders – would not be required to pay income tax because the only associated Indiana activity was the solicitation of the sales. However, taxpayer also receives money from related company when the Indiana salespersons sell related company's tools. In other words, taxpayer receives two streams of income; it receives income from sales of its product and it receives money from related company in consideration of the fact that the taxpayer's Indiana representatives act on behalf of related company.

Taxpayer argues that its Indiana activities are protected by P.L. 86-272 on the ground that its Indiana activities are limited to the solicitation of orders. In support, taxpayer cites to Schering-Plough Healthcare Products Sales Corp. v. Commonwealth, 805 A.2d 1284 (Pa. Commw. Ct. 2002). In that case, the Pennsylvania court found that the out-of-state petitioner was not subject to Pennsylvania net income tax when petitioner's only in-state activities was the solicitation of sales on behalf of its parent corporation. 805 A.2d at 1289. Interpreting the "clear and unambiguous" language of P.L. 86-272, the Pennsylvania court found that, "Congress has simply determined that there is an undue burden on interstate commerce where the only connection with the taxing state by the multistate foreign seller is solicitation of orders by salesmen or foreign contractors." Id.

P.L. 86-272 establishes the minimum standard for imposition of state income based upon solicitation of interstate sales. Wrigley, 112 S.Ct. 2453.

No state shall... shall have power to impose, for any taxable year..., a net income on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the state; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such person enable such customers to fill orders, resulting from such solicitation are orders described in paragraph (1). 15 U.S.C.S. § 381(a).

Insofar as taxpayer's representatives solicit sales for taxpayer's own products, P.L. 86-272 plainly protects those particular sales activities because the representatives' activities within this state on behalf of taxpayer consist solely in the solicitation of sales. In addition, there is nothing within the statute which abrogates that protection based upon the cost-sharing arrangement taxpayer entered into with related company. This is not to say that if taxpayer were providing a similar sales service on behalf of an unrelated third-party, that taxpayer would be entitled to the protection afforded under P.L. 86-272. Under such circumstances, taxpayer would plainly be rendering a "service" on behalf of the third-party, and taxpayer would be subject to tax on that service income. Such is not the situation here; taxpayer is merely soliciting sales on behalf of itself and related company.

During the years at issue, taxpayer's only Indiana activity consisted of the solicitation of sales on its behalf and on related company's behalf. Therefore, the adjusted gross income and withholding tax liabilities should be abated in their entirety.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

02-20030347.LOF

LETTER OF FINDINGS NUMBER: 03-0347
CORPORATE INCOME TAX
For Years 1997, 1998, 1999, 2000, and 2001

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 Income Tax – Management fees

Authority: None

Taxpayer protests the imposition of income tax on management fees at the high rate instead of the low rate of tax.

II. Gross Income Tax – Advertising fees

Authority: 45 IAC 1.1-2-4(a)(4)(A)

Taxpayer protests the imposition of income tax on advertising fees collected from an Indiana limited partnership under the control of taxpayer.

STATEMENT OF FACTS

Taxpayer is an out-of-state corporation with retail activities outside Indiana. Taxpayer is the sole parent corporation of two other out-of-state corporations, one of which is a 99% owner in an Indiana limited partnership("partnership"), the other is a 1% owner in the same partnership. All retail operations for all of the affiliated companies are outside Indiana except for the Indiana limited partnership.

Taxpayer filed consolidated Federal income tax returns with all affiliated entities during the audit period. All state returns, including Indiana, were filed on a separate basis.

The auditor claims that taxpayer has income from management fees and co-op advertising fees charged to subsidiary companies, including the Indiana limited partnership. These fees are at the center of this protest as they were picked up on audit as being income for the taxpayer.

I. Gross Income Tax – Management fees

DISCUSSION

Taxpayer has acquiesced on this point.

FINDINGS

Taxpayer is respectfully denied.

II. Gross Income Tax – Advertising fees

DISCUSSION

Taxpayer claims that it does not receive fees for advertising from the Indiana limited partnership. Rather, taxpayer claims that the partnership reimburses taxpayer for the partnership's own expenses that were previously paid for by taxpayer.

Taxpayer's position is that it contracts with third party vendors for advertising services for its various retail outlets. Some of these third parties are domiciled within Indiana, but most are without. Taxpayer pays on said contract and subsequently receives a dollar-for-dollar reimbursement from the partnership along with a management fee that taxpayer claims and on which it pays income tax. Taxpayer claims that the only taxable income received in this situation is by the third party vendors who provide the advertising services.

However, the Department's position is that taxpayer is dealing firstly with its own subsidiary, partnership. The contract is between taxpayer and partnership for the sale of performance of advertising services. The provision of services of any character is subject to the gross income tax. 45 IAC 1.1-2-4(a)(4)(A). Taxpayer then contracts with a third party to physically perform the service. This does not alter the fact that taxpayer initially contracted to, and subsequently receives payment for, the service.

Taxpayer may not contract away its gross income tax liability by contracting with outside parties to perform services. The fact that a third party, not taxpayer, performed the service is irrelevant.

FINDINGS

The taxpayer is respectfully denied.

DEPARTMENT OF STATE REVENUE

0320030445P.LOF

LETTER OF FINDINGS NUMBER: 03-0445P
Withholding Tax
For the Calendar Year 2002

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is 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 an annual withholding tax form (WH-3) for the calendar year 2002.

The taxpayer is a company located in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the late penalty should be waived as the taxpayer received the annual withholding tax form (WH-3) late on March 5, 2003. The due date of the annual withholding tax form is February 28, 2003.

The Department records show the WH-3 was mailed on October 22, 2002. Department policy with regard to a properly mailed billing by the Department states a Department billing is properly mailed if Department records show the billing was mailed to the correct address. Receipt of the billing by the taxpayer is not necessary to prove the taxpayer received the billing. As the Department records show the WH-3 was properly mailed, the taxpayer fails in demonstrating reasonable cause in filing the WH-3 late.

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

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

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0220030480P.LOF

LETTER OF FINDINGS NUMBER: 03-0480P
Income tax
For the Calendar Year 2000

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is 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 corporate income tax return for the calendar year 2000.

The taxpayer is a company located in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the error is unusual, and, feels the dual assessment of penalty and interest is excessive with regard to the nature of the error.

The previous Chief Financial Officer (CFO) sent the intended estimated taxes for Indiana to the IRS. As work backed up and the previous CFO was not able to keep up with the work, the previous CFO was terminated. The current CFO was hired within a few days. The current CFO did not review the mail backlog for a few months due to the large amount of work that needed to be

caught up on. When the current CFO did review the mail backlog, the current CFO realized, from notices from the IRS and the Department, that the Indiana estimated taxes had been sent to the IRS. The current CFO immediately filed an amended return to the IRS, on or about May 2003. The refund was received September 2003, where upon, the Department was paid.

To continue, the taxpayer feels the dual assessment of penalty and interest is excessive in light of the fact the taxpayer never had use of the money sent to the IRS. The IRS did not pay interest on the refund.

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 as the taxpayer did not have the necessary internal controls to reveal the misdirection of the mailed funds. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0320040051P.LOF

LETTER OF FINDINGS NUMBER: 04-0051P
Withholding Tax
Fiscal Year ending February 3, 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; 45 IAC 1-1-54; West Publishing Co. v. Ind. Dept of Revenue (1988), Ind. Tax. 524 N.E.2d 1329, 1333.

The taxpayer protests the late penalty.

II. Tax Administration - Interest

Authority: IC 6-8.1-10-1

The taxpayer protests the interest assessment.

STATEMENT OF FACTS

The late penalty and interest were assessed on the late filing of an annual withholding tax return for the fiscal year ending February 3, 2001.

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

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be waived as the error was the result of misinformation from the taxpayer's accountant, and, misinformation from a Department employee.

With regard to the misinformation from the taxpayer's accountant, the taxpayer's accountant is in an agency relationship with the taxpayer, and therefore, the taxpayer is liable for the accountant's actions when the accountant acts on the behalf of the taxpayer. 45 IAC 1-1-54.

With regard to the misinformation from the Department employee, the taxpayer provides no clear evidence that the department employee in question made a misrepresentation. "The state will not be stopped in the absence of clear evidence that its agents made representations upon which the party asserting estoppel relied." West Publishing Co.v. Ind. Dept of Revenue (1988), Ind. Tax. 524 N.E.2d 1329, 1333. Thus, as the taxpayer is unable to provide clear evidence of a misrepresentation from said department employee, the taxpayer fails to establish reasonable cause for filing late on this point.

The regulation which provides the guideline for penalty is as follows:

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 as (1) the taxpayer is liable for the accountant's actions, and (2) there is no clear evidence that said department employee made a misrepresentation. As inattention is negligence and subject to penalty, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

II. Tax Administration – Interest

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

DEPARTMENT OF STATE REVENUE

0420040053P.LOF

LETTER OF FINDINGS NUMBER: 04-0053P
Sales & Use Tax
For the Months January, February, March, April, May, July, and August of 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 monthly sales tax returns for the months of January, February, March, April, May, July, and August of the year 2003.

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

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be waived as the error was unintentional and due to unawareness.

In October 2002 the taxpayer received an information letter from the Department. The taxpayer erroneously assumed the payment due dates had changed from monthly to quarterly, and therefore paid sales tax quarterly up through August 2003.

The Department points out that there was no language in the information letter which changed the due dates.

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 as the taxpayer misread the said information letter. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0420040072.LOF

LETTER OF FINDINGS NUMBER 04-0072
RESPONSIBLE OFFICER
SALES TAX
For Tax Periods: 2002-2003

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 specific issues.

ISSUES

Sales and Withholding 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) at page 273:.

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

STATEMENT OF FACTS

The taxpayer was one third shareholder in a corporation that did not remit the proper amount of sales taxes to Indiana. The taxpayer was personally assessed for the taxes and protested these assessments. Taxpayer protested that he was an investor and not an officer of the corporation and that in an effort to protect his investment he had taken the other two shareholders to court and had them removed from the operations of the business.

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 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.

Indiana Department of Revenue assessments are prima facie evidence that the taxes are owed by the Taxpayer who has the burden of proving that assessment is incorrect. IC 6-8.1-5-1 (b).

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.

Id. At 273.

The taxpayer was the primary investor in the corporation at the time of its incorporation and had significant authority by his ownership of shares in the corporation. However, he contends that he had no involvement in the day to day operations and has provided copies of relevant court orders and transcripts from the hearings on this matter that establish his position as an investor only and prove that he did not have control over the finances of the business. Based on his establishment in a contested court proceeding of his absence of control over the finances of the business, taxpayer has established that he does not meet the third factor outlined in Safayan. Taxpayer protest is sustained.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

01-20040075P.LOF

LETTER OF FINDINGS NUMBER: 04-0075P
Income Tax
For the Calendar Year 2002

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is 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 payment of an annual income tax return for the calendar year 2002.

The taxpayer is an individual residing in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the late penalty should be abated as the tax was paid with the filing of the income tax return on the extension due date of October 14, 2004.

The Department points out that 90% of the tax due is required to be paid by the original due date when an extension has been filed. IC 6-8.1-6-1. In the instant case, the tax was paid at the extension due date, six months after the original due date.

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

The Department finds the taxpayer was ignorant of the tax due date. Ignorance is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

03-20040088P.LOF

LETTER OF FINDINGS NUMBER: 04-0088P
Withholding Tax
For Tax Years 2000-02

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—Negligence Penalty

Authority: 45 IAC 1.1-1-24; 45 IAC 15-11-2

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

STATEMENT OF FACTS

As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments of withholding taxes for 2000, 2001 and 2002. Taxpayer paid amounts equal to the assessments, but protested the imposition of a ten percent negligence penalty. Further facts will be provided as necessary.

I. Tax Administration—Negligence Penalty

DISCUSSION

Taxpayer has various companies within its corporate structure which design, build, supervise and work on powerhouses, plants and other facilities located throughout the United States and the world. Taxpayer hired several contractors to work on a plant construction location in Indiana. Most of these were resident contractors, but a few were not. Taxpayer did not check with the Secretary of State's office to determine if the nonresident contractors were registered to do business in Indiana. In the course of the audit, the Department determined that the nonresident contractors were not registered to do business in Indiana.

The Department issued proposed assessments under 45 IAC 1.1-1-24, which states:

(a) "Withholding agent" means a person or entity required to withhold gross income taxes under IC 6-2.1-6.

(b) The term includes a person or entity making payments to a nonresident contractor. The term also includes a prime contractor making payments to nonresident subcontractors. The following contracts are examples of service work that would require withholding on payments to nonresident contractors subject to the gross income tax:

(1) A construction contract of any kind.

(2) A contract for the performance of or participation in athletic events and exhibitions, including auto races.

(3) A contract for entertainment, including single entertainment events.

(4) A contract for the furnishing and installation of tangible personal property.

(5) A contract for leasing tangible personal property.

(c) As used in this section, "nonresident contractor" does not include a foreign corporation qualified to do business in Indiana.

In its protest letter, taxpayer states that it reviewed the contracts related to the eight largest nonresident subcontractors at issue. Taxpayer states that, based on the contracts, in some instances the contract was between a third-party general contractor and the subcontractor. Taxpayer states that in those instances the general contractor is responsible for the withholding tax.

Taxpayer states that since it would have to reimburse the general contractor for the additional withholding tax, and in order to avoid its administrative burden as well as the Department's, it paid the underlying assessments and interest. Also, taxpayer protests the ten percent (10%) negligence penalty on the grounds that the assessments were not the result of taxpayer's intentional disregard of Indiana law. Taxpayer also states that the amount of the assessments relative to the overall amount of business activity conducted is evidence that it is in general compliance.

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

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

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

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

Taxpayer's review only included the eight (8) largest nonresident subcontractors out of thirty-three (33) listed. Even then, taxpayer only claims that some of the eight were not its responsibility. Taxpayer has not provided any documentation in support of its protest, let alone sufficient documentation to support its claim that another taxpayer is responsible for some of the withholding taxes. Therefore, taxpayer did not exercise such reasonable care, caution or diligence as would be expected of an ordinary reasonable taxpayer. Under 45 IAC 15-11-2(b), this is negligence, since the definition of negligence is the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Taxpayer's statement that it did not intentionally disregard Indiana's tax law is not relevant.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20040089P.LOF

LETTER OF FINDINGS NUMBER: 04-0089P
Income Tax
For the Years 2000-2002

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

ISSUE

I. Tax Administration - 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 manufacturing and marketing metal building components for roofing and walls. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional income tax, interest, and penalty. The taxpayer protested the imposition of the ten percent (10%) negligence penalty. The taxpayer was given ample opportunity to schedule a hearing on the protest and/or submit additional information. Since the taxpayer did neither, 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 did not obtain and keep valid exemption certificates from several of its customers as clearly required by the Indiana law and regulations. The taxpayer's inattention to its duties and failure to follow the department's instructions constitute negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420040114P.LOF

LETTER OF FINDINGS NUMBER: 04-0114P
Sales Tax
For the Months of December 2002, January 2003, June 2003, and August 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.

II. Tax Administration – Interest

Authority: IC 6-8.1-10-1

The taxpayer protests the interest assessment.

STATEMENT OF FACTS

The late penalty and interest were assessed on the late filing of sales tax returns for the months of December 2002, January 2003, June 2003, and August 2003.

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

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be waived as the taxpayer was unaware of the early filing due date. The taxpayer's employee who completes the sales tax return is a new employee. The taxpayer's new employee used the coupons left by her predecessor, and, assumed the due date for filing the monthly sales tax return was the 30th of the month. Upon receiving the first proposed assessment, the taxpayer's new employee realized the due date was the 20th of the month and not the 30th of the month. With this new information, the taxpayer's new employee began filing the monthly sales tax returns on the 20th of the month, the early filing due date.

The regulation which provides the guideline for penalty is as follows:

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

The Department finds the taxpayer was ignorant of tax duties as the taxpayer was unaware of the early filing due date. Ignorance is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

II. Tax Administration – Interest

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