INDIANA EMERGENCY MEDICAL SERVICES COMMISSION

Title: Definition of the Term "Rhythm Interpretation"
Identification Number: 01-2004
Date of Original Adoption: July 23, 2004
Date Revised:
Other Policies Repealed or Amended:
Brief Description of Subject Matter: Definition of the term rhythm interpretation as used in the description of the scope of practice for emergency medical technician basic-advanced.
Citations Affected: IC 16-18-2-33.5(a)(11); 836 IAC 1-1-1(12); 836 IAC 1-1-1(24); 836 1-1-1(25); 836 IAC 4-7-3(d)

This non-rule policy statement has been adopted pursuant Indiana Code 4-22-7-7 and does not have the effect of law or represent a formal decision or final action of the Indiana Emergency Medical Services Commission. This nonrule policy statement interprets, supplements, or implements a statute or rule; or specifies a policy that the Indiana Emergency Medical Services Commission and the State Emergency Management Agency relies upon to enforce a statute or rule, conduct an audit or investigation to determine compliance with a statute or rule, or impose a sanction for violation of a statute or rule. This nonrule policy statement shall be used in conjunction with applicable laws. It does not replace laws, and if it conflicts with these laws, the laws shall control. A revision to this nonrule policy statement may be put into effect by the Indiana Emergency Medical Services Commission once the revised nonrule policy statement is made available for public inspection and copying. The Indiana Emergency Medical Services Commission will submit revisions to the Indiana Register for publication.

I. INTRODUCTION

The purpose of this nonrule policy is to define the term "rhythm interpretation" as it is used in reference to the skills of an emergency medical technician-basic advanced. The term "Rhythm interpretation" as used in 836 IAC 1-1-1(24); 836 IAC 1-1-1(25) and 836 IAC 4-7-3(d) is not defined in either the Indiana Code or the Indiana Administrative Code.

An emergency medical technician-basic advanced is defined under 836 IAC 1-1-1(24) as an individual who is certified under IC 16-31 to provide basic life support at the scene of an accident or an illness or during transport and has been certified to perform manual or automated defibrillation, rhythm interpretation, and intravenous line placement.

The term "rhythm interpretation" is also used in 836 IAC 1-1-1(25) and 836 IAC 4-7-3(d) in reference to the skills of an emergency medical technician-basic advanced.

Basic life support for an emergency medical technician-basic advanced includes electrocardiogram interpretation, manual external defibrillation, and intravenous fluid therapy as defined under Indiana Code 16-18-2-33.5(a)(11) and Indiana Administrative Code 836 IAC 1-1-1(12)(K).

II. POLICY

Rhythm interpretation, as that term is used in 836 IAC in reference to the skills of an emergency medical technician-basic advanced, means electrocardiogram interpretation specifically for the purpose of identifying cardiac rhythms requiring defibrillation.

Adopted: July 23, 2004

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
NONRULE POLICY DOCUMENT

The following nonrule policy documents have expired or are no longer in use by the Indiana Department of Environmental Management, Office of Quality.

Title: Maximum Available Control Technology: provides clarity on implementation of Section 112(g) of Title III of the 1990 Clean Air Act Amendments.
Identification Number: Air-001-NPD
Date Originally Effective: December 13, 1995
Dates Revised: August 31, 1996; March 31, 1997
Brief Description of Subject Matter: Provides clarity on implementation of Section 112(g) of Title III of the 1990 Clean Air Act Amendments.

Title: Auto Refinishing: Requirements for Gun Cleaners
Identification Number: Air-002-NPD
Date Originally Effective: May 6, 1996
Dates Revised: September 9, 1996; January 31, 1997; June 10, 1997

Brief Description of Subject Matter: Enforcement of 326 IAC 8-10-5, which requires that by May 1, 1996, automobile refinishers use enclosed gun cleaners. 326 IAC 8-10-5(a) was the citation affected by this nonrule policy document.

Title: Requirements for Construction Permits: for small sources constructed prior to January 1, 1994.
Identification Number: Air-008-NPD
Date Originally Effective: March 10, 1997
Dates Revised: none
Brief Description of Subject Matter: Construction Permitting Requirements for Small Sources

Title: Clean Fuel Fleets Flexible Enforcement guidelines: delays initial purchase requirements due to insufficient availability.
Identification Number: Air-015-NPD
Date Originally Effective: November 14, 1997
Dates Revised: none
Brief Description of Subject Matter: Provides guidelines for the enforcement of the Clean Fuel Vehicle purchase requirements.

Title: Natural Gas Emission Factors/SIP Compliance
Identification Number: Air-021-NPD
Date Originally Effective: November 18, 1998
Dates Revised: None
Brief Description of Subject Matter: Compliance with current state implementation plan particulate matter limits by combustion sources burning only natural gas. 326 IAC 6-1 was the citation affected by this nonrule policy document.

Title: Lead-Based Paint License Transition: regarding the transition to IDEM"s administration of the lead-based paint rule at 326 AIC 23
Identification Number: Air-022-NPD
Date Originally Effective: February 22, 1999
Dates Revised: October 6, 1999
Brief Description of Subject Matter: Describes IDEM's policy regarding a transition to the administration of the lead-based paint rule, 326 IAC 23.

Title: Lead-Based Paint License Transition (Extension)
Identification Number: Air-022(b)-NPD
Date Originally Effective: Feb. 22, 1999
Dates Revised: October 6, 1999
Date Effective: November 5, 1999
Other Policies Repealed or Amended: Air-022-NPD
Brief Description of Subject Matter: Describes IDEM's policy regarding a transition to the administration of the lead-based paint rule, 326 IAC 23.

Title: Guidance on the use of new emission factors for the Reinforced Plastic Composites Fabricating Industry.
Identification Number: Air-024-NPD
Date Originally Effective: November 5, 1999
Dates Revised: none
Brief Description of Subject Matter: Guidance on the Use of New Emission Factors for the Reinforced Plastic Composites Fabricating Industry

Title: Lead-Based Paint License Transition
Identification Number: Air-030-NPD
Date Originally Effective: July 5, 2002
Dates Revised: none
Brief Description of Subject Matter: Describes IDEM's policy regarding House Enrolled Act 1171 statutory changes to lead-based paint licensing expiration dates.

NATURAL RESOURCES COMMISSION
Information Bulletin #45

Disposition of Permanently Injured, Non-Releasable Wild Animals

1. Purpose

The purpose of this nonrule policy document is to establish guidelines for permanently injured and non-releasable wild animals taken in by licensed wildlife rehabilitators. The desire is to protect wild animal populations and provide for conservation education, but also to emphasize the need to euthanize a wild animal humanely when appropriate and prevent wild animals from being kept as pets.

2. Rehabilitation of Indiana's Wildlife

Sick, injured or orphaned wild animals are captured every year by the public and given to licensed rehabilitators with the intent of releasing them back into the wild. The rehabilitation of wild animals such as white-tailed deer serves a need that satisfies the conscience of society, although scientific evidence has not proven that this is an effective tool for the management of wild animal populations. Some wild animals are unable to be released even after medical treatment due to a serious injury or an acclimation to humans. As a result, wildlife rehabilitators often keep these permanently injured or non-releasable animals under various permits, including wild animal possession and education permits.

3. Requirements of Wild Animal Rehabilitation Permits

As a condition of the rehabilitation permit, wild animals taken in for rehabilitation are to be released within 180 days. If a rehabilitator intends to possess a wild animal beyond this 180-day rehabilitation period, a conservation officer must be contacted as to the disposition. Reasonable extensions may be made to facilitate release back into the wild if approved by a conservation officer prior to elapse of the conditional timeframe (180 days). The time of year and extensive injuries are factors that will be taken into consideration for the release of the wild animals.

4. Procedures

Disposition of Permanently Injured, Non-releasable Small Mammals and Non-Migratory Game Birds

1) The mammal or non-migratory game bird can be retained under an educational permit. The educational permit has to be approved and issued by the Division of Fish and Wildlife for that specific mammal or non-migratory game bird and for the purpose outlined in the application.

2) Mammals that have been retained prior to January 1, 2004 as non-releasable under a rehabilitation permit can continue to be possessed, but only under a valid wild animal possession permit. The wild animal possession permit can be obtained after making application that includes a successfully completed inspection by a conservation officer and approval from the Division of Fish and Wildlife.

3) The mammal or non-migratory game bird that is deemed non-releasable and does not fall under categories one and two listed above should be euthanized. It is the responsibility of the rehabilitator to cause it to be euthanized.

Disposition of Permanently Injured, Non-releasable White-Tailed Deer

1) All white-tailed deer taken in by a rehabilitator and deemed non-releasable must be euthanized. It is the responsibility of the rehabilitator to cause the animal to be euthanized.

2) Injured or orphaned white-tailed deer may be given to licensed wild animal rehabilitators, but must be released within 180 days or euthanized. Orphaned or rehabilitated white-tailed deer may not be sold or given to licensed Indiana game breeders.

3) Non-releasable white-tailed deer transferred from a rehabilitation permit to a valid game breeder license with authorization from a conservation officer prior to January 1, 2004 can still be possessed under the game breeder license.

4) White-tailed deer that are unlawfully possessed will be euthanized.

Disposition of Permanently Injured, Non-releasable Reptiles and Amphibians

1) The reptile or amphibian can be retained under an educational permit. The educational permit has to be approved and issued by the Division of Fish and Wildlife for that specific reptile or amphibian and the purpose outlined in the application.

2) As of January 1, 2005, turtles that are non-releasable or obtained from owners who no longer want to possess them may be retained (possessed) under a valid special purpose turtle possession permit. The special purpose turtle possession permit can be obtained after making application that includes a successfully completed inspection by a conservation officer and approval from the Division of Fish and Wildlife. Turtles possessed under this permit cannot be released into the wild.

3) The reptile or amphibian should be euthanized. It is the responsibility of the rehabilitator to cause it to be euthanized.

INDIANA STATE RECOUNT COMMISSION
Guidelines for Conduct of an Election Recount and Contest
As Amended, July 6, 2004
Guideline #1-2004

Chapter 1. Definitions

Sec. 1. (a) “Candidate” refers to a candidate for nomination or election to an office for which a recount or contest petition has been filed.

(b) If a candidate who is entitled to file a recount or contest petition does not do so in accordance with IC 3-12-11, a state chairman or county chairman who files a recount petition under IC 3-12-11, has the rights and responsibilities of a “candidate” under these guidelines.

Sec. 2. “Chad” means the part of a ballot card that indicates a vote on the card when punched out by the voter.

Sec. 3. “Commission” refers to the state recount commission established by IC 3-12-10-1.

Sec. 4. “Cross-petitioner” includes a candidate who was opposed in the primary or election by the petitioner, whether or not the candidate chose to file a cross-petition with the commission under IC 3-12.

Sec. 5. “Disputed ballot” refers to a ballot challenged by a party to a recount or to a ballot that the state board of accounts determines does not conform with these guidelines or IC 3-12.

Sec. 6. “No votes” refers to ballots subjected to the recount which:

(1) do not indicate a vote cast for any candidate subject to the recount; and

(2) are otherwise classified as either “valid” or “invalid” under these guidelines or IC 3-12.

Sec. 7. “Precinct tally sheet” refers to the written record used by the state board of accounts to record the precinct vote tally and other evidence concerning the voting process in a precinct.

Sec. 8. “Recount” means the determination by the state recount commission of the number of valid votes received by each candidate for the office subject to a recount.

Sec. 9. “Tally” means the counting by the state board of accounts of votes cast for each candidate in each of the following categories: undisputed valid, undisputed invalid, or disputed.

Sec. 10. All other terms used in these guidelines have the meaning set forth in IC 3-5.

Chapter 2. Conduct of Election Recounts and Contests Generally

Sec. 1. The state recount commission shall conduct all recounts and contests under identical procedures to the extent reasonably possible.

Sec. 2. The commission makes the final decision as to whether a disputed ballot will be counted.

Sec. 3. (a) All tallying shall be physically performed by the state board of accounts in accordance with these guidelines.

(b) The state board of accounts staff manual for recounts (*Agency Guidelines for Conduct of Recount for the State Recount Commission,* May 2004 edition) is approved for use in recounts conducted by the commission. If any conflict exists between this manual and these guidelines, the guidelines control to the extent of that conflict.

(c) The commission shall conduct the recount at times and locations designated by it, but all tallying of votes shall be conducted within the county where the votes were cast unless the parties consent to a change of location.

Sec. 4. The commission shall appoint a director who is responsible for supervising the conduct of the tally by the state board of accounts. The state board of accounts shall prepare for the director a report on the tally by the state board of accounts. The director shall present the report to the commission to enable the commission to make final decisions in a fair and prompt manner.

Sec. 5. (a) The commission may order with consent of all parties to a recount, that a prerecount inspection of impounded election material be conducted by the attorneys representing the parties. This inspection:

(1) must be conducted under the supervision of the state board of accounts and the Indiana state police at all times; and

(2) is designed to enable the parties to narrow the issues and material subject to dispute in the recount so that the recount may be conducted efficiently.

The director shall attend this inspection and is authorized to resolve any dispute regarding its scope and procedures.

(b) When the recount begins, all tallying must be conducted by audit teams composed of at least two staff members of the state board of accounts. The director may assign additional staff members to the audit teams to conduct the recount. Where possible, team assignments should be rotated daily so that the same auditors do not work as a team on consecutive days.

(c) Except as provided in subsection (d), the audit team shall inspect and tally all ballots in accordance with these guidelines. The audit team may classify a ballot as invalid only for reasons set forth in these guidelines or IC 3-12 and if no party to the recount disputes that determination. The audit team shall also inspect all poll lists, voter affidavits, absentee envelopes, and other documents relevant to the recount, as determined by the director.

(d) If a recount is conducted concerning a primary election, the ballots cast in the primary conducted for the candidates of the other major party, and the ballots cast solely for school board candidates or on public questions are not to be recounted, but shall be documented solely for the purpose of reconciling the number of voters who cast ballots in person or by absentee ballot at the precinct (according to the poll list) with the number of ballots cast in the precinct according to the canvass.

Sec. 6. (a) The state board of accounts shall designate one of its staff to act as a supervisor for each group of audit teams.

(b) Each supervisor should be present at the tallying location while the tally is being conducted, assist the director in managing the tallying process, and keep the director advised of the progress of the tallying.

(c) The supervisor shall inspect all absentee ballot envelopes not distributed to the precinct election boards or to central count absentee ballot counters and shall permit observers to inspect the envelopes. The supervisor may not open the envelope.

Sec. 7. At least one state police officer must be present at each counting location during the tallying. The state police are responsible for the safety and integrity of all election materials during and after the recount, until further order of the commission.

Sec. 8. Each candidate in a race being tallied may observe each audit team as it conducts the tally. Each candidate may also designate one observer per audit team and not more than two managers for the candidate's observers in each county. The audit team shall allow each candidate or his/her manager or observer a reasonable opportunity to view each ballot, document, voting machine or other materials reviewed by the audit team. An audit team does not have to delay the tallying process because of the absence of a candidate or candidate's manager or observer.

Sec. 9. During the tallying of ballots in each precinct, one member of the audit team shall be responsible for inspecting each ballot and determining the tally category for that ballot. The other member of the audit team shall keep all necessary records. The members of the audit team may consult with one another or the director.

Sec. 10. The candidates, and their managers and observers, may not argue or interfere with the audit team but may request that a ballot be identified by the audit team as a disputed ballot. The candidate, manager or observer need not state the reason for the challenge. Unless a ballot is challenged by a candidate, manager, or observer before the audit team signs the precinct tally sheet, the audit team's decision as to the classification of that ballot is final. The commission shall review disputed ballots upon completion of the tally by the state board of accounts.

Sec. 11. The audit team shall mark any disputed ballot as an exhibit. The mark must contain at least the following information: county, township or ward, precinct, exhibit number and the name of the candidate challenging the ballot, or whether the ballot is disputed by the state board of accounts.

Sec. 12. The director shall attempt to resolve procedural problems (other than ballot validity issues) not resolved by these guidelines. The director shall keep the commission advised of the progress of the tallying, procedural problems he/she resolves and any disagreement with his/her actions. If an issue arises during the tallying process, the commission may meet to resolve such an issue at the request of a candidate.

Sec. 13. Each audit team shall tally only one precinct at a time, and election materials for each precinct shall be kept separate by precinct.

Sec. 14. The audit team shall record information relevant to seals on the voting machines and ballot boxes or other containers of election materials on the precinct tally sheet.

Sec. 15. (a) The audit team shall then open the container of election materials and record the following information, if available, on the precinct tally sheet:

(1) the total number of votes recorded on the precinct certificate;

(2) the number of voters' signatures on the poll list;

(3) the number of absentee ballots delivered to the precinct;

(4) the number of absentee voters listed on the poll list;

(5) the number of absentee ballots not counted;

(6) the number of absentee voter applications; and

(7) the number of votes for each candidate in the relevant race as reported by the precinct election board or the county election board.

(b) Any discrepancies between the numbers recorded by election officials and the numbers recorded by the audit team should also be recorded on the precinct tally sheet.

Sec. 16. The audit team may not independently examine the absentee voter applications and affidavits on absentee ballot envelopes but shall permit each candidate, manager, or observer to inspect them and to challenge ballots cast pursuant to any of them.

Sec. 17. The audit team may not remove from its envelope any absentee ballots not removed from their ballot envelopes by the precinct election board or the central count absentee ballot counters.

Sec. 18. The audit team shall:

(1) tally the total number of undisputed valid ballots cast for each candidate in each relevant race;

(2) tally the number of undisputed invalid ballots for each candidate rejected by the audit team;

(3) tally the number of disputed ballots for each candidate;

(4) tally the number of no votes in the precinct;

(5) sign and date the precinct tally sheet;

(6) place all precinct materials in the precinct container; and

(7) return the container and the completed precinct tally sheet to the state board of accounts supervisor or director.

Sec. 19. The director or supervisor shall make copies of each precinct tally sheet available to each candidate's representatives and the media as soon as possible.

Sec. 20. (a) Upon completion of the tallying by the state board of accounts, the commission shall convene to review the report of the director and to receive from the candidates evidence relevant to whether disputed votes should be counted.

(b) The commission shall proceed to conduct the count required under IC 3-12-11-17.7(a) in the following manner:

(1) If the tallying by the state board of accounts indicates that there are not disputed ballots in one or more precincts, the director shall present a report of the votes cast for each candidate in the indicated precincts. The commission shall order the votes counted for the designated candidates and shall order any undisputed invalid ballots or no votes in the precinct to not be counted.

(2) After the disposition of all precincts with no disputed ballots, the commission shall proceed to count all ballots in precincts with one or more disputed ballots.

(3) If the recount is to be conducted in more than one county, the commission may begin with any county agreed upon by the parties. If no agreement exists between the parties, the recount shall begin in the county designated by the commission and proceed to subsequent counties in accordance with an order adopted by the commission. The commission shall conduct the recount in precincts within one county in alphanumeric order, according to the precinct name, unless all parties to the recount join in requesting that the count be conducted in an alternative manner.

(4) The commission shall begin by recognizing the director to present the state board of accounts report regarding the votes cast within all precincts other than the precincts described in (1). The director shall state the number of:

(a) undisputed valid votes cast for each candidate in each precinct;

(b) undisputed invalid votes cast for each candidate; and

(c) no votes cast in each precinct.

(5) The commission shall then order:

the votes described in 4(a) to be counted for the designated candidates; and

the votes described in 4(b) or 4(c) not counted.

(6) If, following the designation of a ballot as disputed, the party who disputed the ballot determines that the ballot should be designated as either an undisputed valid vote cast for a specific candidate, or as an undisputed invalid vote, the party may file a written statement to that effect with the director. The statement must:

(a) identify the ballot according to the "Exhibit No." on the state board of accounts exhibit list of disputed ballots;

(b) state whether the ballot should be categorized as an undisputed valid vote for a specified candidate, or as an undisputed invalid vote; and

(c) be signed by the party to the recount who disputed the ballot.

(7) After the commission acts under (5) to order that ballots be counted or not counted, the director shall report to the commission whether a statement described by (6) has been filed with the director regarding any disputed ballot. If so, the commission shall proceed to order the ballot to be counted for a specified candidate, or not counted, in accordance with the statement.

(8) The commission shall then recognize the petitioner to present ballots disputed by the petitioner or state board of accounts to the commission that the petitioner contends should be counted as votes for the petitioner. The petitioner shall present each ballot in the order that the ballot is designated as an exhibit number in the exhibit list of disputed ballots and for the first such precinct according to the precinct order listed in (3). However, the commission may consent to the consideration of more than one ballot in the precinct at the same time if requested by the petitioner, and the commission determines that the issues regarding the disputed ballots are essentially identical so that there is no need for a determination regarding each ballot in this group.

(9) After the presentation of a ballot (or when permitted, a group of ballots) under (8), the commission shall determine based on all relevant evidence whether or not the ballot(s) shall be counted as a vote (or votes) for the petitioner, a vote (or votes) for the cross-petitioner, or whether the ballots shall not be counted for any candidate.

(10) After the completion of the petitioner's case-in-chief in all of the precincts included in the recount, the commission shall then recognize the cross-petitioner to present ballots disputed by the cross-petitioner or state board of accounts to the commission that the cross-petitioner contends should be counted as votes for the cross-petitioner. The cross-petitioner shall present each ballot in the order that the ballot is designated as an exhibit number in the exhibit list of disputed ballots and for the first such precinct according to the precinct order listed in (3). However, the commission may consent to the consideration of more than one ballot in the precinct at the same time if requested by the cross-petitioner, and the commission determines that the issues regarding the disputed ballots are essentially identical so that there is no need for a determination regarding each ballot in this group.

(11) After the presentation of a ballot (or when permitted, a group of ballots) under (11), the commission shall determine based on all relevant evidence whether or not the ballot(s) in the precinct shall be counted as a vote (or votes) for the petitioner, a vote (or votes) for the cross-petitioner, or whether the ballots shall not be counted for any candidate.

(12) After completion of the cross-petitioner's case-in-chief in all of the precincts included in the recount, the commission shall

then recognize the director to report whether any disputed ballots in any precinct have not been presented by either the petitioner or cross-petitioner to the commission. If the director identifies any ballots that remain disputed, the director shall present these ballots to the commission for determination.

Sec. 21. (a) Except as provided in subsection (b), (c), or (d), a member of the commission (or an individual acting on behalf of the commission) shall not initiate, permit, or consider ex parte communications, or consider other communications made to the member or individual outside the presence of the parties, concerning a pending or impending proceeding.

(b) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized if the member or individual reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication and promptly notifies the commission and all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(c) A member or individual may consult with commission staff and others whose function it is to aid the member or individual in carrying out the member or individual's responsibilities.

(d) A member or individual may, with the consent of the parties, confer separately with the parties and their lawyers to mediate or settle matters pending before the commission.

Sec. 22. All testimony presented to the commission by an individual shall be sworn to (or affirmed) by that individual.

Sec. 23. The commission may accept evidence in a proceeding even if the evidence would not be admissible in a judicial proceeding under the rules of evidence. In accepting the evidence described by this section, the commission shall ensure that the commission's proceedings are conducted with the decorum required to protect the rights of the parties to the proceeding and other individuals.

Sec. 24. Unless otherwise ordered by the commission, if the commission requests or requires that written briefs be submitted in a proceeding before the commission, the briefs must be filed with the election division no later than forty-eight (48) hours before the commission is scheduled to meet to consider the matter.

Sec. 25. After the commission has completed its count under Section 20, the commission shall adjust accordingly the tallies certified by the state board of accounts, resolve any other issues raised in the recount, or contest and certify the results to the election division pursuant to IC 3-12-11-15.

Chapter 3. Tallying Votes in a Ballot Card Voting System Precinct

Sec. 1. This chapter applies only to tallying votes in a precinct that uses ballot cards for registering votes.

Sec. 2. The director shall obtain the use of one or, if possible, two automatic tabulating machines in each county. The director may seek the assistance of county election officials in preparing the machines for use in the tallying.

Sec. 3. The state board of accounts shall prepare a test deck of sample ballot cards, and the candidates may jointly prepare test decks. At the beginning and end of each day of tallying, the counting machine shall be tested by running decks prepared by the candidates. Candidates and their managers or observers may observe all testing and operation of automatic tabulating machines.

Sec. 4. The audit team shall examine the precinct header card to determine whether it is the correct card for the precinct. Candidates, managers, or observers may inspect the precinct header card and have it marked as an exhibit for review by the commission.

Sec. 5. (a) The audit team shall manually inspect each ballot card in the container of election materials to determine whether it should be counted.

(b) A ballot marked "REJECTED", "VOID", "SPOILED", or "CANCELLED" or with any other similar notation regarding the reliability of the ballot permitted under the state law must be disputed by the audit team. The audit team shall record any available information concerning the reasons the marking appears on a ballot.

Sec. 6. The audit team shall divide all ballots into three groups:

(1) Ballot cards to be counted that are undisputed.

(2) Ballot cards that are disputed.

(3) Ballot cards not to be counted that are undisputed, including no votes.

Sec. 7. (a) All undamaged ballots to be counted shall then be counted on two separate automatic tabulating machines, if available; otherwise, the ballots shall be counted twice on one machine. The audit team shall compare the totals for each candidate from each machine run and shall record the totals.

(b) If the totals are identical on both machines, or on both runs on the same machine, no further counting will be necessary.

(c) If the totals are not identical, the audit team shall manually count the ballots at least twice, so that the audit team and supervisor are satisfied that the manual count is accurate.

Sec. 8. The director may order any appropriate test or a hand count in any precinct he/she believes there is a substantial question concerning the accuracy of the tabulating machine count.

Sec. 9. Notwithstanding sections 7 and 8 of this chapter if a petition or cross petition for a recount request that the ballot cards in a specific precinct be counted manually, the audit teams shall count the cards accordingly and may not use automatic tabulating machines except in a test unless the petitioner or cross-petitioner withdraws the request after the state board of accounts conducts a test of the automatic tabulating machine to ascertain its accuracy. A written withdrawal of such a request is effective upon delivery to the director, supervisor, or commission.

Chapter 4. Tallying Votes in Voting Machine Precincts

Sec. 1. This chapter applies to tallying votes in a precinct that uses voting machines.

Sec. 2. If the precinct includes votes on a voting machine and paper ballots, the audit team shall inspect and tally all paper ballots in the container.

Sec. 3. The audit team shall divide the paper ballots into three groups:

(1) Paper ballots to be counted that are undisputed.

(2) Paper ballots that are disputed.

(3) Paper ballots not to be counted that are undisputed, including no votes.

Sec. 4. The audit team shall inspect each voting machine used for voting in the precinct. If evidence tape has been placed on the machine, the audit team shall record whether the tape is broken or intact.

Sec. 5. The audit team shall compare and record the public counter number and protective opening and protective closing numbers on the tally sheet prepared by the precinct election board. Any discrepancies shall be noted.

Sec. 6. (a) If the review of the precinct election materials and tallying of paper ballots is done in a different location than where the voting machines are stored, each audit team shall complete as much of the precinct tally sheet as possible without inspecting the voting machines before the director or state board of accounts supervisor and audit team proceed to the voting machine location, inspect the voting machines, and complete the precinct tally sheets.

(b) The audit team, upon instructions from the director, may accept a report from another state board of accounts audit team that has made the physical inspection of the voting machines and use the information in the report for making the precinct tally.

Chapter 5. Tallying Votes in Paper Ballot Precincts

Sec. 1. This chapter applies only to tallying votes in a precinct that uses paper ballots for registering votes.

Sec. 2. The audit team shall divide the paper ballots into three groups:

(1) Paper ballots to be counted that are undisputed.

(2) Paper ballots that are disputed.

(3) Paper ballots not to be counted that are undisputed, including no votes.

Sec. 3. (a) The audit team shall manually inspect each paper ballot in the container of election materials.

(b) A ballot marked "REJECTED" or "VOID" or "SPOILED" or "CANCELLED" or with any other similar notation regarding the reliability of the ballot permitted under the state law may not be counted by the audit team. The audit team shall record any available information concerning the reasons the marking appears on a ballot.

Chapter 6. Tallying Votes in an Electronic Voting System Precinct

Sec. 1. This chapter applies only to tallying votes in a precinct that uses the electronic voting system.

Sec. 2. (a) The audit team shall check the election night printout to ensure that the test of the electronic voting machine showed that the votes were recorded correctly, no over voting could occur, and the vote tallies for each office were equal to zero. The team shall note any discrepancies.

(b) The team shall check the election night results reported by the precinct election board with the printout for accuracy and shall note any discrepancies.

Sec. 3. If requested by a candidate or candidate's representative, the audit team shall cause a new printout to be made from the memory cartridges for a precinct. The new printout shall be compared with the old printout and election night results reported by the precinct election board. The audit team shall note any discrepancies.

Sec. 4. If a new printout is requested under Section 3 from more than one memory cartridge, the cartridges shall be read on one electronic voting system designated by the director, unless a party requests the use of the electronic voting system in which the cartridge was originally used.

Sec. 5. Unless otherwise requested by a party, a memory cartridge read on an electronic voting system is not required to also be read on the computer program maintained by the county election board for use in election night tabulations.

AS ADOPTED AND AMENDED BY THE STATE RECOUNT COMMISSION

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #37
SALES TAX
AUGUST 2004
(Replaces Bulletin #37 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 inconsistent with the law, regulations, or court decisions is not binding on the Department or the taxpayer. Therefore, 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: Sales by Out-of-State Merchants

REFERENCES: IC 6-2.5-4-1; IC 6-2.5-4-14; IC 6-2.5-3-1; IC 6-2.5-8-1

I. Definition of Indiana Retail Merchant

A person is an Indiana Retail Merchant and must be registered with the Department to collect Indiana Use Tax if the retail merchant is engaged in selling at retail for use, storage, or consumption in Indiana and is:

1. Maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business in Indiana unless the property is subsequently shipped to another state;
2. Has a representative, agent, salesman, canvasser, or solicitor operating in Indiana under the authority of the retail merchant or its subsidiary for the purpose of selling, delivering, installing, repairing, assembling, setting up, accepting returns, billing, invoicing or taking orders for the sale of any tangible personal property for use, storage or consumption in Indiana;
3. Closely related to another person that maintains a place of business in Indiana; or
4. Entering into a contract to provide property or services to a state agency or a state educational institution.

II. Engaged in Business in Indiana

An out-of-state vendor is engaged in business in Indiana and must be registered as an Indiana Retail Merchant and charge Indiana Use Tax on tangible personal property delivered into Indiana if the out-of-state vendor's only Indiana activity is within one of the four categories above. This activity may include any of the following:

a. maintaining an administrative office;
b. maintaining a research facility;
c. displaying merchandise at local trade fairs and exhibitions;
d. maintaining a factory or warehouse; or
e. delivering goods into Indiana by the seller's truck where title and possession transfer in Indiana.

III. Not Engaged in Business in Indiana

An out-of-state vendor is NOT engaged in business in Indiana and therefore is NOT required to register as an Indiana Retail Merchant and charge Indiana Use Tax on tangible personal property delivered in Indiana where the out-of-state vendor's ONLY Indiana activity is any of the following:

1. owning Indiana realty for investment;
2. being "qualified" to do business in Indiana;
3. purchasing goods in Indiana;
4. conducting credit investigations;
5. delivering goods by common carrier or parcel post.

IV. Consigned Goods

An out-of-state seller who consigns tangible personal property to an Indiana resident "on approval" is deemed to be engaged in business in Indiana, and must register as an Indiana Retail Merchant to collect Indiana Use Tax on such transactions.

An out-of-state seller whose only business activity in Indiana is the consignment of tangible personal property to an Indiana resident on a "sale or return" basis is deemed not to be engaged in business in Indiana and is not required to register to collect Indiana Use Tax.

V. Registration Procedures, Requirements and Privileges

An Indiana Registered Retail Merchant's Certificate will provide the registrant authority to collect Indiana Sales or Use Tax. In addition, the registrant is entitled to privileges of exemption from the tax on purchases of items to be used for an exempt purpose. The Indiana Registered Retail Merchant's Certificate is permanent. The registration fee is $25.00.

VI. Purchaser's Use Tax Liability

If an out-of-state vendor is not required to collect Indiana Use Tax, the Indiana purchaser is liable for the Indiana Use Tax on such purchases if the property is to be used, stored, or consumed in Indiana.

VII. Out-Of-State Tax Collection Permit

An out-of-state merchant not required to become registered as an Indiana Retail Merchant may voluntarily register for an Out-of-State Use Tax Collection and Remittance Permit. Holders of such permits must collect and remit Indiana Use Tax to the Department on sales of tangible personal property subject to the tax. This is a free registration. Registration may be done online at: www.in.gov/dor/electronic

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #91
INCOME TAX
AUGUST 2004

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SUBJECT: Blended Biodiesel Tax Credits

REFERENCES: IC 6-3.1-27

INTRODUCTION

P.L.224-2003, SECTION 199, effective January 1, 2004 provides for three new tax credits. The first is a credit for producing biodiesel; the second credit is for producing blended biodiesel; and the third is for the retail sale of blended biodiesel through a metered pump at a service station. The credits can be applied against the sales tax, the adjusted gross income tax, the financial institutions tax, and the insurance premiums tax.

I. BIODIESEL TAX CREDIT

Biodiesel is defined as a renewable, biodegradable, mono alkyl ester combustible liquid fuel derived from agricultural plant oils or animal fats that meets American Society for Testing and Materials specification D6751-02 for biodiesel fuel (B100) blend stock distillate fuels.

A taxpayer that produces biodiesel at a facility located in Indiana is entitled to a credit against the taxpayer’s state tax liability equal to the product of one dollar ($1.00) multiplied by the number of gallons of biodiesel produced by the taxpayer during the taxable year and used to produce blended biodiesel.

The total amount of credits allowed may not exceed one million dollars ($1,000,000) for all taxpayers and all taxable years.

II. BLENDED BIODIESEL TAX CREDIT

Blended biodiesel is defined as a blend of biodiesel with petroleum diesel, so that the percentage of biodiesel in the blend is at least two percent (2%) (B2 or greater). The term does not include biodiesel (B100).

A taxpayer that produces blended biodiesel at a facility located in Indiana is entitled to a credit against the taxpayer’s state tax liability equal to the product of two cents ($.02) multiplied by the number of gallons of blended biodiesel produced at the Indiana facility and blended with Indiana produced biodiesel.

The total amount of credits allowed may not exceed one million dollars ($1,000,000) for all taxpayers and all taxable years.

III. RETAIL SALE OF BLENDED BIODIESEL TAX CREDIT

A taxpayer that is a dealer and operates a service station in Indiana at which blended biodiesel is sold and dispensed through a metered pump in a taxable year is entitled to a credit against the taxpayer’s state tax liability.

The credit allowed is one cent ($.01) multiplied by the number of gallons of blended biodiesel sold and dispensed through all the metered pumps located at the service station. The credit must be computed separately for each service station operated by the taxpayer.

The total amount of credits allowed may not exceed one million dollars ($1,000,000) for all taxpayers and all taxable years.

IV. APPLICATION FORM AND APPROVAL OF THE TAX CREDIT

Taxpayers desiring to claim one of the three credits must file a claim for credit on Form BD-100 Biodiesel Credit Application, which is available at the Department’s web site (www.in.gov/dor/taxforms/f&eforms).

The claim for credit must be completed by the taxpayer and filed with the Department for approval. The approved claim will be returned to the applicant. A copy of the approved claim must be attached to any return on which the credit is taken. The application and claim can be filed on a monthly, quarterly, semi-annual or annual basis depending on which tax type the taxpayer is claiming the credit for. Failure to submit the approved BD-100 with the tax return will result in the claim being denied by the Department.

V. ADMINISTRATION OF THE TAX CREDITS

Qualifying taxpayers include pass through entities such as S Corporations, partnerships, limited liability companies, and limited liability partnerships. If the pass through entity is entitled to a credit, but does not have state tax liability to which the credit can be applied, a shareholder, partner, or member of the pass through entity is entitled to the credit in the same percentage as the person’s distributive income to which the person is entitled.

If the credit is applied against the taxpayer’s adjusted gross income tax, financial institutions tax, or insurance premiums tax, the credit shall be taken on the annual return filed by the taxpayer. If the credit is to be applied against a taxpayer’s sales tax liability, the credit can be taken on a monthly basis. A taxpayer may not take a credit against sales tax collected as a retail merchant, but may take a credit against the use tax due on the taxpayer’s taxable purchases.

If the credit claimed exceeds the taxpayer's state tax liability for the taxable year, the taxpayer may carry over the excess to the following taxable years. The taxpayer is not entitled to a refund or carryback of any unused credits.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN # 92
INCOME TAX
AUGUST 2004

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SUBJECT: Individual Earned Income Tax Credit (EITC) Procedures

REFERENCES: IC 6-3-4-8; IC 6-3.1-21

INTRODUCTION:

The Indiana earned income tax credit is effective until December 31, 2005. The statute requires the Department to allow an advance payment of the earned income tax credit through reduced income tax withholdings.

I. CALCULATION OF THE EARNED INCOME CREDIT

An individual is eligible for the Indiana earned income tax credit if the person is eligible for the federal earned income tax credit under Section 32 of the Internal Revenue Code. The Indiana credit amount is equal to six percent (6%) of the amount of federal earned income tax credit that the individual is eligible to receive and claim for the taxable year.

If the credit amount exceeds the taxpayer's actual tax liability for the taxable year, the excess credit shall be refunded to the taxpayer.

II. CALCULATION OF ADVANCE EARNED INCOME CREDIT PAYMENTS

An employee subject to withholding of Indiana adjusted gross income tax may request his/her employer to reduce the amount of adjusted gross income tax withheld as an advance payment of the Indiana earned income tax credit.

To qualify for the advance earned income tax credit payment, the individual must be an Indiana resident, have a federal Form W-5 on file with the employer, and receive federal advance earned income tax credit payments from his/her employer.

To request an Indiana advance earned income tax credit payment, the employee must complete and sign Form WH-5, which the employer is required to maintain for three (3) years after the year that the form is completed by the employee.

The employer shall advance to the employee six percent (6%) of the federal advance earned income tax credit payment, but is not required to advance the credit payment if the amount is less than one dollar ($1) per pay period.

III. REPORTING OF ADVANCE EARNED INCOME TAX PAYMENT AMOUNTS BY THE EMPLOYER

The total amount that the employer advances to all employees shall be reported when the employer remits the Indiana adjusted gross income tax withheld. The advance shall be deducted from the total tax withheld for all employees when calculating the net remittance that the employer is required to remit to the Department.

The total annual amount that the employer advances for the earned income tax credit payments will be reported on the Form WH-3, Annual Withholding Tax Reconciliation Return.

The total amount advanced to individual employees will be shown on the Form W-2 Wage and Tax Statement in the box directly beneath box 19, with 'INADV' directly beneath box 20.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #94
INCOME TAX
SEPTEMBER 2004
(Replaces Information Bulletin #91 dated January 2003)

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SUBJECT: Rerefined Lubrication Oil Facility Tax Credit

REFERENCE: IC 6-3.1-22.2

INTRODUCTION:

This Bulletin is intended to summarize the tax credit available for property tax paid for an oil rerefining facility.

I. REREFINED LUBRICATION OIL

Rerefined lubrication oil is base oil manufactured from at least ninety-five percent (95%) used oil, and uses not more than two percent (2%) previously unused oil in a refining process that effectively removes physical and chemical impurities and spent and unspent additives to the extent that the base oil is capable of meeting industry standards for engine oil.

II. ELIGIBLE ENTITIES AND TAXES FOR WHICH THE CREDIT MAY BE APPLIED AGAINST

A taxpayer is an individual or entity that has state tax liability, including pass through entities.

The tax credit can be applied against the following taxes:

- State Gross Retail and Use Tax
- Adjusted Gross Income Tax
- Financial Institutions Tax
- Insurance Premiums Tax

III. QUALIFICATION FOR THE CREDIT

A person is entitled to a credit against his/her state tax liability in a taxable year for a percentage of the ad valorem property taxes paid in the taxable year for: real property on which a facility that processes rerefined lubrication oil is located; and personal property used in the processing of rerefined lubrication oil, including personal property used in the transportation of rerefined lubrication oil to and from the processing facility.

IV. CALCULATION OF THE CREDIT

The amount of the credit to which a taxpayer is entitled equals the product of:

The amount of ad valorem property taxes paid by the taxpayer in a taxable year; multiplied by the percentage that corresponds to the tax year listed below.

	PERCENTAGE OF
YEAR	CREDIT
2001	100%
2002	80%
2003	60%
2004	40%
2005	20%

A taxpayer is entitled to a carry-forward of any unused credit for a period not to exceed two years. However, no unused credit may be carried forward to a tax year beginning after December 31, 2007.

The Department of Commerce shall determine if the taxpayer is entitled to the credit.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:

FORT MIAMI DETACHMENT
MARINE CORPS LEAGUE, INC.
DOCKET NO. 29-2004-0095

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED DEPARTMENTAL ORDER

An administrative hearing was held on Thursday, April 22, 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, Fort Miami Detachment Marine Corps League, Inc., was represented by Arend J. Abel and Marilyn Moores of

Cohen & Malad, LLP, One Indiana Square, Suite 1400, Indianapolis, Indiana 46204. John M. Miller appeared on behalf of the Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-21.5 et seq., 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

Petitioner was the subject of an audit which was completed on or about September 27, 2002. The audit and subsequent assessments covered the periods ending May 31, 1999 through May 31, 2002. On January 5, 2004, the Petitioner's charity gaming license was suspended for three (3) years, and Petitioner was assessed civil penalties in the amount of seven thousand one hundred dollars ($7,100). The Petitioner protested in a timely manner.

FINDINGS OF FACTS

1) The Indiana Department of Revenue completed a charity game audit of Petitioner on or about September 27, 2002. (Department's Exhibit B).

2) The Department also conducted an income tax, sales, and use tax audit of the Petitioner. (Department's Exhibit B).

3) Petitioner did not protest the Department's assessments, and paid all of its liabilities in full no later than February 4, 2003. (Petitioner's Exhibit #1).

4) On March 2, 2002 the Department issued a letter outlining civil penalties and a suspension based upon the September 27, 2002 audit results. (Department's Exhibit A).

5) In its letter of March 2, 2002 the Department stated, "The investigation by the Department revealed that Fort Miami Marine Corps League failed to keep accurate records of the allowable events it conducted, and to make accurate and timely reports of all financial aspects of the allowable events as required by IC 4-32-9-17. The Department reconstructed that gaming records pertaining to the sale of pull tabs. The investigation determined that Fort Miami understated its gross receipts derived from the sale of pull tabs by $105,309. This understatement of gross receipts derived from the sale of pull tabs resulted in the organization's charity gaming license fees being underreported by $3,750 for the periods ended April 30, 1999 and April 30, 2000…**The Department imposes a civil penalty of five hundred dollars ($500.00)**." (Department's Exhibit A).

6) Michael Broz, Commandant of Petitioner's organization stated in his affidavit, "After the audit was completed, I discovered in an outside building that used to be a concession stand, numerous boxes of unused gaming materials that were not reported on our organization's annual inventory filed with the Department of Revenue…"(Petitioner's Exhibit #1).

7) The Department's letter dated March 2, 2002 also stated, "The audit noted that on three occasions Fort Miami Marine Corps League sold pull tab games with a payout of more than $20,000. One game was called 5365 Red Hot and had a payout of $2,400. Another game was called CRW 105 Cruisin with a payout of $2,982. The third game was called BTW 104 Spin Bottle with a payout of $2,188. All games were purchased from Clarke Bingo. *Indiana Code § 4-32-9-33. Prize limits for pull tab, punchboard and tip board games. (a) The total prizes awarded fro one (1) pull tab, punchboard and tip board game may not exceed two thousand dollars ($2,000)…***The Department imposes a civil penalty for the second violation of one-thousand six hundred dollars ($1,600)**. It is the Department's opinion that an organization should not profit from pull tab games exceeding the maximum dollar limit." (Department's Exhibit A).

8) As to whether Petitioner on three separate occasions sold pull tab games with payouts in excess of $2,000, Petitioner's counsel stated, "We have not presented any evidence refuting that, that particular point. In fact, I pressed—we pressed for that. Our client describes to us, saying no contest, because we can't prove or disprove it." (Record at 59-60).

9) Finally, the Department's letter of March 2, 2003 stated, "During the audit, it was noted that Fort Miami Marine Corps League had 8 unauthorized "Cherry Master" gambling machines. An investigation by the Criminal Investigation Division in November of 2001 noted that Fort Miami Marine Corps League possessed unauthorized gambling machines. The operation of gambling machines as defined in IC 35-45-5-1 constitutes illegal gambling. *Indiana Administrative Code, 45 IAC 18-1-18, defines "Conduct prejudicial to the public confidence in the department" to include operating a gambling device, including any activity illegal under IC 35-45-5-1…*In this case the organization has engaged in conduct prejudicial to the public confidence in the department and **the Department imposes a civil penalty of five thousand dollars ($5,000)**. *Indiana Code § 4-32-12-3. Additional penalties authorized. In addition to the penalties described in section 2 [IC 4-32-12-2] 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.* Since the Fort Miami Marine Corps League has been found to be in possession of illegal gambling machines, "Cherry Masters", the Department hereby suspends the charity gaming license of the Fort Miami Detachment Marine Cops League, Inc for a period of three (3) years effective with the receipt of this letter. The Department noted on 2 different occasions, once by the Criminal Investigation Division November 2001 and again by the Audit Division in September 2002 that Fort Miami Marine Corps League possessed gambling machines that were in violation

of Indiana Administrative Code 45 § 18-1-18 and Indiana Code § 35-45-5-1." (Department's Exhibit A).

10) During Petitioner's audit, eight (8) "Cherry Master" video machines were observed at Petitioner's location. (Department's Exhibit B).

11) On Cross-Examination of the Department's witness, the questioning was as follows:

> Q. Did you see anyone at Fort Miami receive cash as a result of playing Cherry Masters at any time when you were there?
> A. No.
>
> > MR. DRERUP[1]: Your actual lottery work was in the other part of the building, wasn't it, Tom?
> >
> > THE DEPONENT: Right.
> >
> > MR. DRERUP: I mean quite a distance and through doorways. You didn't even come through that entrance normally, where the Cherry Masters are.
> >
> > THE DEPONENT: I came through that entrance a few days, but all I saw was people, one or two people. It wasn't a whole lot. But I saw no payout. (Record at 26).

12) Michael Broz, Commandant of Petitioner's organization stated in his affidavit, "We have removed all "Cherrymaster" amusement machines, which had been located in a private location requiring key card access on our premises, completely separated from the public area where bingo is conducted…"(Petitioner's Exhibit #1).

13) The collection reports obtained by the Department show the amount of money in the gaming machines, the merchant's share, and the amount due the operator (Department's Exhibits C, D, and E). These reports only show the amount of money in each machine when it is serviced by the vendor. This income is then split between the vendor and Petitioner. Therefore, the records only show the amount of money received by the Petitioner from each machine. The reports do not show whether there were any payouts to patrons.

14) On January 5, 2004, the Petitioner's charity gaming license was suspended for three (3) years, and Petitioner was assessed civil penalties in the amount of seven thousand one hundred dollars ($7,100).

STATEMENT OF LAW

1) The periods at issue are the years ending May 31, 1999 through May 31, 2002. Pursuant to IC 4-32-8-1, IC 6-8.1 applies to the department's decision making process under this article, except that a formal protest of any decision, intended decision, or other action must be filed not more than seventy-two (72) hours after receipt of the notice of decision, intended decision, or other action. (*As added by P.L.24-1992, SEC.49).*The Department's hearings were governed by IC 6-8.1-5-1 during the years at issue. However, the Department also followed the hearing procedures found in IC 4-21.5 in order to conduct its hearings in an orderly manner. This allowed the court reporter to produce a thorough written transcript in case the matter was appealed. Charity gaming matters do not fall under the jurisdiction of the tax court. Charity gaming matters shall be appealed to a local Circuit or Superior whose review is not de novo.

2) The Department's hearings are now governed by IC 4-21.5 exclusively. (See IC 4-32-8-5. *As added by P.L.188-2003, SEC.3.).*

3) Pursuant to IC 6-8.1-5-1, 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. (Burden of proof now found in 45 IAC 18-8-4).

4) The Department's administrative hearings are conducted pursuant to IC 6-8.1- 5-1 and IC § 4-21.5 et seq. (See, House Enrolled Act No. 1556).

5) 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…"

6) 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."

7) "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).

8) 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.". *(Department of State Revenue; 45 IAC 18-1-18; filed Feb 28,2003, 2:16 p.m.: 26 IR 2302).*

9) IC 4-32-9-17 states, "A qualified organization shall maintain accurate records of all financial aspects of an allowable event under this article. A qualified organization shall make accurate reports of all financial aspects of an allowable event to the department within the time established by the department. The department may prescribe forms for this purpose. The department shall, by rule, require a qualified organization to deposit funds received from an allowable event in a separate and

segregated account set up for that purpose. All expenses of the qualified organization with respect to an allowable event shall be paid from the separate account."

10) 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…"

11) IC 110 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."

12) "'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).

13) 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).

14) IC 4-32-9-33 provides in part, "(a) The total prizes awarded for one (1) pull tab, punchboard, or tip board game may not exceed two thousand dollars ($2,000).

(b) A single prize awarded for one (1) winning ticket in a pull tab, punchboard, or tip board game may not exceed three hundred dollars ($300).

(c) The selling price for one (1) ticket for a pull tab, punchboard, or tip board game may not exceed one dollar ($1).

15) IC 4-32-12-1(a) provides in pertinent part, "The Department may suspend or revoke the license or levy a civil penalty against a qualified organization or an individual under this article for any of the following: (1) Violation of a provision of this article or of a rule of the department...(5) Conduct prejudicial to public confidence in the department."

16) IC 4-32-12-2 states, "The department may impose upon a qualified organization or an individual the following civil penalties:

(1) Not more than one thousand dollars ($1,000) for the first violation.

(2) Not more than two thousand five hundred dollars ($2,500) for the second violation.

(3) Not more than five thousand dollars ($5,000) for each additional violation."

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) The Department's audit investigation revealed that Petitioner had failed to keep accurate records of the allowable events it conducted. This is evidenced by the numerous boxes of gaming materials Petitioner states were subsequently found.

2) Petitioner inability to accurately account for all its bingo and charity gaming supplies show a failure to make accurate and timely reports of all financial aspects of the allowable events. This is a violation of IC 4-32-9-17.

3) Petitioner's counsel acquiesced to the Department's assertion that on three separate occasions sold pull tab games with payouts in excess of $2,000 a violation of IC 4-32-9-33.

4) Petitioner possessed eight (8) "Cherry Master" video machines.

5) The Department cited 45 IAC 18-1-18 and levied a civil penalty of five thousand dollars ($5,000) for violating this provision of the Indiana Code. However, 45 IAC 18-1-18 was not in effect at the time the alleged violation occurred.

6) Pursuant to IC 6-8.1-5-1, 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. However, the Department at a minimum must have a reasonable basis for its findings.

7) Depending upon how the machines in question are used, they could be used for amusement purposes. The machines can also be used as an illegal gambling device. Evidence of possible illegal use could include a reset button which is used to clear the machine after each player has finished, or a machine that produces a paper ticket showing the number of credits earned and is therefore used to receive payment.

8) There was no evidence offered by the Department showing in fact that the Cherry Master machines were used in an illegal manner, or that they in fact meet the definition of a gambling device as defined in IC 35-45-5-1.

9) Pursuant to IC 4-32-12-3 the Department has the statutory authority to lengthen a period of suspension of the license to conduct charity gaming.

10) Petitioner's allegation that the Department's actions were in retaliation for the organization filing a lawsuit in another matter was not supported by any evidence, and can only be viewed as mere speculation.

PROPOSED DEPARTMENTAL ORDER

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

The Petitioner's appeal is denied in part and sustained in part. The Department's audit investigation revealed that Petitioner had failed to keep accurate records of the allowable events it conducted. This is evidenced by the numerous boxes of gaming supplies Petitioner's representative states were subsequently found. Petitioner's inability to accurately account for all its bingo and charity gaming supplies shows a failure to make accurate and timely reports of all financial aspects of the allowable events. This is a violation of IC 4-32-9-17. Petitioner's counsel acquiesced to the Department's assertion that on three separate occasions it sold pull tab games with payouts in excess of $2,000 a violation of IC 4-32-9-33. Petitioner could not have violated the provisions of 45 IAC 18-1-18 because the regulation did not exist at the time of the alleged violation. The Department failed to establish a reasonable basis for its assertion that the video gaming machines in question were used for illegal purposes or constituted gambling devices as defined in IC 35-45-5-1.

The years that were subject to audit by the Department are closed. The Petitioner's failure to pursue its right to protest negates the Department's ability to review the numerous boxes of records recently found by Petitioner. However, since the assessments were paid in full, by statute, the Petitioner may file a claim for refund which would allow the Department to review these records. Any subsequent review of these records will have no bearing upon the findings of this hearing.

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

[1] Stephen Drerup an auditor, was not being questioned by Petitioner's attorney. Mr. Drerup was sworn in at the beginning of the hearing as were all of the potential witnesses. His spontaneous answers were unsolicited, but were made on the record and under oath. There were no objections to his spontaneous responses by either party.

DEPARTMENT OF STATE REVENUE

04980017.LOF

LETTER OF FINDINGS NUMBER: 98-0017
Sales and Use Tax
For the Years 1997-Present

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

ISSUES

I. Sales and Use Tax-Denial of Sales Tax Exemption

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

The taxpayer protests the denial of sales tax exemption on an airplane.

II. Tax Administration-Penalty

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

The taxpayer protests the imposition of penalty.

STATEMENT OF FACTS

The taxpayer is a limited liability corporation that owns an airplane. The taxpayer applied for an exemption from sales tax based on its status as a retail merchant engaged in the renting and leasing of the airplane to the public. The Indiana Department of Revenue, hereinafter referred to as the "department," denied this request for exemption. The taxpayer protested the denial and a hearing was held. This Letter of Findings results.

I. Sales and Use Tax-Denial of Sales Tax Exemption

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

Indiana imposes a sales tax on the transfer of property in a retail transaction. IC 6-2.5-2-1. In the case of aircraft, taxpayers are to pay the tax directly to the department when registering the aircraft unless the aircraft qualifies for an exemption. IC 6-2.5-3-6. The taxpayer contends that the subject aircraft qualifies for an exemption from the sales tax because the taxpayer is a retail merchant in the business of leasing aircraft to the public in the ordinary course of business without changing the form of the aircraft. IC 6-2.5-5-8. The department denied this exemption contending that the taxpayer was a private flying club rather than a business engaged in the leasing of an airplane.

In support of its position, the taxpayer provided substantial documentation including a copy of the Articles of Incorporation, a tax return, flying log sheets, a copy of the computer home page, copies of checks paying sales tax on rentals, and financial records. Close scrutiny of the documentation, however, reveals several features which do not support the taxpayer's contention that the taxpayer is a business rather than a flying club. Article I of the Articles of Incorporation states that as follows:

> The purpose of this Company shall be to provide for its Members convenient means for operating high performance aircraft for personal non-commercial use, at economical rates.

Further, Article XVII indicates that any net profit of the corporation will be used to reduce the hourly flying rates for members. This is a private benefit to the owners rather than an anticipation of earning an income as in the typical business. The corporate internet home page discusses membership requirements. Submitted records indicate that most rentals are to members at a significantly reduced membership hourly rental rate. The rental fees do not approach covering the taxpayer's expenses. In fact, tax records indicate that the corporation lost at least $7,800.00 each year between 1997 and 2002 with an average loss of $16,000.00. The evidence supports the determination that the taxpayer is not in reality a leasing business but rather a private flying club. It is not entitled to an exemption from the sales tax on the purchase of its aircraft.

FINDING

The taxpayer's protest is denied.

II. Tax Administration-Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. The taxpayer contends that the negligence penalty is inappropriate in this situation because the taxpayer did not intentionally fail to pay the proper amount of tax.

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.

After reviewing the particular facts and circumstances of this case, the department finds that the negligence penalty is not warranted.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

02990293.LOF

LETTER OF FINDINGS NUMBER 99-0293
GROSS INCOME TAX FOR THE PERIOD COVERING THE
FISCAL YEARS ENDING SEPTEMBER 30, 1993, 1994 AND 1995
(4TH QUARTER 1992--3RD QUARTER 1995)

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

ISSUES

I. Gross Income Tax—Imposition on Domiciliary—Source State of Gross Income—Installment Contract Interest
Tax Procedure—Protests—Burden of Proof

Authority: IC § 6-8.1-1-5-1(b) (1998); IC §§ 6-2.1-1-2, -1-16(28) and -2-2(a) (1988) (1993)(repealed 2003); IC § 6-8.1-1-3 (1988) (1993); *Okla. Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214 (U.S. 1995); *New York ex rel. Cohn v. Graves*, 57 S.Ct. 466 (U.S. 1937); *Wheeling Steel Corp. v. Fox*, 56 S.Ct. 773 (U.S. 1936); *Lawrence v. State Tax Comm'n of Miss.*, 52 S.Ct. 556 (U.S. 1932); *State v. Huffman*, 643 N.E.2d 899 (Ind. 1994); *Miles v. Dep't of Treasury*, 199 N.E. 372 (Ind. 1935) ("*Miles II*"); *Miami Coal Co. v. Fox*, 176 N.E. 11 (Ind. 1931); *Bethlehem Steel Corp. v. Ind. Dep't of State Revenue*, 597 N.E.2d 1327 (Ind. Tax Ct. 1992) ("*Bethlehem Steel I*"), *aff'd* 639 N.E.2d 264 (Ind. 1994) ("*Bethlehem Steel II*"); *Associated Ins. Cos. v. Ind. Dep't of State Revenue*, 655 N.E.2d 1271 (Ind. Tax Ct. 1995); 45 IAC §§ 1-1-7, -51 (1992) (repealed 1999); Judith A. Frank, *Preneed Funeral Plans: The Case for Uniformity*, 4 ELDER L.J. 1 (1996)

The protesting affiliated group (hereinafter "the protestant"), as second successor in interest to the taxpayer, argues that certain interest income the taxpayer received from pre-need funeral installment contracts should be excluded from gross income. The protestant alleges that the interest was from out-of-state business situses.

II. Gross Income Tax—Imposition on Domiciliary—Source State of Gross Income—"Pre-Need" Trust Interest and Dividend Distributions

Authority: 42 U.S.C.A. §§ 1381-1383(d) (West 1991 & Supp. 1995); FLA. STAT. ANN. § 497.415(1) (West 1988 & Supp. 1995); IC §§ 6-2.1-1-2, -16(28), and -2-2(a) (1988) (1993) (repealed 2003); IC §§ 6-8.1-1-3, -5-1(b) (1998); MICH. COMP. LAWS ANN. § 328.222(1) (West 1992); *Guar. Trust Co. v. Virginia*, 59 S.Ct. 1 (U.S. 1938); *New York ex rel. Cohn v. Graves*, 57 S.Ct. 466 (U.S. 1937); *Maguire v. Trefry*, 40 S.Ct. 417 (U.S. 1920); *Hunt v. Rousmanier's Adm'rs*, 5 L.Ed. 589 (U.S. 1823); *Whidden v. Sunny South Packing Co.*, 162 So. 503 (Fla. 1935); *Hawley v. Smith*, 45 Ind. 183 (1873); *Ind. Family & Soc. Servs. Admin. v. Culley*, 769 N.E.2d 680 (Ind. Ct. App. 2002); *Bethlehem Steel Corp. v. Ind. Dep't of State Revenue*, 597 N.E.2d 1327 (Ind. Tax Ct. 1992) ("*Bethlehem Steel I*"), *aff'd* 639 N.E.2d 264 (Ind. 1994) ("*Bethlehem Steel II*"); 45 IAC § 1-1-51 (1992) (repealed 1999); RESTATEMENT (SECOND) OF TRUSTS § 130(a) (1959); 90 C.J.S. *Trusts* § 240 (2002); Judith A. Frank, *Preneed Funeral Plans: The Case for Uniformity*, 4 ELDER L.J. 1 (1996)

The protestant contends that the Department should exclude from the taxpayer's gross income interest and dividends distributed to it from pre-need funeral trusts that receive deposits of, and invest, pre-need installment contract payments. The protestant submits that the interest and dividends should be excluded because the trusts are maintained and managed outside Indiana.

III. Gross Income Tax—Definition of "Gross Income"—Amortization of Intangibles—Pre-Need Trusts
Gross Income Tax—Definition of "Gross Income"—Amortization of Intangibles—Situses of Intangibles

Authority: I.R.C. (26 U.S.C.) § 167(a) (1988 & Supp. V 1993) (1994); IC §§ 6-2.1-1-2(a), -10, -11(1988) (1993) (repealed 2003); *Newark Morning Ledger Co. v. United States*, 113 S.Ct. 1670 (U.S. 1993); *INDOPCO, Inc. v. Comm'r*, 112 S.Ct. 1039 (U.S. 1992); *Davis v. United States*, 110 S.Ct. 2014 (U.S. 1990); *Buchanan v. Warley*, 38 S. Ct. 16 (U.S. 1917); *Dep't of Ins. v. Motors Ins. Corp.*, 138 N.E.2d 157 (Ind. 1956); *Ind. Dep't of State Revenue v. Colpaert Realty Corp.*, 109 N.E.2d 415 (Ind. 1952); *Dep't of Fin. Insts. v. Holt*, 108 N.E.2d 629 (Ind. 1952); *Dep't of Fin. Insts. v. Gen. Fin. Corp.*, 86 N.E.2d 444 (Ind. 1949); *Gardner-White Co. v. Dunckel*, 295 N.W. 624 (Mich. 1941)

The protestant argues that the Department should exclude from the taxpayer's gross income certain federal income tax deductions it took to amortize the pre-need trusts associated with two Texas mortuaries it acquired and later merged into itself. The protestant contends that the pre-need trust amortization deductions are not gross income, or in the alternative that if they are gross income, then they arise from out-of-state business situses.

IV. Gross Income Tax—Imposition on Domiciliary—Source State of Gross Income—(Insurance Commissions)(Fiscal Year Ending 09/30/1993)

Authority: I.R.C. (26 U.S.C.) § 1361(b)(1)(B) (1988) (1994)IC §§ 6-2.1-1-2, -16(28), -2-2(a) and –5-5(a) (1988) (1993) (repealed 2003); IC §§ 6-8.1-1-3, -5-1(b) (1998); 11A KY. REV. STAT. ANN. §§ 304.9-270(1) and 304.9-425 (Michie 1996 & 2001 Repls.); OHIO REV. CODE ANN. §§ 3905.18(A), 3905.181 [sic; should read "3905.18.1"] and 3905.20(B)(1). (Anderson 1996 & 2002 Repls.); *Ariz. Ins. Guar. Ass'n v. Humphrey*, 508 P.2d 1146 (Ariz. 1973); *Miami Coal Co. v. Fox,* 176 N.E. 11 (Ind. 1931); *Sample v. Kinser Ins. Agency, Inc.*, 700 N.E.2d 802 (Ind. Ct. App. 1998); *Vector Eng'g & Mfg. Corp. v. Pequet,* 431 N.E.2d 503 (Ind. Ct. App. 1982); *Bethlehem Steel Corp. v. Ind. Dep't of State Revenue,* 597 N.E.2d 1327 (Ind. Tax Ct. 1992) ("*Bethlehem Steel I*"), *aff'd* 639 N.E.2d 264 (Ind. 1994) ("*Bethlehem Steel II*"); *Bishop v. Am. States Life Ins. Co.*, 635 S.W.2d 313 (Ky. 1982); *Boro Hall Agency, Inc. v. Citron,* 329 N.Y.S.2d 269 (N.Y. Civ. Ct. 1972); *Hartford Fire Ins. Co. v. Whitman,* 79 N.E. 459 (Ohio 1906); *Cockrell v. Grimes,* 740 P.2d 746 (Okla. Ct. App. 1987); 45 IAC §§ 1-1-49(5) and -51 (1992) (repealed 1999); 43 AM.JUR.2D *Insurance* §§ 146 and 147 (2003); 2A C.J.S. *Agency* § 334 (2003); 44 C.J.S. *Insurance* §§ 201 and 205 (1993); 13 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D: LAW OF INSURANCE AGENTS §§ 95.1, 97.2 and 97.8 (LEXIS Publ'g 1999); Judith A. Frank, *Preneed Funeral Plans: The Case for Uniformity*, 4 ELDER L.J. 1 (1996)

The protestant submits that certain alleged insurance commissions paid by an insurance subsidiary of the taxpayer to two Kentucky and Ohio companies should be excluded from gross income because they were earned by out-of-state business situses.

V. Gross Income Tax—Imposition on Domiciliary—Receipt of Gross Income by Insurer as Agent (Insurance Commissions)(Fiscal Year Ending 09/30/1993)

Authority: IC §§ 6-2.1-1-2(a) and (b), -10, -11, -13 and -2-2 (1988) (1993) (repealed 2003); IC § 27-1-18-2(b) (1988) (1993); *Oil Supply Co. v. Hires Parts Serv., Inc.,* 726 N.E.2d 246 (Ind. 2000); *Derloshon v. City of Ft. Wayne Dep't of Redev.,* 234 N.E.2d 269 (Ind. 1968); *W. Adj. and Insp. Co. v. Gross Income Tax Div.*, 142 N.E.2d 630 (Ind. 1957); *Dep't of Treasury v. Ice Serv., Inc.,* 41 N.E.2d 201 (Ind.1942); *United Artists Theatre Circ., Inc. v. Ind. Dep't of State Revenue,* 459 N.E.2d 754 (Ind. Ct. App. 1984); *Rotation Prods. Corp. v. Dep't of State Revenue*, 690 N.E.2d 795 (Ind. Tax Ct. 1998); *Universal Group Ltd. v. Ind. Dep't of State Revenue,* 642 N.E.2d 553 (Ind. Tax Ct. 1994) ("*Universal Group III*"); 45 IAC §§ 1-1-8 to -10, -17, -51, -54 and -64 (1992) (repealed 1999)

In the alternative to its out-of-state-business-situs argument concerning the alleged insurance commissions, the protestant alleges that the taxpayer was not liable for gross income tax because the insurance subsidiary held the alleged commissions as agent for the Kentucky and Ohio companies.

VI. Gross Income Tax—Imposition on Domiciliary—Source State of Gross Income—Other Miscellaneous Gross Receipts From Out-of-State Business Situses

Authority: IC § 6-8.1-5-1(b) (1998)

The protestant contends that the taxpayer was not liable for gross income tax on certain miscellaneous gross receipts allegedly earned by business situses outside Indiana.

VII. Gross Income Tax—Imposition on Domiciliary—Source State of Gross Income—Miscellaneous Service Gross Receipts (Open/Close Trust Withdrawals) (Fiscal Year Ending 09/30/1993)

Authority: IC §§ 6-2.1-2-2(a)(1), -5(9), -7(b) and (c) (1988) (1993)(repealed 2003); IC § 6-8.1-5-1(b) (1998); *Okla. Tax Comm'n v. Chickasaw Nation,* 115 S.Ct. 2214 (U.S. 1995); *Guar. Trust Co. v. Virginia,* 59 S.Ct. 1 (U.S. 1938); *New York ex rel. Cohn v. Graves,* 57 S.Ct. 466 (U.S. 1937); *Wheeling Steel Corp. v. Fox,* 56 S.Ct. 773 (U.S. 1936); *Lawrence v. State Tax Comm'n of Miss.,* 52 S.Ct. 556 (U.S. 1932); *Maguire v. Trefry,* 40 S.Ct. 417 (U.S. 1920); *Ind. Dep't of State Revenue v. Bethlehem Steel Corp.,* 639 N.E.2d 264 (Ind. 1994) ("*Bethlehem Steel II*"), *aff'g* 597 N.E.2d 1327 (Ind. Tax Ct. 1992) ("*Bethlehem Steel I*"); *Indiana Department of State Revenue v. E.W. Bohren, Inc.*, 178 N.E.2d 438 (Ind. 1961); *Miles v. Dep't of Treasury,* 199 N.E. 372 (Ind. 1935) ("*Miles II*"); *Miami Coal Co. v. Fox,* 176 N.E. 11 (Ind. 1931); 45 IAC §§ 1-1-51, -112 (1992) (repealed 1999); RESTATEMENT (SECOND) OF TRUSTS § 130(a) (1959); 90 C.J.S. *Trusts* § 240 (2002)

The protestant submits that the taxpayer was not liable for gross income tax on certain pre-need trust principal withdrawals for grave-digging services performed at cemeteries it owned located outside Indiana.

VIII. Gross Income Tax—Deductions from Gross Income—Inter-Company Transactions

Authority: IC §§ 6-2.1-4-6, -5-5 (1988) (1993) (repealed 2003); 45 IAC §§ 1-1-166, -167 (1992)

The protestant argues that the taxpayer was entitled to deduct from gross income certain receipts the protestant alleges were the result of transactions between members of the taxpayer's Indiana affiliated group.

IX. Tax Administration—Amending Returns—Departmental Authority to Amend

Gross Income Tax—Imposition on Domiciliary—Source State of Gross Income—(Insurance Commissions)(Fiscal Year Ending 09/30/1994)

Gross Income Tax—Deductions from Gross Income—Bad Debt Deductions (All Years)
Authority: IC §§ 6-8.1-5-2(a), -6-3(a)(1), -10-3(a) (1993) (1998); *Middleton Motors, Inc. v. Ind. Dep't of State Revenue,* 380 N.E.2d 79 (Ind. 1978); 45 IAC §§ 15-5-7(d), -11-3 (1996) (2001)

The protestant requests the Department to amend the taxpayer's returns for the audit period to reflect gross income that the protestant alleges was included, and deductions that it alleges were omitted, in error.

X. Tax Administration—Negligence Penalty (Inter-Company Service Charges Adjustment)
Authority: IC § 6-8.1-10-2.1(e) (1998); 45 IAC § 15-11-2(c) (2001)

The protestant requests the Department to abate the negligence penalties imposed.

STATEMENT OF FACTS

The taxpayer was an affiliated group engaged in the mortuary and cemetery (including mausoleum) businesses in Indiana and several other states. It filed consolidated annual income tax returns at the federal level and for both Indiana gross and adjusted gross income tax purposes, using the accrual method of accounting and a fiscal year that ended on September 30. The Department conducted an income tax audit of the taxpayer for the fiscal years ending on September 30 of 1993, 1994 and 1995 (hereinafter "fiscal year 1993," "fiscal year 1994" and "fiscal year 1995," respectively) (collectively, "the audit period"). During those years the parent corporation (hereinafter "the parent") was incorporated and headquartered in Indiana. However, after the end of the audit period, the taxpayer was the subject of two mergers. It was first acquired by and merged into a Delaware corporation, which took the parent's name. It was this successor corporation with which the auditor dealt in conducting the audit. However, the acquiring corporation was thereafter in turn acquired by and merged into another corporation, chartered in a state other than Indiana or Delaware, and engaged in the same businesses as the taxpayer. Since it was this last corporation that filed the protest, the Department will refer to this second successor in interest as "the protestant" in this letter in order to distinguish it from the taxpayer.

The Department conducted a prior income tax audit of the taxpayer for fiscal years 1989 through 1991. In 1994 issued original and rehearing Letters of Findings in response to the taxpayer's protest of the proposed gross income tax assessments that arose out of that audit. At the hearing on the present dispute and in a follow-up telephone conversation the protestant, through its attending employees, represented that during the audit period the taxpayer, with one exception, did not change its business practices from those it used in fiscal years 1989 through 1991. Accordingly, the Department finds that during the audit period the taxpayer centralized all the financial and administrative operations of the subsidiaries and of the parent's various locations at the parent's Indiana headquarters. The parent was responsible for paying all the subsidiaries' and locations' expenses. It made periodic automatic sweeps of the operating accounts of all of the parent's locations, and of those of all but two of the subsidiaries, transferring these revenues to the parent's checking account at an Indiana bank headquartered in the same city as the parent. The parent then paid the subsidiaries' payables out of those proceeds. In turn the subsidiaries, and the parent's various locations, were each responsible for reimbursing the parent for a part of the financial and administrative services it rendered to its locations and to the subsidiaries. The parent called these reimbursements "overhead allocations" in its chart of accounts.

The audit was for all types of Indiana income taxes, including under the former Gross Income Tax Act of 1933, chapter 50, 1933 Indiana Acts 388 (repealed 2003) and its implementing regulation, each formerly codified during the audit period, as amended, at IC article 6-2.1 (1988) (1993) and at 45 IAC article 1-1 (1992) (repealed and recodified 1999 as former 45 IAC article 1.1 (1996 and Supp. 1998) (repealed 2003)), respectively. The present protest involves only the parts of the proposed assessments that are for gross income tax. The Department will provide additional facts if and as needed.

SUMMARY OF FINDINGS

The Department denies the protest in part and sustains it in part. The Department denies the protest as to all issues except Issue III, as to which the protest is sustained.

I. Gross Income Tax—Exclusions From Definition of "Gross Income"—Interest and Dividend Gross Receipts From Out-of-State Business Situses
Tax Procedure—Protests—Burden of Proof
Gross Income Tax—Exclusions From Definition of "Gross Income"—Service Gross Receipts From Out-of-State Business Situses

DISCUSSION

A. OVERVIEW OF PRE-NEED FUNERAL CONTRACTS

The present issue and several others in this protest involve what the mortuary and cemetery industries call "pre-need" contracts and "pre-need" trusts. The discussion of these issues in the protest letter was at best conclusory and incomplete. In particular, the protestant's discussions in both that letter and its post-hearing memorandum on "pre-need trust amortization," the subject of Issue III, were confusing. Accordingly, the Department conducted its own research on these subjects. The Department therefore will discuss the taxpayer's specific activities during the audit period concerning such trusts in the context of those industries' relevant general practices concerning "pre-need" sales, and the state regulatory schemes that govern "pre-need" trusts, as revealed by the Department's research.

One legal commentator has described "pre-need" contracts as follows:

> The concept of the preneed funeral contract has aptly been described as "pay now - die later." Typically, a consumer enters an agreement to presently pay for a package of funeral services and goods which will be delivered upon the death of a designated person. The consumer may prearrange his own funeral or arrange a funeral for another person.….
>
> ….
>
> With many preneed contracts, the consumer may customize fully his funeral by specifying the exact services to be provided as well as the specific goods to be used in conjunction with the funeral. Alternatively, the consumer can leave the details to his survivors.
>
> One option available with many preneed funeral contracts is the "guaranteed price" or "inflation proof" contract. An inflation proof contract establishes a fixed price for specified goods and services and requires that the funeral home provide these goods and services at the price established at contract execution. In effect, the consumer has locked in the price of the services and goods regardless of any inflation that may occur between contract execution and future delivery.

Judith A. Frank, *Preneed Funeral Plans: The Case for Uniformity*, 4 ELDER L.J. 1, 5-6 (1996) (footnotes omitted) (hereinafter Frank, *Preneed Funeral Plans*). The term "pre-need" was coined to describe such contracts, since the individual obviously pays for these items before they are needed. The prospective decedent's status with the mortuary or cemetery company changes from "pre-need" to "at-need" at death.

Although the consumer has the option to prepay in a lump sum, "pre-need payments are customarily made in…installments over a long period of time." JESSICA MITFORD, THE AMERICAN WAY OF DEATH REVISITED 87 (Alfred A. Knopf 1998) (hereinafter MITFORD, REVISITED). Pre-need contracts are thus a species of retail installment contract or conditional sales contract. *See* BLACK'S LAW DICTIONARY 324 (7th ed. 1999) (defining "retail installment contract"). Installment pre-need contracts, like all installment contracts, include a finance charge (i.e., interest) calculated on the declining balance of the amount financed or principal (i.e., the "guaranteed" or fixed price for the property and services selected).

B. THE PROPOSED ADJUSTMENT FOR PRE-NEED CONTRACT INTEREST AND THE PROTESTANT'S ARGUMENT

Parts of each of the Department's Notices of Proposed Assessment to the taxpayer were for gross income tax at high rate on five categories of interest the taxpayer received during the audit period. The protestant has challenged the proposed assessments as to three of these categories. The taxpayer described these categories on its federal Forms 1120 (U.S. Corporation Income Tax Return) for the audit period as "Merchandise Trust Interest," "Funeral Pre-need Trust Interest" (both discussed under Issue II below) and "Installment Contract Interest" (i.e., pre-need contract interest). As authority for the parts of the proposed assessments levied on the interest, the auditor applied, and found that the taxpayer satisfied, the "commercial domicile" test of former 45 IAC § 1-1-51 (1992) (repealed 1999)(last version at 45 IAC § 1.1-6-2 (2001) (repealed 2003)), the implementing regulation that specifically governed taxation of gross income from intangibles.

The protestant argues that the pre-need contract interest was not subject to imposition of gross income tax based on its factual representation that those contracts were sold at business locations outside Indiana. However, other than the respective locations of the parent and the subsidiaries, the protestant has not provided any facts to support this contention.

This omission is the first of several failures by the protestant to submit evidence, make argument, or cite to authorities to support its positions on the issues. In particular, the protestant has failed to prove enough facts to make its case, both as to the present issue and almost every other issue in this dispute. As to one of these other issues, specifically Issue V, the protestant has also failed to convince the Department that the protestant's legal position is sound.

C. INDIANA AUTHORITIES GOVERNING DETERMINATION OF THE GROSS INCOME TAX SITUS OF AN INTANGIBLE

1. Summary of the Implementing Regulation and Its Origins

Former 45 IAC § 1-1-51 applies to the present issue because, as noted above, pre-need contracts are a type of conditional sales contract, and the regulation's definition of "intangible" or "intangible property" specifically included conditional sales contracts. *Id.* The equitable interests in the various pre-need trusts forming the subjects of Issues II and III are also intangibles under the former regulation, as the Department will discuss under Issue II. So are the insurance agent licenses, agent registrations, agency contracts and insurance policies sold underlying the alleged commission income discussed under Issue IV. The definition includes, in addition to the categories specifically enumerated in former 45 IAC § 1-1-51, "*all* other evidences of similar rights capable of being transferred, acquired or sold." *Id* (emphasis added).

The former regulation is too long for the Department to quote even just the relevant parts in full in this letter. However, in *Indiana Department of State Revenue v. Bethlehem Steel Corp.*, 639 N.E.2d 264 (Ind. 1994) ("*Bethlehem Steel II*"), *aff'g* 597 N.E.2d 1327 (Ind. Tax Ct. 1992) ("*Bethlehem Steel I*"), the Indiana Supreme Court summarized this regulation as follows:

> **A. The Interpreting Regulation.** The Department's regulation, 45 IAC 1-1-51, provides two tests for determining when intangible income derives from an Indiana activity, business, *or source*. First, *the "business situs" test* provides that if the taxpayer has established a business situs in Indiana, and "the intangible forms an integral part of a business regularly conducted at [that] situs," then the intangible has an Indiana situs for tax purposes. Second, *the "commercial domicile" test holds that if the taxpayer has established its commercial domicile in Indiana, then "all of the income from intangibles will be taxed...*

> *except that income which may be directly related to an integral part of a business regularly conducted at a 'business situs' outside Indiana."* If the taxpayer has established its commercial domicile in another state, then "no income from intangibles will be taxed... unless the taxpayer has also established a business situs in Indiana and the intangible income derived therefrom forms an integral part of that Indiana activity." *Id.*

Bethlehem Steel II, 639 N.E.2d at 268 (emphases added) (insertion by the court). However, "the Department did not construct its situs approach from whole cloth. The analysis was derived from the property tax context[.]" *Id.* Specifically, the regulation codified the "business situs" test of *Miami Coal Co. v. Fox,* 176 N.E. 11 (Ind. 1931), and the "commercial domicile" test of *Wheeling Steel Corp. v. Fox,* 56 S.Ct. 773 (U.S. 1936). *See generally Bethlehem Steel II,* 639 N.E.2d at 268-269 and *Bethlehem Steel I,* 597 N.E.2d at 1333-1334 (both discussing *Miami Coal* and *Wheeling Steel*). The "commercial domicile" test is the one the auditor used, and the "business situs" test as applied to intangibles acts as an exception to the "commercial domicile" test. The Department therefore will first discuss the "commercial domicile" test, and the effect of commercial domicile Indiana's power to tax income earned out of state.

2. Definition and Effect of "Commercial Domicile" on State Taxing Power Over Income Earned Out of State

A "commercial domicile" is "the actual seat of…corporate government." *Wheeling Steel,* 56 S.Ct. at 778. "The commercial domicile may also be called the 'nerve center' or 'corporate center of all the business functions of the taxpayer." Former 45 IAC § 1-1-51, fifth paragraph, last sentence. As its name implies, it is a type of domicile. " 'Domicil[e] implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance.' " *Ulrey v. Ulrey*, 106 N.E.2d 793, 795 (Ind. 1952), quoting *Williams v. North Carolina*, 65 S.Ct. 1092, 1095 (U.S. 1945). Among these responsibilities is that of paying taxes to the state in which one is domiciled. Domicile was one of the bases for imposing the gross income tax, both as a matter of explicit statutory language and of judicial construction. Former IC § 6-2.1-2-2(a)(1) imposed the gross income tax on "[t]he entire taxable gross income of a taxpayer who is a resident *or a domiciliary* of Indiana[.]" *Id* (emphasis added). In *Miles v. Department of Treasury,* 199 N.E. 372 ("*Miles II*"), *modifying on reh'g* 193 N.E. 855 (Ind. 1935), the Indiana Supreme Court, in upholding the gross income tax against both state and federal constitutional attacks, said:

> We conclude that the tax in question is an excise, *levied upon those domiciled within the state* or who derived income from sources within the state, *upon the basis of the privilege of domicile* or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justifies a tax upon the basis of the right to receive income within, or transact business under the protection of, the state. We feel that the weight of reason and authority sustains this view.
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> *Id.* at 379 (emphases added).

Miles II also clearly recognized that the power to levy the gross income tax on Indiana domiciliaries included the power to levy it on income those domiciliaries earned outside the state. That opinion, *id.* at 378, quoted extensively from *Lawrence v. State Tax Commission of Mississippi,* 52 S.Ct. 556 (U.S. 1932), in which a Mississippi resident challenged that state's tax assessment on contracting income he earned in Tennessee. In sustaining the assessment the United States Supreme Court said:

> The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, *domicile in itself establishes a basis for taxation*. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government. *See Fidelity & Columbia Trust Co. v. Louisville*, 245 U.S. 54, 58[,] [38 S.Ct. 40, 40 (1917)]; *Maguire v. Trefry*, 253 U.S. 12, 14, 17[,] [40 S.Ct. 417, 418, 419 (1920)]; *Kirtland v. Hotchkiss*, 100 U.S. 491, 498[,] [25 L.Ed. 558, 562 (1879)]; *Shaffer v. Carter*, 252 U.S. 37, 50[, 40 S.Ct. 221, 224-225 (1920)]. The Federal Constitution imposes on the states no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, *it leaves the states unrestricted in their power to tax those domiciled within them*, *so long as the tax imposed is* upon property within the state or *on privileges enjoyed there*, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment. *Kirtland v. Hotchkiss*, *supra*.
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> ….
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> It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by [that state] on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, *regardless of the place where it is carried on*. *The tax,* which is apportioned to the ability of the taxpayer to bear it, *is founded upon the protection afforded to the recipient of the income* by the state, in his person, in *his right to receive the income*, and in his enjoyment of it when received. *These are rights and privileges incident to his domicile in the state* and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship.
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> 52 S.Ct. at 557 (emphases and insertions added, and omission, by the Department).

Both the Indiana courts and the United States Supreme Court continue to take the position that the state can tax all of the income of its residents and domiciliaries. In *Thomas v. Indiana Department of State Revenue,* 675 N.E.2d 362 (Ind. Tax Ct. 1997), an individual Indiana adjusted gross (i.e., net) income taxpayer appealed this Department's denial of an a credit for income tax paid to, and assessed him tax on income earned in, the District of Columbia. On appeal, the taxpayer "challenge[d] Indiana's authority to levy the adjusted gross income tax on sources of income earned outside Indiana." *Id.* at 367. In response the Indiana Tax Court said:

> This claim is clearly without merit. It is well-established that a state "may tax *all* the income of its residents, even income earned outside the taxing jurisdiction." *Oklahoma Tax Comm'n v. Chickasaw Nation*, [515] U.S. [450], [462-463], 115 S.Ct. 2214, 2222, 132 L.Ed.2d 400 (1995)[emphasis in *Chickasaw Nation*]. In *New York ex rel. Cohn v. Graves*, the [United States] Supreme Court explained:
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> > That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. *Domicile itself affords a basis for such taxation*. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from the responsibility for sharing the costs of government.... A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. *The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicile within the state.* To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship.
> >
> > *Neither the privilege nor the burden is affected by the character of the source from which the income is derived.*
>
> 300 U.S. 308, 312-13, 57 S.Ct. 466, 467-68 (1937) (citations omitted [by the Indiana Tax Court]). That a state chooses to grant a credit to residents for taxes paid in other jurisdictions should not be mistaken for a lack of authority to levy on such proceeds. *See* 2 J. Hellerstein & W. Hellerstein, *State Taxation* § 20.04 (Supp. 1993). Thus, *this Court holds that Indiana has the authority to tax the out-of-state income of its residents.*

675 N.E.2d at 367-368 (all emphases after first added by the Department). The fact that the tax in issue here is gross rather than net, as was the case in *Cohn* and *Thomas*, and in *Chickasaw Nation* in relevant part, is a distinction without a difference. The type of income tax does not affect the fact that the state has the power to tax the income of its residents or domiciliaries, but only the extent to which it has chosen to exercise that power. *Miles II*, if no other opinion, remained dispositive authority that Indiana continued to have full power and authority to impose tax on the entire gross income of its domiciliaries, commercial or otherwise, wherever earned. Any abatement of that liability can only be in the form of an exclusion, exemption, deduction or credit, given as a matter of legislative, or authorized regulatory, grace. *See Thomas*, 675 N.E.2d at 368. Under IC § 6-8.1-5-1(b) (1998), the person against whom a proposed assessment is made has the burden of proving that it is wrong. This burden of proof includes proving entitlement to an exclusion, exemption, deduction or credit that the auditor disallowed.

The protestant admits that the commercial domicile of the parent was in Indiana. However, the parent's centralizing all the subsidiaries' financial and administrative operations at its Indiana headquarters indicates that Indiana was also in fact the headquarters, and thus the commercial domicile of not only the parent, but also of each member of the affiliated group and of the group as a whole. This was the case partly as a result of the group's own actions. The group chose to file consolidated Indiana gross income tax returns for the audit period. "The spirit and intent of the gross income tax consolidated filing statute [former IC § 6-2.1-5-5] is to treat an affiliated group as a single taxpayer." *Associated Ins. Cos. v. Ind. Dep't of State Revenue*, 655 N.E.2d 1271, 1274 (Ind. Tax Ct. 1995). By filing consolidated returns, the Indiana affiliated group thereby agreed to such treatment. Moreover, Indiana was the commercial domicile of that group not only in fact but also as a pure matter of law. The Indiana affiliated group is the taxpayer as a matter of substantive definition. *See* former IC § 6-2.1-1-16(28) and IC § 6-8.1-1-3 (1988) (1993) (1998) (respectively defining "taxpayer" and "person" as including, *inter alia*, any "group or combination acting as a unit[]") and former 45 IAC § 1-1-7 (defining a "taxpayer" as, *inter alia*, "a 'person' "). Legally, therefore, that group, not just the parent, was the taxpayer.

It follows from all of the foregoing facts and authorities that the commercial domicile of the parent is also the commercial domicile of the Indiana affiliated group, i.e. the taxpayer, and of each of its members. It further follows that Indiana, and this Department as the state agency authorized to administer the gross income tax, have full legal authority to assess that tax on all the gross income of the entire Indiana affiliated group unless the taxpayer proves that an exception, such as the "business situs" test discussed below, applies.

3. The "Business Situs" Test: Business Situs of a Taxpayer and Its Relationship to the "Commercial Domicile" Rule and to the "Tax Situs" of an Intangible

Former IC § 6-2.1-2-2(a)(1) imposed the gross income tax on "[t]he entire taxable gross income of a *taxpayer* [as previously defined, i.e. including an affiliated group] who is a resident *or a domiciliary* of Indiana[.]" *Id* (emphases added). Thus, both former IC § 6-2.1-2-2(a)(1) and former 45 IAC § 1-1-51 imposed gross income tax on all of the interest the taxpayer earned on its pre-need contracts as being, respectively, gross income in general and gross income from intangibles in particular, unless it can show that these contracts are *"directly related to an integral part of a business regularly conducted at a 'business situs' outside Indiana."* Former 45 IAC § 1-1-51, sixth paragraph, first sentence (emphasis added). The protestant thus has the burden of proving that the pre-need contracts fall within this exception to the "commercial domicile" test. The exception, like all "exceptions to a statute [or a regulation,] must be strictly construed." *Natural Res. Comm'n v. Porter County Drainage Bd.*, 576 N.E.2d 587, 589 (Ind. 1991). "The rules of statutory construction apply to the construction of administrative regulations[.]" *State Bd. of Tax Comm'rs v. Two Market Square Assocs., L.P.*, 679 N.E.2d 882, 885 (Ind. 1997).

The Tax Court explained the "business situs" test in *Bethlehem Steel I,* saying that

> the dispositive analysis for imposing tax under the "business situs" test focuses, as the [Indiana] supreme court did in *Miami Coal*, on the relationship between the intangible and the "business situs." A conclusion that an intangible is integrally connected with a taxpayer's "business situs" determines what may be termed the *intangible's "business situs"* or the *"tax situs" or "source"* of the intangible.

597 N.E.2d at 1334 (first emphasis in original) (second emphasis added). As the preceding quote indicates, the Tax Court created the phrase "tax situs," which the Indiana Supreme Court adopted on appeal (*see Bethlehem Steel II*, 639 N.E.2d at 269 and 270), as a synonym for an intangible's "business situs." In addition, *Bethlehem Steel I* refers to the "source" of an intangible as another synonym for its "business situs" (and, by extension, its tax situs). 597 N.E.2d at 1335. It does so because former IC § 6-2.1-2-2(a)(2) imposed the tax on the gross income of non-resident or non-domiciliary taxpayers "derived from activities or businesses or any other *sources* within Indiana[.]" *Id* (emphasis added). Many, if not most, of the reported Indiana opinions since *Miami Coal* that decided the "business situs" of an intangible, including the *Bethlehem Steel* opinions, did so under former IC § 6-2.1-2-2(a)(2) and its predecessors. However, the taxpayer in *Miami Coal* itself was an Indiana domiciliary corporation that the Indiana Supreme Court held had been improperly assessed property tax on accounts receivable the court found had an out-of-state business situs. The analysis for determining the business situs of an intangible under former 45 IAC § 1-1-51 is thus the same for resident or domiciliary taxpayers with out-of-state operations subject to former IC § 6-2.1-2-2(a)(1) and for non-resident or non-domiciliary taxpayers with in-state operations subject to former IC § 6-2.1-2-2(a)(2).

No single fact, such as the jurisdiction in which a business situs of a taxpayer is located, the physical location of an intangible, or the residence or domicile of the customer or buyer where the intangible in question is a contract, is conclusive in determining that intangible's tax situs. As a result of the *Bethlehem Steel* opinions, "we [now] look to the whole of the income-producing transaction—the actors, activity, and property—and weigh the in-state and out-of-state elements to determine if the intangible has an Indiana tax situs." *Bethlehem Steel II*, 639 N.E.2d at 269-270. "Deciding the source of income, or 'business situs,' [of an intangible] for purposes of state taxation,…is fact sensitive, requiring a case by case determination." *Bethlehem Steel I,* 597 N.E.2d at 1337. Making that determination, however, requires evidence of what those facts are, evidence that, as the Department will discuss below, the protestant has failed to provide.

D. THE PROTESTANT HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF THAT THE PRE-NEED CONTRACTS HAD OUT-OF-STATE TAX SITUSES.

1. The Mortuary and Cemetery Industries Generally Market Pre-Need Contracts on a Centralized, Rather than a Local, Basis.

As previously noted, the protestant has not provided the Department with any evidence indicating the office through which each pre-need contract to be performed at an out-of-state location was sold. In particular, the protestant has provided no evidence indicating the office of the taxpayer through which each such pre-need contract was marketed, negotiated and brought into being, the office (if different) that decided to approve the contract and extend credit to each consumer, that kept the payment accounts and other records of executory contracts, and that supervised collection proceedings on delinquent contracts. The Department thus has none of the necessary facts before it from which it can make the fact-sensitive determination of the business situs of each pre-need contract to be performed at an out-of-state location.

The Department cannot simply presume from the mere circumstance that a pre-need contract was or is to be *performed* by an out-of-state subsidiary or location that it was also in fact *marketed and negotiated from, signed at and serviced from* that subsidiary or location. The latter circumstances do not necessarily follow from the former because of the existence of an alternative to local activity that the mortuary and cemetery industries generally use to market pre-need contracts. The best-known popular commentator on these industries describes this alternative marketing method as follows:

> All of the clever planning[,] [which the author had previously described,] to extract the maximum use from each acre of [cemetery] land would avail little if the cemetery promoter then had to sit back and wait upon the haphazard whim of the Grim Reaper. With the death rate at its present [1995-96] level, he might have to wait a very long time indeed to begin to realize profit on his investment. This barrier has been brilliantly surmounted by the massive "pre-need" sales campaign, *employing squads of telemarketers*…. One of the most successful devices in the history of merchandising, pre-need selling is the key to the runaway growth of the modern cemetery business.

MITFORD, REVISITED at 86 (emphasis added). *See also* JESSICA MITFORD, THE AMERICAN WAY OF DEATH 130 (Simon and Schuster 1963), which the above quotation repeats almost *verbatim*, but which instead refers to "squads of door-to-door salesmen[,]" *id.* The sales force might consist of employees of a mortuary or cemetery company, or could be a marketing company hired by that mortuary or cemetery company but acting as an independent contractor.

2. There Is Some Evidence From a Partly Overlapping Sales and Use Tax Audit of the Taxpayer Suggesting It Used a Centralized

Sales Force to Market Pre-Need Contracts.

Thus, sales representatives that were operating out of, or controlled from, a location other than the out-of-state subsidiaries or locations at which the pre-need contracts were to be performed, may have contacted and solicited all or some of the consumers that entered into these contracts. In this connection the Department notes that the auditor included several completed copies of a form Prepaid Funeral Retail Installment Contract in the workpapers of a gross retail (sales) and use tax audit of the parent the auditor conducted simultaneously with the taxpayer's income tax audit, and that partly overlapped the income tax audit period. The contracts, most of which were executed in the third quarter of 1995 (i.e., within the income tax audit period), include a paragraph above the signature block in bold-faced type entitled "Purchaser's Right to Cancel." That paragraph repeats *verbatim* the statement of the buyer's right to cancel a home solicitation sale set out in Uniform Consumer Credit Code ("U.C.C.C.") § 2.503 (1968 Act), 7 U.L.A. Pt. III 285, 398-399 (2002), enacted by P.L. No. 366, § 3,1971 Ind. Acts 1557, 1605 and formerly codified at IC § 24-4.5-2-503 (1988) (repealed 1992). (IC § 24-4.5-2-502 (1988 and Supp. 1992) (1993), which incorporated the FTC Cooling-Off Rule, 16 C.F.R. Part 429 (1992-1994), performed the same function as the repealed statute during the audit period). The fact that the parent felt it necessary to use this paragraph, and continued to use it throughout the income tax audit period, implies that the parent was using a door-to-door or a telemarketing sales force. (P.L. 237, § 1, 1979 Ind. Acts 1132, amended IC § 24-4.5-2-501(1), the Indiana enactment of U.C.C.C. § 2.501(1), 7 U.L.A. Pt. III at 395, to define "home solicitation sale" as "including a solicitation over the telephone[.]" 1979 Ind. Acts at 1132).

3. The Protestant Has Not Submitted Any Evidence In this Protest Concerning the Pre-Need Contracts.

a. There Is No Evidence that the Taxpayer's Members Marketed the Pre-Need Contracts at Their Various Out-of-State Locations.

The protestant has submitted no evidence whatever in this protest concerning the pre-need contracts to be performed at the out-of-state subsidiaries or locations. It has by necessary implication therefore also failed to submit any evidence that any of the contracts were anything other than pre-need contracts the taxpayer solicited, as distinguished from pre-need or at-need contracts entered into by "walk-in" consumers at those locations. More importantly, the protestant has failed to submit any evidence that the taxpayer's members used sales forces that were operated and supervised from their respective out-of-state locations to market, negotiate and close these contracts. However, the Department wishes to make it clear that it is not finding that the taxpayer operated or controlled a centralized sales force from the parent's Indiana headquarters. It is only finding that the protestant has failed to prove that the out-of-state subsidiaries and locations each had decentralized sales forces separate from any sales force that the parent's headquarters may have operated or controlled.

b. There Is No Evidence that the Out-of-State Subsidiaries and Locations Had Independent Authority to Accept Pre-Need Contracts.

The Department also cannot simply assume that the out-of-state subsidiaries and locations accepted each of the pre-need contracts on their own authority and without approval by the parent's Indiana headquarters. (*See* former 45 IAC § 1-1-49(5), which stated that one way of establishing a business situs, either in Indiana or another state, is "[a]cceptance of orders without the right of approval or rejection in another state[,]" *id.*) In this connection, it is important to remember that these are installment contracts and the decision to enter into one with a consumer is thus an extension of credit to that consumer. Typically, prior to extending credit, a prospective consumer creditor obtains a report on the prospective consumer to determine his or her creditworthiness. The creditor gets the report either from a national credit reporting company affiliated with, or directly from, a credit bureau located where the consumer resides, since the information the report will contain is at least in part a matter of local knowledge. However, the preparation of that report, which a third-party independent contractor performs, does not necessarily also imply that the decision to extend credit to the consumer is made by the prospective creditor's local outlet, rather than by its headquarters or an intermediate-level office. The Department is not finding that the parent's headquarters approved each of the pre-need contracts to be performed by an out-of-state subsidiary or location. However, as to any contracts it may have accepted, the intangible each such contract represented would have acquired an Indiana tax situs. This would be the case by operation of the "commercial domicile" rule as discussed above. However, in this connection it is also significant to note that the contract would be considered made in Indiana as a matter of consumer law, even if made with a non-resident consumer. IC §§ 24-4.5-1-201(1) and 1-201(1)(a), the Indiana versions of U.C.C.C. §§ 1.201(1) and 1.201(1)(a), 7 U.L.A. Pt. III at 315, respectively state that "this article applies to sales,…made in this state" and that "a sale…is made in this state if the buyer's agreement or offer to purchase…is received by the seller or a person acting on behalf of the seller in this state[]"). (The reference to "a person acting on behalf of the seller was added to IC § 24-4.5-1-201(1)(a) during the audit period by P.L. 122-1994, § 4, 1994 Ind. Acts 1473, 1476.) *See also* U.C.C.C. §§ 2.104(1) and 2.105(3), 7 U.L.A. Pt. III at 330 and 333, respectively codified at IC §§ 24-4.5-2-104(1) and -2-105(3), and which define "consumer credit sale" as including a "sale of…services," and "services" as "includ[ing] …(b) privileges with respect to… *funerals [and] cemetery accommodations*[.]" *Id* (emphasis added). The taxpayer, as an Indiana domiciliary, was chargeable with constructive knowledge of all of these legal authorities. It was thus doubly incumbent on the protestant to affirmatively establish that an out-of-state subsidiary or location, and not the parent's Indiana headquarters, made the final decision to accept each pre-need contract to be performed by that subsidiary or location. The protestant has failed to do so.

c. There Is No Evidence that the Out-of-State Subsidiaries and Locations Serviced Consumers' Payments on Executory Pre-Need Contracts.

Nor can the Department presume that the out-of-state subsidiaries or locations received and processed the payments on the pre-need contracts while these contracts were executory. As noted in the Statement of Facts, the parent centralized all the administrative and financial operations of the subsidiaries and of the parent's various locations at the parent's headquarters. All but two of the subsidiaries made daily wire transfers of their revenues to the parent's checking account at an Indiana bank headquartered in the same city as the parent. Logically, this financial centralization should have included, not just payments by new, "walk-in" pre-need or at need consumers, but also payments on already existing pre-need contracts. As noted earlier in this Discussion, "pre-need selling is the key to the runaway growth of the modern cemetery business." MITFORD, REVISITED at 86. Given this fact, the pre-need contract payments would have been too important a part of the taxpayer's cash flow for the parent not to have accounted for and managed them on the respective behalves of all of the taxpayer's members, including those with out-of-state operations. The Department is aware, as it will discuss under Issue II below, that most states require the deposit of pre-need contract payments into trusts specially created and maintained for that purpose. It is also aware that the taxpayer maintained at least one such trust in the name of each member of the taxpayer's Indiana affiliated group with out-of-state operations at a financial institution in that location's local market. However, these circumstances do not preclude the possibility that the taxpayer centralized the management and use of the pre-need contract payments. In this connection the Department notes that at the hearing the protestant submitted in evidence a Form 1041 (U.S. Income Tax Return for Estates and Trusts) for calendar year 1995 for a grantor trust the parent created, named for one of its out-of-state subsidiaries.

Aside from this fiduciary return, however, the protestant has not provided the Department with any evidence establishing how pre-need contract payments were treated, and in particular how they were routed and processed. The Department therefore cannot find that the consumers made their payments directly to the out-of-state subsidiaries or locations which then transferred the payments into their respective local pre-need trusts without any involvement of the parent's Indiana headquarters.

d. There Is No Evidence that the Out-of-State Subsidiaries and Locations Collected Delinquent Pre-Need Contract Balances.

Lastly, the protestant has submitted no evidence that each out-of-state subsidiary or location supervised the collection of delinquent contracts independent of the parent's Indiana headquarters. As far as the actual initiation of the collection process was concerned, Subparagraph 6(c) of the form Pre-Need Funeral Retail Installment Contract states that a "default [would be] referred to an attorney by SELLER[]" (emphasis in original), which on its face would appear to refer to the contracting member of the taxpayer. However, it does not follow from these circumstances that a contracting out-of-state subsidiary or location also in fact supervised the collecting firm subsequent to its being retained. In the absence of any evidence to this effect it is possible that the parent's headquarters could have done so, either directly through any collections personnel or in-house counsel it may have had, or indirectly through any debt collection or law firm, it may have retained. Such supervision would have been consistent with the parent's centralization at its Indiana headquarters of the taxpayer's administrative and financial operations and payment of the members' expenses, including presumably any fees they incurred for professional collection services. It also would have been a logical extension of any accounting and management activities in which the parent engaged in connection with any contract payments it may have received on executory contracts not in default. The Department is not finding that the parent in fact engaged in such supervision, but only that the protestant has failed to prove that the out-of-state subsidiaries and locations did so.

4. The "Commercial Domicile" Test Therefore Applied and The Pre-Need Contract Interest Was Subject to Indiana Gross Income Tax.

In summary, the protestant has failed to submit any evidence to the Department from which it could determine the business situses of the pre-need contracts, which would not necessarily be same as the respective locations of the out-of-state subsidiaries and locations. The protestant has thus failed to meet its burdens of production of evidence, and of proof, that these intangibles had business situses outside Indiana and therefore fell within the "out-of-state business situs" exception to the "commercial domicile" test of former 45 IAC § 1-1-51, sixth paragraph. Having failed to bring the taxpayer within this exception, the "commercial domicile" test of that regulation is fully applicable to this issue. The proposed assessments of gross income tax on the interest that the pre-need contracts earned are fully consistent with this test as set out in former 45 IAC § 1-1-51 and the judicial opinions on which the regulation is based and which have interpreted it, as discussed above. The auditor, who used the "commercial domicile" test of the regulation as authority, therefore did not err in adjusting the taxpayer's gross income tax liability to propose these parts of the assessments.

However, even if the protestant had met its burden of proof that out-of-state tax situses had generated the interest, it would have been unavailing as to interest received by the parent from its direct outlets (as distinguished from any interest that subsidiaries incorporated and operating out of state may have received). Former IC § 6-2.1-1-2(c)(6) did state that as to Indiana-chartered corporations the definition of "gross income" excluded gross receipts "from a trade or business situated and regularly carried on at a legal situs outside Indiana or from activities incident to such trade or business…." *Id.* However, former IC § 6-2.1-1-2(d) qualified this exclusion in relevant part by stating that "[t]he exclusion provided by clause (6) of subsection (c) does not apply to any receipts of a taxpayer received as *interest or dividends*, from sales,…or to bonuses or commissions received by any taxpayer." *Id* (emphasis added). The auditor did not cite this latter statute as a basis for this adjustment, but the Department finds that it provides additional support for these parts of the proposed assessments as to any pre-need contract interest the parent received.

FINDING

The Department denies the protest as to this issue.

II. Gross Income Tax—Imposition on Domiciliary—Source State of Gross Income—"Pre-Need" Trust Interest and Dividend Distributions

DISCUSSION

A. THE PROPOSED ASSESSMENTS AND THE PROTESTANT'S ARGUMENT

The file indicates that each member of the group maintained one or more of what are called "pre-need trusts" in connection with the operations of each of that member's locations. All of these trusts had the same name as the member or location in question, and were described as being either "Funeral Pre-need Trusts" or "Merchandise Trusts." As noted in the Discussion of Issue I above, the Notices of Proposed Assessment to the taxpayer include proposed assessments of gross income tax at high rate on five categories of interest as depicted on the taxpayer's federal Forms 1120 filed during the audit period. In addition to the previously discussed category of "Installment Contract Interest," the protestant also challenges the proposed assessments as to the "Merchandise Trust Interest" and "Funeral Pre-need Trust Interest" categories. The Notices also include proposed assessments of gross income tax on dividends that the merchandise and funeral pre-need trusts earned during the audit period and distributed to the taxpayer, to which the protestant also objects. It argues that the interest and dividends distributed to the taxpayer's members were not subject to imposition of gross income tax on the ground that the trusts, and the trust securities that generated that income, were managed and maintained by trustees outside Indiana. Before addressing the merits of this argument, however, the Department will first discuss "pre-need" trust state regulatory schemes, both generally and in particular in states where the various members of the taxpayer's Indiana affiliated group were incorporated or maintained facilities. The Department will then examine how the terms of the taxpayer's pre-need contracts with its various customers relating to pre-need trusts and the income they earn fit within this statutory framework.

B. OVERVIEW OF STATUTORY REGULATION OF PRE-NEED FUNERAL TRUSTS

"The most common funding methods [for pre-need contracts] recognized under state statutes are (1) the state-regulated trust and (2) the funeral insurance or annuity policy." Frank, *Preneed Funeral Plans* at 7. (The Department discusses funeral insurance or annuity policies under Issue IV below.) "The most common form of funding for a preneed funeral contract…is the state-regulated trust." *Id.* Thirty-seven states "expressly require the creation of a trust account in connection with the sale of a preneed funeral contract." *Id* & n.27 (listing statutes from thirty-seven states that require creation of pre-need trusts, escrow or trust accounts, or equivalent forms of deposit). These states include Indiana, the parent's state of incorporation and commercial domicile, and Maryland, Michigan, Pennsylvania and West Virginia. *See id* (citing, *inter alia*, Indiana, Maryland, Michigan, Pennsylvania and West Virginia statutes). Another eight states make the use of a pre-need trust one valid option for the funding of a pre-need contract. *Id.* at 7 & n.28 (listing statutes from eight states that make pre-need trust optional). Among these are Florida, Illinois and Texas. *See id* (citing, *inter alia*, Florida, Illinois and Texas statutes). At least one member of the taxpayer's Indiana affiliated group had been incorporated or maintained an outlet in Florida, Illinois, Maryland, Michigan, Pennsylvania, Texas and West Virginia during the audit period.

Frank describes the basic method of administering pre-need funeral trusts as follows:

> In the simplest preneed funeral trust, the consumer pays the seller the agreed consideration for the future funeral services and goods. The seller in turn deposits the funds into a special account. Over the life of the agreement, the trust funds grow. Upon the death of the recipient, the provider performs the funeral. After giving proof of performance to the trustee, the provider seeks reimbursement out of the trust funds.

Frank, *Preneed Funeral Plans* at 22. Statutes in states that have mandated or authorized pre-need trusts also require the contracting mortuary or cemetery company to deposit into such trusts a percentage of the consumer's payments under the pre-need contract that varies from state to state. *See generally id.* at 26-27 & 26 nn.143-147 (respectively noting variance and classifying statutes specifying required percentages of deposit). "[T]he majority of states require preneed funeral sales proceeds to remain in trust accruing interest[.]" *Id.* at 28 & n.160 (citing, *inter alia,* Florida, Indiana, Michigan, Ohio, Texas, Virginia and West Virginia statutes). "The vast majority of states require that preneed funeral contract sale proceeds be entrusted to a fiscal institution as trustee or placed directly into some other financial depository." *Id.* at 23 & n.130 (citing, *inter alia*, Illinois, Indiana, Maryland, Pennsylvania, Texas and West Virginia statutes). The pre-need contract may include language declaring the consumer's payments to such a trust to be irrevocable. Such language enables consumers who need to dispose of assets to qualify for Medicaid or for Supplemental Security Income without incurring a penalty. *See* MITFORD, REVISITED at 268-69 (discussing this subject), Frank, *Preneed Funeral Plans* at 9 (same) and *id.* n.36 (citing 42 U.S.C.A. §§ 1381-1383(d) (West 1991 & Supp. 1995)). *See also Ind. Family & Soc. Servs. Admin. v. Culley*, 769 N.E.2d 680, 683 (Ind. Ct. App. 2002) and authorities cited there (discussing exemption of transfer of irrevocable Indiana funeral trusts from Medicaid applicant asset transfer restrictions).

The beneficiary, and the ownership of the beneficial interest in the trust corpus, also varies among the states that have enacted statutes on these subjects. Of the states in which the members of the taxpayer's Indiana affiliated group were incorporated or had outlets, Michigan, like twenty-one other states, requires the trust funds to be held for the benefit of the consumer or decedent. *Id.*

at 8 & n.32 (listing statutes from twenty-two states that so require, including, *inter alia*, MICH. COMP. LAWS ANN. § 328.222(1) (West 1992)). Illinois and West Virginia are two of four states whose trust statutes do not specify a beneficiary. *Id.* at 8 & n.34 (listing statutes from four such states, including, *inter alia*, Illinois and West Virginia). However, in Florida, where the Department finds the greatest number of the taxpayer's outlets to have been incorporated or located, and in Indiana, the beneficiary is the seller or provider of the funeral services. *See id.* at 8 n.33 (citing Florida and Indiana statutes). *See also id.* at 27-28 (stating that "in Florida, the statutory language makes it clear that the certificate holder (seller) is the owner of funds paid into trust[]") and *id.* at 28 n.155 (citing FLA. STAT. ANN. § 497.415(1) (West 1988 & Supp. 1995)). If the taxpayer had the beneficial interest in the Florida trust accounts' principal it follows that it also had the beneficial interest in any income those trust accounts earned.

C. THERE IS EVIDENCE THAT THE TAXPAYER CONTRACTED WITH CONSUMERS TO USE THE PRE-NEED TRUSTS' CORPUSES AND INCOMES AS ITS OWN.

The taxpayer further strengthened its claims to the trusts' corpuses and incomes by contracting with consumers to that effect, thereby insuring it would receive those sums in states whose statutes permitted, or that at least did not clearly bar, that practice. As noted under the Discussion of Issue I, the auditor included several completed copies of a form Prepaid Funeral Retail Installment Contract of the parent in the workpapers of its gross retail (sales) and use tax audit, which partly overlapped the taxpayer's income tax audit period. The Department will assume for purposes of this letter, without finding, that the members of the taxpayer's Indiana affiliated group used this or a substantially similar form pre-need contract in other states, in light of the protestant's failure to submit a copy of any other such contract any of them may have used, and given the taxpayer's centralization of administrative operations, presumably including professional legal services. Two paragraphs of this contract set out the parent's rights as between it and the consumer on the questions of entitlement to trust corpus and income, among other matters:

> 7. Interest will accrue to the trust account(s) and *the principal and interest earned shall inure to the benefit of the beneficiary of the trust(s) (SELLER)* to cover all costs incident to the beneficiary's performance of this Agreement, any excess shall be refunded to the PURCHASER, their estate or their heirs at law. Disbursement of funds discharging this Agreement may be made by the Trustee, upon receipt of evidence satisfactory to Trustee that the Agreement has been performed. PURCHASER represents and acknowledges that PURCHASER understands the IRREVOCABLE nature of such trust(s).
>
> 8. *PURCHASER hereby appoints and irrevocably designates SELLER as PURCHASER's agent and attorney-in-fact with respect to PURCHASER's interest in the trust account(s) and all matters pertaining to same.* The Trustee shall be permitted to follow all lawful instructions of SELLER. PURCHASER empowers Trustee to invest in a life insurance or annuity policy or policies, the owner and beneficiary of which shall be the Trustee. *This power of attorney is coupled with an interest, is irrevocable, and shall not be affected by PURCHASER's subsequent death, disability or incapacity.*

(Emphases added.)

As can be seen, Paragraph 7 gave the parent (and presumably the other members of the taxpayer's Indiana affiliated group) the beneficial interest in the trust principal and income to the extent necessary to perform the contract. The consumer or the consumer's estate would get a refund only if there were any excess over that amount. However, the parent (and presumably the taxpayer) included other language in Paragraph 8 to insure that it would have immediate beneficial ownership of the entire trust corpus and income, including any such excess. In that paragraph the consumer grants the seller an irrevocable power of attorney coupled with an interest. The Department presumes that the parent chose this language intentionally and with full understanding of its effect. It is well settled at common law that where a power of attorney is coupled with a vested interest in the property that is the subject of the power, both the power and the interest survive the principal's death, the power does not create an agency and the putative agent becomes the principal concerning the interest. *Hunt v. Rousmanier's Adm'rs,* 5 L.Ed. 589, 597(U.S. 1823) (Marshall, C.J.)*; see also, e.g., Whidden v. Sunny South Packing Co.,* 162 So. 503, 505 (Fla. 1935) and *Hawley v. Smith,* 45 Ind. 183, 203-06 (1873) (both quoting *Hunt*).

The parent, and any subsidiaries with Florida operations, had the beneficial interest in the Florida pre-need trusts by statute, and by extension to their income as well. By virtue of the power-coupled-with-an-interest language in Paragraph 8 of the form Prepaid Funeral Retail Installment Contract, the parent (and presumably the taxpayer) also had the beneficial interest in the other out-of-state pre-need trusts' principal and income in all states in which it operated that recognized such language. The taxpayer thereby was entitled to treat the earnings on all those trust deposits as its own. Such evidence as the protestant has submitted indicates that the taxpayer did exactly that. In addition to the Form 1041 for calendar 1995 for the grantor trust the parent created, mentioned in the Discussion of Issue I above, the taxpayer also submitted Forms 1041 for calendar 1995 for three pre-need merchandise trusts. Schedule K-1 (Beneficiary's Share of Income, Deductions, Credits, etc.) of each return indicates that the parent is the beneficiary. The returns also indicate, for that year at least, the entire adjusted total income earned during the year and indicated on Line 17 was distributed to the parent, for which the trusts claimed income distribution deductions on Line 18 of the 1041s. All four trusts are maintained out-of-state and are named after out-of-state subsidiaries or locations of the parent. The grantor trust is maintained in Florida. The other three are maintained in Pennsylvania. One of the three has the same name as one of four wholly owned Pennsylvania subsidiaries that the parent merged into itself effective December 31, 1991 and operated thereafter as outlets under its own name. The Department cannot identify the other two pre-need trusts from the names appearing on their respective 1041s as relating to any location maintained by a member of the taxpayer’s Indiana affiliated group.

D. THE PRE-NEED TRUSTS’ LEGAL SITUSES AND THE TRUSTEES’ DOMICILES ARE IRRELEVANT TO THE QUESTIONS OF THE SITUSES OF THE TAXPAYER’S EQUITABLE INTERESTS IN THE TRUSTS AND ITS GROSS INCOME TAX LIABILITY ON THE DISTRIBUTED INTEREST AND DIVIDEND INCOME.

As previously noted, the protestant contends that the Department cannot assess gross income tax on the interest and dividends the pre-need trusts distributed to the taxpayer because the trust securities that generated that income were managed and maintained out of state. However, as a pure question of Indiana’s power to tax, the fact that *legal* title to the pre-need trust assets may have been maintained in other states does not bar the Department from taxing the trust income distributed to the *equitable* owner of the corpus (i.e., the taxpayer). *See Maguire v. Trefry,* 40 S.Ct. 417, 419 (U.S. 1920) (holding that Massachusetts could tax the income a Massachusetts beneficiary received from a trust consisting of assets held and administered in Pennsylvania), reaffirmed in *New York ex rel. Cohn v. Graves,* 57 S.Ct. 466, 468 (U.S. 1937). *See also Guaranty Trust Co. v. Virginia,* 59 S.Ct. 1, 3 (U.S. 1938) (holding that Virginia could levy an income tax on a trust beneficiary residing in Virginia even though the New York trustees had paid New York taxes on the same income), citing *Lawrence* and *Cohn*, discussed under Issue I above. As found there, the taxpayer was an Indiana domiciliary whose income Indiana had full power to tax. The taxing of income distributed to the taxpayer as a beneficiary of out-of-state trusts is merely a specific application of this general power. The domiciles of the various trustees thus are irrelevant to this question. Whatever effect they may have for these trusts’ respective gross receipts, fiduciary income or property tax liabilities in other states, the trustees’ domiciles have no bearing on whether the taxpayer was, and the protestant as its successor in interest is, subject to gross income tax on the distributed income and dividends.

The physical locations of the trusts’ respective assets are also irrelevant as a matter of Indiana gross income tax law. The protestant stated that the interest and dividends the taxpayer received derived from securities, i.e. intangible personal property, held in the pre-need trusts. The taxpayer’s beneficial interests in the respective pre-need trusts were therefore also intangible to that extent. “Unless statutes provide otherwise, the beneficial estate or interest of the cestui que trust is subject to the same incidents, properties and consequences as attach to similar legal estates and interests.” 90 C.J.S. *Trusts* § 240, at 367 (2002). “[I]f the trust property is personal property, the interest of the beneficiary is personal property[.]” RESTATEMENT (SECOND) OF TRUSTS § 130(a) (1959). The authorities discussed under Issue I above used to determine the tax situs/es of intangibles therefore apply as well to the taxpayer’s equitable interests in the pre-need trusts as their beneficiary, to the extent that they derived from intangibles. Former 45 IAC § 1-1-51, eighth paragraph stated that “*[t]he physical location of the intangible at the time any income is received* under either the ‘business situs’ test or the ‘commercial domicile’ test *is not a controlling factor* but will be considered in view of all of the facts presented.” *Id* (emphases added). In the specific context of the pre-need trust intangibles the taxpayer as beneficiary used in its business, the physical locations of the trusts’ constituent intangibles are only relevant in determining the respective legal situses of those intangibles and any corresponding liabilities of the pre-need trusts for tax imposed by the trustees’ respective domiciliary states. Given that the respective business situses of those intangibles could in principle be completely different from their legal situses, the intangibles’ physical locations are irrelevant to the question of whether the taxpayer is liable for Indiana gross income tax.

In short, the question is not whether the pre-need trustees, as holders of the legal titles to the respective trusts’ intangibles, may have managed and maintained those intangibles outside Indiana. The legal situs/es of those intangibles for purposes of the tax laws of other states might very well be different from the tax situs/es of the taxpayer’s equitable interests in those intangibles for Indiana gross income tax purposes. The real issue, in terms of the authorities discussed under Issue I, is what the tax situs/es of those equitable interests were, which can only be determined from evidence of where and how the taxpayer used them in its business.

E. THE PROTESTANT’S EVIDENCE FAILS THE “BUSINESS SITUS” TEST.

To prove that the assessment of gross income tax on the distributed trust interest and dividends was wrong, the protestant has the burden of proving that its use of the intangibles the pre-need trusts purchased, and the distributed interest and dividends those intangibles generated, were “‘directly related to an integral part of a business regularly conducted at [its]’business situs[es]’ outside Indiana.’” 45 IAC § 1-1-51, sixth paragraph, *quoted in Bethlehem Steel II*, 639 N.E.2d at 268. Specifically, the taxpayer has to prove that its members regularly used its equitable interests in those intangibles and their distributed income in the business operations of the respective out-of-state business locations for which it named the pre-need trusts. Doing so thereby would have given those interests out-of-state tax or business situses as well. However, the Department, after reviewing the evidence the protestant has submitted, finds that it has failed to sustain this burden of proof, as discussed below.

Strictly speaking, two of the three Forms 1041 the protestant has submitted for the merchandise trusts in question are irrelevant to the protestant’s argument on this issue, in that neither of the subsidiaries or locations for which these trusts were named were members of the taxpayer’s Indiana affiliated group during the audit period. These two returns therefore do not necessarily prove how the taxpayer treated the income it received from pre-need trusts named for locations maintained by members of that group.

However, even if they had been for such locations, neither they nor the 1041s for the Florida grantor trust and the merged Pennsylvania location help the protestant’s argument. All four returns indicate that the parent received each of the trusts’ entire adjusted total incomes for the year, and nothing else. The returns do not indicate any effective legal restrictions on the purposes for which the parent could use the distributed income, nor what it in fact did with the income once received. Nor has the protestant submitted any other evidence on these points. It has not submitted any records to the hearings officer, such as copies of the respective documents that created each trust, indicating that trust beneficiaries' use of the income was restricted to fulfilling pre-need contracts performed at, or to subsidizing the day-to-day operations of, the locations to which the trusts related. Paragraph 7 of the Prepaid Funeral Retail Installment Contract does state that "interest earned [would] inure to the benefit of the beneficiary of the trust(s) (SELLER) to cover all costs incident to the beneficiary's performance of this Agreement[.]" However, the power-coupled-with-an-interest language of Paragraph 8 of the same agreement in effect removed this restriction by enabling the taxpayer to treat the distributed earnings as its own. Most importantly, however, the protestant did not submit any books or records to the hearings officer indicating that the parent or any other member actually used distributed trust income to fulfill pre-need contracts at, or to subsidize day-to-day operations of, the namesake locations for the pre-need trusts. Nor has the protestant submitted any books or records indicating that the Michigan pre-need trust either held that income for, or distributed it to the respective consumers or on behalf of the respective decedents, as MICH. COMP. LAWS ANN. § 328.222(1) would seem to imply. Given this lack of a record, there is nothing to indicate that the taxpayer did not use the income distributed from the pre-need trusts for any business purpose of, or at any location maintained by, any member.

F. CONCLUSION: THE "COMMERCIAL DOMICILE" TEST APPLIES AND THE DISTRIBUTED INTEREST AND DIVIDEND TRUST INCOME IS SUBJECT TO INDIANA GROSS INCOME TAX.

The protestant has thus failed to sustain its burden of proof that the taxpayer's intangible equitable interests in the pre-need trusts had out-of-state tax situses, i.e. that they were "integrally connected with [the] taxpayer's '[out-of-state] business situs[es.]' " *Bethlehem Steel I*, 597 N.E.2d at 1334. Indiana being the taxpayer's commercial domicile, the auditor was correct to propose assessments of gross income tax on the interest and dividends distributed from the pre-need trusts. Even if the protestant had proved its case, the interest and dividends received by the Indiana parent (as distinguished from the out-of-state subsidiaries) would still have remained gross income taxable by Indiana by virtue of former IC § 6-2.1-1-2(d), which specifically refers to "interest or dividends," *id.*

FINDING

The Department denies the protest as to this issue.

III. Gross Income Tax—Definition of "Gross Income"—Amortization of Intangibles—Pre-Need Trusts
Gross Income Tax—Definition of "Gross Income"—Amortization of Intangibles—Situses of Intangibles

DISCUSSION

A. THE PARENT'S ACQUISITION OF, BOOK AMORTIZATION OF THE PRE-NEED TRUSTS RELATED TO, AND STATUS DURING THE AUDIT PERIOD OF, TWO TEXAS MORTUARIES

The parent acquired two Texas mortuaries with cemeteries attached in 1985 and 1986. After these two acquisitions, the parent decided to amortize the respective pre-need trusts maintained and administered in connection with each of these facilities, as each of those trusts was constituted on each acquisition's closing date. To do so the parent created a category on its chart of accounts it called "Pre-Need Trust Amortization," and each year of the audit period it recognized a certain amount of this amortization on its books. It merged one of the Texas mortuaries into itself at the end of calendar 1991, along with the four wholly owned Pennsylvania cemetery subsidiaries mentioned above in the Discussion of Issue II. As it did with those latter mortuaries, the parent thereafter ran the merged Texas mortuary as an outlet under its own name. The other one merged into the parent immediately after the end of the audit period, but remained a wholly owned subsidiary during that time.

B. THE TAXPAYER'S FEDERAL INCOME TAX TREATMENT OF THE AMORTIZATION OF THE TEXAS PRE-NEED TRUSTS

The taxpayer was also able during the audit period to begin deducting each year's pre-need trust amortization on its federal Forms 1120 due to major changes in federal tax law on depreciation and amortization of goodwill-related intangibles that occurred in the second half of the taxpayer's 1993 fiscal year. On April 20, 1993 the United States Supreme Court issued its opinion in *Newark Morning Ledger Co. v. United States*, 113 S.Ct. 1670 (U.S. 1993). The Court held that "a taxpayer able to prove that a particular [customer-based intangible] asset can be valued and that it has a limited useful life may depreciate its value [under I.R.C. (26 U.S.C.) § 167(a)] over its useful life regardless of how much the asset appears to reflect the expectancy of continued patronage, [i.e., goodwill]…." *Id.* at 1681. On August 10, 1993, less than four months later, Congress enacted I.R.C. § 197 (1988 & Supp. V 1993) (1994) in the Revenue Reconciliation Act of 1993 (Omnibus Budget Reconciliation Act of 1993, Title XIII), Pub. L. No. 103-66, § 13261, 107 Stat. 416, 532-541. Section 197 grants an amortization deduction for goodwill, customer-based and other types of intangibles identified therein as being amortizable, and sets out general rules under which federal income taxpayers may, and restrictions on when they may not, amortize them. Circumstantially, however, it appears unlikely that the taxpayer used I.R.C. § 197 for two reasons. First, subparagraph (e)(1)(A) of that section explicitly excludes interests in trusts from the definition of "section 197 intangible" in I.R.C. § 197(d). Second, the taxpayer chose a twenty-year useful life over which to amortize the pre-need trusts rather than the fifteen-year period for which I.R.C. § 197(a) provides. The Department therefore assumes for purposes of this discussion, without finding, that the taxpayer claimed its deductions under I.R.C. § 167(a) as interpreted in *Newark Morning Ledger* instead of I.R.C. § 197.

C. THE AUDITOR'S ADJUSTMENT

The auditor treated the pre-need trust amortization figures, which he took from reports the taxpayer used to prepare its 1120s, as gross income. He did not give an explicit reason why he believed such was the case, but he allocated them to the taxpayer's Indiana commercial domicile. The Department infers from this allocation that the auditor believed the sums amortized to be derived from intangible personal property. That property specifically consisted of the parent's and the remaining Texas subsidiary's respective equitable interests in the deposited pre-need contract payments, and intangible personal property purchased with those deposits for investment, constituting the pre-need trusts' corpuses. Each of those equitable interests included the parent's and the remaining Texas subsidiary's rights to receive a distribution of corpus each time they performed a pre-acquisition pre-need contract for which payments had been deposited. Their rights to receive, and actual receipts of, those distributions were in turn the legal and factual bases, respectively, for the amortization of the trusts. The auditor proposed to assess gross income tax on the amortized sums at high rate pursuant to former 45 IAC § 1-1-112 (1992), which imposed gross income tax at high rate on gross income derived from sources not otherwise described in the Gross Income Tax Act and the regulations. *See also* former IC § 6-2.1-2-5(9) (imposing gross income tax at high rate on any activity on which tax is not assessed at low rate).

D. THE PROTESTANT'S ARGUMENTS

The protestant has challenged these parts of the proposed assessments on two grounds. First, it asserts that the pre-need trust amortization is not gross income. Second, it claims that the amortization is related to the purchase of non-Indiana business locations, in essence claiming that the sums amortized derive from out-of-state business situses and that the "commercial domicile" rule is therefore inapplicable. The Department agrees with the protestant's first argument, for the reasons set out below, making it unnecessary to address the second argument.

E. THE TAXPAYER'S FEDERAL INCOME TAX DEDUCTIONS FOR PRE-NEED TRUST AMORTIZATION WERE NOT GROSS INCOME.

1. The Pre-Need Trust Amortization Deductions Were Not "Receipts."

a. Gross Income Means Gross "Receipts," Which Includes "Credits" and "Other Property."

Former IC § 6-2.1-1-2(a) defined "gross income" as "all the gross *receipts* a taxpayer receives" from the categories that subsection enumerates. *Id* (emphasis added). Former IC § 6-2.1-1-10 defined "receipts" as being "cash, notes, *credits, or other property* that is received by a taxpayer or a third party,…for the taxpayer's benefit." *Id* (emphasis added). The pre-need trust amortization deductions were plainly not cash or notes, so the only possible bases on which the auditor could have classified them as receipts was on the theory that they were either "credits" or "other property." The Department will examine each of these classifications in turn.

b. The Pre-Need Trust Amortization Deductions Were Not "Credits" as the Definition of "Receipts" Uses That Word.

In *Indiana Department of State Revenue v. Colpaert Realty Corp.*, 109 N.E.2d 415 (Ind. 1952), the Indiana Supreme Court had to define "credit" as used in § 1(h) of the Gross Income Tax Act of 1933 (ch. 50, 1933 Ind. Acts 388, as added by ch. 370, sec. 1, 1947 Ind. Acts 1471, 1474), a predecessor of former IC § 6-2.1-1-10. The court said:

> In the case of *Gardner-White Co. v. Dunckel* (1941), 296 Mich. 225, 295 N.W. 624, it was said that the term "credit" as used in [Michigan's] General Sales Tax Act defining the phrase "gross proceeds," "[']represents a type of property... that is capable of being borrowed upon or discounted at financial institutions. It is an item of incorporeal personal property just as much as a share of stock or a bond, chattel mortgage, real estate mortgage or other form of collateral.[']" [296 Mich. at 233, 295 N.W. at 627 (quoting and adopting the definition of the trial court).]
>
> It is in this sense, we think, that the phrase "credits and/or other property" was used in § 1 (h) of the [Indiana gross income tax] statute. *The word* [credit] *as there used imports the existence of something of value which may presently be demanded by the one in whose favor the credit is created, if one is created; something of value capable of being withdrawn and used; a claim or demand for money or other thing of value presently existing.*

Id. at 420 (emphasis added).

A "credit" as former IC § 6-2.1-1-10 used that word is therefore an intangible asset that can be made immediately available as money or other present value, and is immediately usable, upon demand of the person entitled to it (i.e., the creditor/taxpayer). The classic example would be a checking or passbook account or other demand deposit in a financial institution.

In contrast, a taxpayer cannot simply demand that the IRS allow it a deduction, or demand a refund based on a claimed deduction, without more. "[T]he burden of clearly showing [the IRS] the right to [a] claimed [federal income tax] deduction is on the taxpayer." *INDOPCO, Inc. v. Comm'r,* 112 S.Ct. 1039, 1043 (U.S. 1992) (internal quotation marks omitted). A taxpayer's burden of proof of entitlement to a depreciation deduction for customer-based, goodwill-related intangibles in particular is "substantial" and "often …too great to bear." *Newark Morning Ledger,* 113 S.Ct. at 1683 and 1681, respectively.

The taxpayer therefore was anything but entitled to demand that the IRS recognize the pre-need trust amortization deductions. The taxpayer would have had to rigorously prove its entitlement to those deductions to the satisfaction of a presumably very skeptical IRS in any audit of its 1120s for the audit period, and thereafter if necessary in the federal courts. The pre-need trust amortization deductions thus do not fit the definition of "credit" as it is used in former IC § 6-2.1-1-10 or, by extension, that statute's definition of "receipts." Nor could the taxpayer have received those deductions as former IC § 6-2.1-1-11 defined "receives," since they could not be "credit[ed] to the taxpayer," *id.* The auditor erred in classifying the pre-need trust amortization deductions as gross receipts, and by extension as gross income, from intangible personal property to the extent that he may have believed them to be credits.

c. The Pre-Need Trust Amortization Deductions Were Not "Other Property" as the Definition of "Receipts" Uses That Term, and as Indiana Judicial Precedent Defines "Property."

Nor do the deductions constitute "other property" as IC § 6-2.1-1-10 uses that phrase. In *Department of Insurance v. Motors Insurance Corp.,* 138 N.E.2d 157 (Ind. 1956), the Indiana Supreme Court gave the following definitions of "property":

> This court in *Dept. of Financial Inst. v. General Finance Corp.* (1949), 227 Ind. 373, 384, 86 N.E. 2d 444, 10 A.L.R. 2d 436, quoting from *Buchanan v. Warley* (1917), 245 U.S. 60, 74, 62 L. Ed. 149, 161, 38 S. Ct. 16, said:
>
> > "'Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, *use, and dispose* of it. The Constitution protects these essential attributes of property. *Holden v. Hardy*, 169 U.S. 366, 391, 42 L. Ed. 780, 790, 18 S. Ct. 383 [(1898)]. Property consists of the free *use, enjoyment, and disposal* of a person's acquisitions without control or diminution save by the law of the land.'" [86 N.E.2d at 448, quoting 38 S.Ct. at 18.]
>
> "Property" in its legal sense means a valuable right or interest in something rather than the thing itself, and is the right to possess, *use and dispose* of that something in such a manner as is not inconsistent with law. *Dept. of Financial Institutions v. Holt, etc.* (1952), 231 Ind. 293, 303, 108 N.E.2d 629, 634; *Meek v. State* (1933), 205 Ind. 102, 105, 185 N.E. 899.

138 N.E.2d at 162-163 (emphases added by the Department).

"The term [property] includes valid contracts." *Holt,* 108 N.E.2d at 634, citing *General Finance,* 86 N.E.2d at 448. The pre-need contracts between the two Texas mortuaries and the various consumers who entered into them before the parent acquired those mortuaries thus were property. So were the previously discussed equitable interests of the parent, as successor in interest to one of those mortuaries, and of the remaining mortuary, in the corpuses of the pre-need trusts respectively maintained in connection with those locations. Those corpuses included deposits of payments made under contracts consumers had entered into with the two funeral homes prior to the parent's respective acquisitions of them. The parent and the remaining mortuary also had, as part of their equitable interests in the trusts, the rights to receive distributions of corpus upon their respective performances of pre-need contracts at the two Texas locations. Once deposited to those locations' respective operating accounts, the received corpus distributions became subject to the parent's periodic sweeps of those accounts mentioned in the Statement of Facts. The parent thereafter could use those distributions in the operation of the taxpayer's business, i.e. the business of the entire affiliated group. To the extent that those distributions represented pre-acquisition deposits of pre-need contract principal, the parent and the remaining Texas mortuary thereby depreciated those trusts, for which the taxpayer was entitled to claim deductions under I.R.C. 167(a) as interpreted in *Newark Morning Ledger* for each year of the audit period.

However, the rights to claim those deductions, standing alone, were not property because the taxpayer could not acquire or dispose of them independently of the parent's and the remaining Texas mortuary's respective equitable interests in the pre-need trusts, from which those rights derived. This finding follows from a fundamental rule of federal income tax law that applies here. That rule is that "[u]nless there is a specific statutory provision to the contrary, a taxpayer ordinarily reports his own income and takes his own deductions." *Davis v. United States,* 110 S.Ct. 2014, 2023 (U.S. 1990). I.R.C. § 167 does not have a provision allowing any entity other than a taxpayer who owns an interest in depreciable property to claim a depreciation deduction. Any putative buyer of the pre-need trust depreciation deductions thus would not have been able to claim them legally on its federal income tax returns for the reporting periods covering the audit period. If any such "buyer" had done so and had its returns audited, the IRS presumably would have disallowed the "bought" deductions. Although the taxpayer in the *Bethlehem Steel* case did sell federal tax attributes, it was only able to do so because former I.R.C. § 168(f)(8) (repealed 1986) explicitly made such a sale possible. Thus, in contrast to its being controlling authority under Issues I and II above and Issue IV below, the *Bethlehem Steel* opinions do not control on the more specific question of whether the pre-need trust depreciation deductions were property under Indiana law. They are legally distinguishable on this particular point from the present issue because that case arose under a former paragraph of the Internal Revenue Code structured differently than I.R.C. § 167.

In light of the foregoing analysis, the Department finds that the auditor erred in classifying the pre-need trust depreciation deductions as gross receipts, and by extension as gross income, from intangible personal property, to the extent that he may have believed them to be property.

2. Since the Pre-Need Trust Amortization Deductions Were Not "Receipts," They Could Not Be "Gross Income."

The pre-need trust amortization deductions were not "receipts" as former IC § 6-2.1-1-10 defined that word, nor could the parent or the remaining Texas mortuary have received them as former IC § 6-2.1-1-11 defined "receives." By extension, the deductions also were not "gross income" as former IC § 6-2.1-1-2(a) defined that term.

Since the deductions were not credits or other intangible personal property capable of having a situs, it is unnecessary for the Department to determine their tax situs state under the authorities discussed under Issue I above. The Department therefore respectfully declines to address the protestant's second argument on the present issue.

FINDING

The protest is sustained as to this issue.

IV. Gross Income Tax—Imposition on Domiciliary—Source State of Gross Income—(Insurance Commissions)(Fiscal Year Ending 09/30/1993)

DISCUSSION

A. OVERVIEW OF INSURANCE FUNDING OF PRE-NEED CONTRACTS

> Another method of funding preneed funeral contracts is through the use of an insurance policy or annuity plan. With insurance policies, the consumer purchases, either in a lump sum or by installments, a funeral or burial policy. The consumer names the seller or the funeral provider as the beneficiary of the insurance or annuity policy. The benefit is paid out at the death of the consumer or the decedent. An annuity plan works essentially the same way, except that the consumer pays the seller or provider in installments over a specified period of time.

Frank, *Preneed Funeral Plans* at 9-10 (footnotes omitted). *See also Ind. Family & Soc. Servs. Admin. v. Culley,* 769 N.E.2d 680, 683-684 (Ind. Ct. App. 2002) (holding that FSSA abused its discretion in imposing a Medicaid disqualification asset transfer penalty on a Medicaid recipient who had used cash to buy insurance policies to fund such trusts for her children and their spouses). "The seller…arranges for any necessary insurance policy underwriting." Frank, *Preneed Funeral Plans* at 18-19 (footnote omitted). The mortuary or cemetery company thus commonly doubles as an insurance agent in a pre-need contract transaction. The entity responsible for closing the sale, whether that company or some other entity acting on its behalf, therefore can collect two commissions: one for the pre-need contract itself, and a second one for selling the insurance.

B. THE TAX TREATMENT OF THE TAXPAYER'S CREDIT LIFE INSURANCE OPERATION AND THE PROTESTANT'S ARGUMENTS

During the audit period the parent owned an Indiana-chartered insurance company that issued policies of credit life insurance. Credit life insurance is defined as "insurance on the life of a debtor pursuant to or in connection with a specific loan or other credit transaction." IC § 27-8-4-2(b)(1) (1988) (1993). The insurer issued these policies to consumers who entered into pre-need contracts and who chose to take out such policies as a contingent method of paying off any outstanding balance under the pre-need contract at the consumer's death. *See generally* Consumer Credit Protection Act § 106(b), 15 U.S.C. § 1605(b) (1988) (1994) requiring the creditor to include credit life, accident and health insurance premiums in the finance charge unless the debtor receives written disclosures that insurance is not a factor in the decision to extend credit and of the cost of the insurance, and the debtor indicates the desire for such insurance in writing). *See also* Federal Reserve Bd. Regulation Z (Truth-in-Lending Regulations) § 226.4(d)(1), 12 C.F.R. § 226.4(d)(1) (1992-95) (permitting exclusion of credit life insurance premiums from the finance charge if the fact that the creditor does not require, and the premium for the initial term of, such insurance are disclosed, and the consumer signs or initials a written request for the insurance).

The taxpayer reported the receipts of this insurer for gross income tax purposes during the audit period net after deducting what the auditor characterized in the Audit Summary as "management fees." The auditor adjusted the taxpayer's liability by proposing to assess gross income tax at high rate on these deducted sums. The protestant objects to the parts of the assessments on these receipts, characterizing them as sales commissions the insurer paid to two Subchapter S Kentucky and Ohio corporations commonly owned by the parent's individual shareholders on the policies that those corporations sold. According to the protestant, these sums are not subject to gross income tax for two reasons. First, they were earned by out-of-state locations (i.e., the intangibles that gave rise to them had business situses outside Indiana). Second, and in the alternative, the insurer received the sums as an agent of, and immediately turned them over to, the Kentucky and Ohio Subchapter S corporations.

C. THE PROTESTANT HAS SUBMITTED NO EVIDENCE TO SUPPORT ITS OUT-OF-STATE-TAX-SITUSES ARGUMENT.

1. There Is No Evidence That Either the Ohio or the Kentucky Subchapter S Corporation Sold, or Earned Commissions From the Sale of, the Credit Life Insurance Subsidiary's Policies.

The protestant has not submitted any evidence or authority to support either its out-of-state business situs assertion or its agency assertion. Turning first to the claim of out-of-state business situses, the Department notes at the outset that the protestant did not submit any evidence to the hearings officer indicating that the assessed sums in fact consisted of commissions, rather than of "management fees" as characterized in the Audit Summary. However, assuming without deciding that the sums in question were in fact commissions, the Department notes that the protestant's claim suffers from much the same deficiencies as were discussed under Issue I when it made the same claim concerning pre-need contract interest. As stated in that discussion, "the protestant has provided no evidence indicating the office of the taxpayer through which each [installment] pre-need contract was marketed, negotiated and brought into being, [and] the office (if different) that decided to approve the contract and extend credit to each consumer, that kept the payment accounts and other records of executory contracts[.]" Similarly, concerning the present issue, the protestant submitted no evidence whatever to the hearings officer that the Ohio or Kentucky Subchapter S corporations in fact made the sales out of which the alleged commissions arose.

2. There Is No Evidence That Either the Ohio or the Kentucky Subchapter S Corporation, or Any Officer or Employee of Either Corporation, Was a Licensed, Registered Insurance Agent.

There is nothing in the protest record to indicate that these corporations were even licensed, appointed insurance agents entitled as such to receive commissions. During the audit period both Kentucky and Ohio, among other states, barred (and still bar) an insurer from paying, or an agent from receiving, a commission if the agent does not hold a license. Ch. 171, § 6, 1982 Ky. Acts 417, 420, codified at 11A KY. REV. STAT. ANN. § 304.9-425(Michie 1996 & 2001 Repls.) (current version at 11A KY. REV. STAT. ANN. § 304.9-425(1)-(2) (Cum. Supp. 2003); OHIO REV. CODE ANN. §§ 3905.18(A)-(B) and 3905.181 [sic; should read "3905.18.1"] (Anderson 1996 & 2002 Repls.) (same, respectively). *See also* 43 AM.JUR.2D *Insurance* § 147 (2003) (same) and 44 C.J.S. *Insurance* § 205, at 389 (1993) (same). However, the protestant did not submit copies of official records of the Ohio or Kentucky state insurance departments of any insurance agent licenses issued to the Ohio or Kentucky Subchapter S corporations, or any of their officers or employees. Nor has the protestant provided this Department with copies of any official records of the heads of the Ohio or Kentucky state insurance departments evidencing that the insurer registered its appointment of the Ohio and Kentucky Subchapter S corporations, or any of the individuals previously mentioned, as the insurer's agent in those corporations' respective markets. Both jurisdictions require registration of such appointments. 11A KY. REV. STAT. ANN. § 304.9-270(1); OHIO REV. CODE ANN. § 3905.20(B)(1).

3. There Is No Evidence That an Insurer/Insurance Agent Contractual Relationship Existed Between the Credit Life Insurance Subsidiary and Either the Ohio or the Kentucky Subchapter S Corporation, or Any Officer or Employee of Either Corporation.

The protestant also failed to submit copies of any insurance agency contract/s that may have existed between either of the Subchapter S corporations, or any of their officers or employees, and the insurer. Any such contract would have been relevant evidence of the existence of an insurer/insurance agency relationship, since the contract would specify the terms of the agency. "The parties have the right to agree upon the terms of a contract of agency, and their rights are determined by the provisions of such contract[.]" 13 ERIC MILLS HOLMES, HOLMES' APPLEMAN ON INSURANCE 2D: LAW OF INSURANCE AGENTS § 95.1, at 478 (LEXIS Publ'g 1999) (hereinafter HOLMES' APPLEMAN ON INSURANCE 2D); *see also* opinions cited at 13 *id.* n.19. Whether the Ohio and Kentucky Subchapter S corporations, or any of the previously mentioned individuals, could approve insurance applications for, or otherwise bind the insurer to issue, policies on their own authority might have been among those terms. The presence or absence of such authority would have been a relevant (but not the only) factor for the Department to consider in determining whether or not the Subchapter S corporations had business situses for insurance (as distinguished from mortuary or cemetery) purposes. *See* 45 IAC § 1-1-49(5) (stating that one way of establishing a business situs, either in Indiana or another state, is "[a]cceptance of orders without the right of approval or rejection in another state[,]" *id.*). The terms of the contract/s also would have included those upon the occurrence of which the agent would earn a commission. 13 HOLMES' APPLEMAN ON INSURANCE 2D § 97.2, at 642; 43 Am.Jur.2d *Insurance* § 146 (1982); 44 C.J.S. *Insurance* § 205, at 389 (1993) and 2A C.J.S. *Agency* § 334, at 606 (2003). Lastly, the protestant failed to submit to the hearings officer copies of any books or records to indicate that the Subchapter S corporations, or any of their officers or employees, in fact sold any life insurance policies of the insurer or earned any commissions as a result of any such sales. Such records could have included, for example, insurance applications approved by the putative agents and policies (including declarations pages identifying the consumer) the insurer issued based on such applications.

4. There Is Thus No Evidence of Any Out-of-State Tax Situs Out of Which the Alleged Commissions Arose.

Applying the precedents discussed under Issue I, the protestant has wholly failed to show any relationship between any supposed intangibles (i.e., any insurance agency license, registration, agency contract and sold policies) from which the alleged commissions may have arisen and the Ohio or Kentucky Subchapter S corporations' respective business situses. Even assuming (without finding) that all of these intangibles existed, the protestant has not proved that either of the Subchapter S corporations performed any activity related to the putative intangibles at its business situs, or the degree of any such activity. In particular, the protestant has failed to prove that either of the Subchapter S corporations marketed, negotiated, sold, had actual or implied authority to approve issuance of, and serviced the insurer's policies at and through that corporation's business situs. An office, other than the headquarters, of a taxpayer whose regular income derives from sales has a business situs at that office only if it is engaged in such activity and has independent authority to enter into sales contracts. *See Miami Coal*, 176 N.E. at 16 (out-of-state office that serviced accounts receivable arising from its sales of coal was business situs of accounts receivable for property tax purposes), approved in *Bethlehem Steel II*, 639 N.E.2d at 269-270. *See also* former 45 IAC § 1-1-49(5) (stating that one way of establishing a business situs, either in Indiana or another state, is "[a]cceptance of orders without the right of approval or rejection in another state[,]" *id.*).

However, the Department can no more assume that either of these Subchapter S corporations, or any of their officers or employees, conducted insurance sales activities, had authority to approve the policy applications or bind the insurer to issue the policies that gave rise to the alleged commissions, than it could assume that they sold the pre-need contracts the policies were intended to finance. As discussed under Issue I, centralized sales forces are prevalent in the mortuary and cemetery industries. Given these marketing conditions and the fact that the parent and the Subchapter S corporations had common shareholders, it is possible that these three companies, acting in concert, jointly employed such a force to market not only pre-need contracts, but also simultaneously any insurance policies related to them. (In this connection the Department notes that the original protest letter states the insurer sold credit life insurance. Paragraph 4 and Subparagraph 5(d) of the form Prepaid Funeral Retail Installment Contracts discussed under Issue I gave the consumer the option of purchasing credit life insurance, implying that the contract and the insurance are marketed in the same transaction.) However, as under Issue I, the Department is not finding that the parent or the taxpayer, and the Subchapter S corporations, jointly employed a centralized sales force. It is only finding that the protestant has failed to sustain its burden of production of evidence, and thus its burden of proof, that the Ohio and Kentucky Subchapter S corporations were each operating its own decentralized sales force as an insurance agency under contract with the insurer, with the authority to approve policy applications or bind the insurer to issue policies.

5. The "Commercial Domicile" Test Therefore Applied to Give Any Intangibles Underlying the Alleged Commissions an Indiana Tax Situs.

Given the total absence of evidence that the Ohio and Kentucky Subchapter S corporations were so acting, the "commercial domicile" test of former 45 IAC § 1-1-51 applied. Without proof that either Subchapter S corporation, or any of their officers or employees, had actual or implied authority to approve policy applications or otherwise bind the insurer, the Department can only assume that the insurer had reserved the right to approve applications, making the alleged commissions gross income attributable to Indiana as the state of the insurer's, and the insurer's parent's, commercial domicile. This result is supported not only by the regulation, but also by judicial precedent in Indiana and other jurisdictions, including Ohio and Kentucky, governing when a sales agent (whether in the insurance or some other sales business) earns a commission. "[T]he general rule is that a person employed on a commission basis is entitled to those commissions when the order is accepted by the employer." *Sample v. Kinser Ins. Agency, Inc.*, 700 N.E.2d 802, 804 (Ind. Ct. App. 1998); *see also Vector Eng'g & Mfg. Corp. v. Pequet*, 431 N.E.2d 503, 505 (Ind. Ct. App. 1982) (same, cited in *Sample, id.* and citing opinions from other jurisdictions). "Generally, in the absence of an agreement [or here, proof of an agreement] to the contrary, an agent's commission is earned on the date that the customer is insured by the insurance company." *Ariz. Ins. Guar. Ass'n v. Humphrey,* 508 P.2d 1146, 1148 (Ariz. 1973) (citing *Boro Hall Agency, Inc. v. Citron*, 329 N.Y.S.2d 269, 270-71 (N.Y. Civ. Ct. 1972)), quoted in 13 HOLMES' APPLEMAN ON INSURANCE 2D § 97.8, at 672 and cited at 13 *id.* n.146. *See also Cockrell v. Grimes*, 740 P.2d 746, 749 (Okla. Ct. App. 1987) (same) (quoting *Ariz. Ins. Guar. Ass'n*, *supra*), quoted in 44 C.J.S. *Insurance* § 205, at 389 (1993) and cited at *id.* n.31. "A contract of insurance is consummated [and the agent earns a commission] upon the unconditional acceptance of the application of the insured by the insurer." *Hartford Fire Ins. Co. v. Whitman*, 79 N.E. 459, 461 (Ohio 1906), cited in 43 Am.Jur.2d *Insurance* § 201, at 283 n.47 (1982), *inter alia*. *See also Bishop v. Am. States Life Ins. Co.*, 635 S.W.2d 313, 315 (Ky. 1982) (holding that the agent had earned his commission once the insurer accepted his tender of the insured's application and first premium check, stating that "nothing more was required of [the agent.]" If the Ohio and Kentucky Subchapter S corporations earned their alleged commissions when the insurer accepted their respective consumers' applications, and that acceptance occurred in Indiana, then it follows that the alleged commissions were earned, and were in fact premium gross income attributable to the taxpayer, in Indiana. Thus, the Department can subject the gross income that the management fees or alleged commissions represent to assessment of Indiana gross income tax unless the protestant can prove that the insurer held them as agent for the Ohio and Kentucky Subchapter S corporations, to which question the Department now turns.

FINDING

The protest is denied as to this issue.

V. Gross Income Tax—Imposition on Domiciliary—Receipt of Gross Income by Insurer as Agent (Insurance Commissions)(Fiscal Year Ending 09/30/1993)

DISCUSSION

A. EVIDENTIARY ELEMENTS AND BURDEN OF PROOF OF AGENCY AND OF GROSS INCOME RECEIVED IN AN AGENCY CAPACITY

During the audit period the Department had codified its gross income tax regulation on agency receipts at former 45 IAC § 1-1-54 (last version at 45 IAC §§ 1.1-1-2 and –6-10), which read in relevant part as follows:

> Sec. 54. Agents. Taxpayers are not subject to gross income tax on income they receive in an agency capacity. However, before a taxpayer may deduct such income in computing his taxable gross receipts, he must meet two (2) requirements:
>
> *(1) The taxpayer must be a true agent. Agency is a relationship which results from the manifestation of consent by one person to another authorizing the other to act on his behalf and subject to his complete control, and consent by the other to so act.* Agency may be established by oral or written contract, or may be implied from the conduct of the parties. *However, the representation of one party that he is an agent of another without a manifestation of consent by the alleged principal is insufficient to establish agency.* Both parties must intend to act in such a relationship.
>
> Characteristic of agency is the principal's right to complete and continuous control over the acts of the agent throughout the entire performance of the contract. This right to control cannot be limited to the accomplishment of a desired result. *In addition, the principal must be liable for the authorized acts of the agent.*
>
> *(2) The agent must have no right, title or interest in the money or property received or transferred as an agent.* In other words, the income received for work done or services performed on behalf of a principal must pass intact to the principal or a third party; the agent is merely a conduit through which the funds pass. A contractual relationship whereby one person incurs expense under an agreement to be reimbursed by another is not an agency relationship unless the other elements of agency exist, particularly the element of control, discussed above.…

> In summary, when applying the above factors to a taxpayer, *the critical factor is that of control. Notwithstanding the fact that the taxpayer acting for another has no right, title or interest in the money or property received, he is not entitled to deduct such income from his gross receipts unless he was acting as a true agent subject at all times to the control of his principal.*

Id (emphases added).

The protestant's agency argument by its own terms is governed by subsection (1). Its assertion that it immediately turned over the alleged commissions to the Ohio and Kentucky Subchapter S corporations implies that the insurer had no right, title or interest in those sums, and thus is governed by subsection (2), of the former regulation. IC § 6-8.1-5-1(b), discussed under Issue I, imposes the burden of proving each of these elements on the protestant. The statute essentially requires "the person against whom the assessment is made," *id.*, to raise, prove and convince the Department of any affirmative defenses to the assessment that the person may have. Agency and the absence of any right, title or interest in the assessed receipts are such defenses. *See W. Adj. And Insp. Co. v. Gross Income Tax Div.,* 142 N.E.2d 630, 635 (Ind. 1957) (stating that the taxpayer "ha[s] the burden of making out an affirmative [agency or trusteeship] case"). *Cf. Vawter v. Baker,* 23 Ind. 63, 65 (1864) (holding agency to be an affirmative defense in a breach of contract action and placing the burden of proof of agency on the defendant). However, the last passage emphasized in the above-quoted regulation makes it clear that an agency relationship must be found to exist before the question of an assessed person's absence of any right, title or interest in receipts becomes material. Accordingly, before the Department can address the protestant's assertion that the insurer immediately turned the alleged commissions over to the Ohio and Kentucky Subchapter S corporations, the Department must first find that there were agency relationships between each of these corporations as principals and the insurer as agent. The Department therefore turns to this latter question first.

The definition of "agency" in subsection (1) of the former regulation is in substantial accord with Indiana judicial definitions of "agent." "An agent is one who acts on behalf of some person, with that person's consent and subject to that person's control. *See Dept. of Treasury v. Ice Service, Inc.,* 220 Ind. 64, [67-68,] 41 N.E.2d 201[,] [203] (Ind.1942) (citing RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) [sic])." *Oil Supply Co. v. Hires Parts Serv., Inc.*, 726 N.E.2d 246, 248 (Ind. 2000). Therefore, "the elements of an actual agency relationship are three: [1] manifestation of consent by the principal; [2] acquiescence by the agent; and [3] control exerted by the principal." *Hope Lutheran Church v. Chellew,* 460 N.E.2d 1244, 1247 (Ind. Ct. App. 1984). The principal's right to and exercise of control need not be complete. *Universal Group Ltd. v. Ind. Dep't of State Revenue,* 642 N.E.2d 553, 557-58 (Ind. Tax Ct. 1994) ("*Universal Group III*"), *granting reh'g on and withdrawing* 634 N.E.2d 891 (Ind. Tax Ct. 1994). However, as former 45 IAC § 1-1-54(1) stated, "[t]his right to control cannot be limited to the accomplishment of a desired result[,]" *id.*, which is the criterion for identifying an independent contractor. "*An agent, on the other hand, is subject to the control of the principal with respect to the details of the work.*" *W. Adj.*, 142 N.E.2d at 634 (emphasis added).

B. THE PROTESTANT HAS SUBMITTED NO EVIDENCE THAT THE TAXPAYER'S CREDIT INSURANCE SUBSIDIARY WAS AN AGENT OF EITHER THE OHIO OR THE KENTUCKY SUBCHAPTER S CORPORATION AS TO THE ALLEGED COMMISSIONS.

The only material that the protestant has offered to the Department is its uncorroborated assertion that the insurer was acting as the Ohio and Kentucky Subchapter S corporations' agent. Such a statement is not proof of agency under Indiana common law. "It is a well established rule that agency cannot be proven by the declarations of the agent alone." *United Artists Theatre Circ., Inc. v. Ind. Dep't of State Revenue,* 459 N.E.2d 754, 758 (Ind. Ct. App. 1984). Former 45 IAC § 1-1-54(1) adopted this rule in substance. "[T]he representation of one party that he is an agent of another without a manifestation of consent by the alleged principal is insufficient to establish agency." *Id.* The Department cannot presume that the insurer was the agent of the Ohio and Kentucky Subchapter S corporations based solely on the protestant's unsubstantiated assertion. If anything, the idea of the insurer acting as an agent for those two companies, which would themselves be called "agencies" if they were in fact selling insurance, while not impossible, appears at first blush to be an implausible case of the tail wagging the dog. The Department therefore cannot simply accept the protestant's assertion without actual proof that the insurer was an agent. "An administrative tribunal cannot rely on its own information for support of its findings, and an order of the tribunal must be based on *evidence produced in the hearing*…." *Derloshon v. City of Ft. Wayne Dep't of Redev.,* 234 N.E.2d 269, 273 (Ind. 1968) (internal quotation marks omitted; emphasis added). The protestant has submitted no evidence during this protest that the insurer acted as the agent of either Subchapter S corporation, or what kind of work it did for them under any alleged agency agreements, including why it was holding the alleged commissions for these companies. Nor has the protestant submitted any evidence that they exercised control over the insurer, or how much or what kind of control they exercised. Given the lack of any evidence of agency, the Department therefore must presume that the insurer was not the agent of either the Ohio or the Kentucky Subchapter S corporation.

C. EVEN IF THE CREDIT INSURANCE SUBSIDIARY HAD BEEN AN AGENT, AS A MATTER OF LAW IT HAD AN INTEREST IN THE ALLEGED COMMISSIONS.

Since the protestant has not provided any evidence of agency to the Department, it is unnecessary, strictly speaking, for the Department to address the protestant's implied lack-of-right-title-or-interest argument. However, the Department would note that even if the protestant had submitted evidence sufficient to establish that the insurer was an agent, the protestant's assertion that the insurer lacked any interest in the alleged commissions is insufficient in law. Former IC § 6-2.1-1-2(b) stated that "no deductions from a taxpayer's gross income may be taken for [among other items]…commissions paid or credited[.]" *Id.* The implementing regulation, former 45 IAC § 1-1-17 (last version at 45 IAC § 1.1-1-10), is to the same effect. Former 45 IAC § 1-1-64, which applied the definition of the phrase "gross income" in former IC § 6-2.1-1-2(a) to life, health and hospitalization insurance companies, is also relevant to this question. It read in relevant part as follows:

> The gross income tax applies to those life, health and hospitalization insurance companies that do not elect to pay the [gross] premium tax as administered by the Indiana Department of Insurance under IC 27-1-18-2(b) of the Indiana Insurance Act.
>
> Gross income as it applies to receipts of life, health and hospitalization insurance companies means the amount of gross premiums, interest, dividends, rents and all other earnings with respect to conducting the business of the company. *Commissions, fees or other expenses incurred with respect to the various insurance company transactions are not to be deducted in determining gross earnings therefrom;….*

Id (emphasis added). (Similarly, the gross premiums tax of IC § 27-1-18-2 does not permit commissions to be deducted. *Id.*)

Former IC § 6-2.1-1-13 defined "taxable gross income as "the remainder of: all *gross income* which is not exempt from tax under IC 6-2.1-3; *less* (2) *all deductions* which are allowed under IC 6-2.1-4." *Id* (emphases added). "Deduction" is in turn defined in relevant part as "[a]n amount subtracted *from gross income*…." BLACK'S LAW DICTIONARY 422 (definition 2) (7th ed. 1999) (emphasis added). Both authorities thus necessarily imply that a sum that a taxpayer seeks to deduct was already part of that taxpayer's gross income. This latter circumstance in turn necessarily implies that the taxpayer in question (and not some other entity) had a right, title or interest in that gross income. By stating that commissions are not deductible, the legislature decided that commissions were to remain part of the gross income that is the proceeds of a sale of a principal's property or product that the agent or broker helped the parties consummate. In the present case, the product was credit life insurance policies and the proceeds were premiums, all of which (including the alleged commissions) were, and remain, gross income to the insurer. The insurer in turn was a member of the taxpayer's affiliated group. The taxpayer therefore was, and the protestant as its successor in interest is, liable for gross income tax on its receipts for these premiums/alleged commissions.

Neither the agency tax opinions discussed above, nor former 45 IAC § 1-1-54, require a different result. For the Department to find that this part of the assessment was wrong, it would also have to interpret these authorities as allowing a deduction from gross income that both the General Assembly and this Department have explicitly stated is not available. Only the legislature can create deductions. *Cf. Rotation Prods. Corp. v. Dep't of State Revenue*, 690 N.E.2d 795, 798 (Ind. Tax Ct. 1998)(stating that "courts have no power to create an exemption in the absence of statutory authority"). The Department cannot create a deduction. "It does not lie with the Department to promulgate a regulation in excess of, or contrary to, the law." *Universal Group III*, 642 N.E.2d at 557. It would be particularly inappropriate for the Department to do so as to this issue because it would create a conflict between former 45 IAC § 1-1-54, the regulation making income received in an agency capacity not subject to gross income tax, and former 45 IAC § 1-1-64, which stated that commissions are not deductible from the gross income of life, health and hospitalization insurance carriers. As previously noted under Issue I, the rules governing statutory interpretation also govern interpretation of regulations. *Two Market Square Assocs.*, 679 N.E.2d at 885. The Department promulgated former 45 IAC §§ 1-1-54 and -64 at the same time. *See* Final Rules, Gross Income Tax, LSA Doc. No. 8-15(F), 1 IR 950, 962 and 966 (1978), respectively. Statutes relating to taxation and enacted simultaneously "must be construed together as parts of one body of law and as together expressing the legislative will." *Lutz v. Arnold*, 193 N.E. 840, 848 (Ind. 1935). It therefore follows that regulations relating to taxation and promulgated simultaneously by the same agency must also be construed together. *See id.* Accordingly, the Department construes former 45 § 1-1-54 as not having created a deduction for commissions.

The protestant, therefore, has failed to sustain its burden of proof that the part of the gross income tax assessment for fiscal year 1993 on the management fees or alleged commissions was wrong. These sums were part of the taxpayer's gross receipts or gross income under former IC §§ 6-2.1-1-2, -1-10 and -1-11, former 45 IAC §§ 1-1-8 to –10, -17, -51 and -64. The field auditor was therefore correct to assess the taxpayer for those receipts because under former IC § 6-2.1-2-2(a)(1) they were part of the entire taxable gross income of a taxpayer who was a domiciliary of Indiana.

FINDING

The protest is denied as to this issue.

VI. Gross Income Tax—Imposition on Domiciliary—Source State of Gross Income—Other Miscellaneous Gross Receipts From Out-of-State Business Situses

DISCUSSION

The auditor also proposed to assess gross income tax on certain receipts characterized on the taxpayer's chart of accounts as "Miscellaneous Income: Other." As it did with the pre-need contract interest and the pre-need trust interest and dividends, the protestant argues that these unidentified receipts are not subject to Indiana gross income tax because non-Indiana business locations generated them. However, the protestant has not submitted any evidence on this issue, and has not even specified the activity or activities that generated these receipts. The Department accordingly finds, as it did under Issues I, II, IV and V, that the protestant has also failed to sustain its burden of proof that the assessment of gross income tax for each year of the audit period on the other miscellaneous receipts was wrong.

FINDING

The protest is denied as to this issue.

VII. Gross Income Tax—Imposition on Domiciliary—Source State of Gross Income—Miscellaneous Service Gross Receipts (Open/Close Trust Withdrawals) (Fiscal Year Ending 09/30/1993)

DISCUSSION

Each member of the taxpayer's Indiana affiliated group engaged in cemetery operations provided what the taxpayer called "opening/closing services," consisting of the digging of a grave before, and the filling of that grave after, any graveside service for a decedent. After completing the closing, the member that performed these services received a withdrawal from the local pre-need trust. The taxpayer described these receipts as "Open/Close Trust Withdraw" (sic) on its chart of accounts and reported them as "Other Income" on Line 10 of its federal Forms 1120 for each year of the audit period. The auditor allocated the full amounts of the withdrawals reported on the federal returns to the taxpayer's Indiana commercial domicile and proposed to assess gross income tax on them at high rate pursuant to former 45 IAC § 1-1-112, previously discussed under Issue III.

The protestant challenges the parts of the assessments levied on the open/close trust withdrawals on the grounds that the locations that allegedly received those payments, and the trusts from which they received them, were all outside Indiana. The Department has already found under Issue II above that the domiciles of the various pre-need trustees are irrelevant and, without more, are no bar to imposing Indiana gross income tax on pre-need trust distributions. That discussion is incorporated by reference as if fully set out here. The protestant has not submitted any books, records or other documents to the Department to support its other assertion. There is thus no evidence before the Department indicating the respective amounts of open/close trust withdrawal receipts that were attributable to openings and closings conducted at the taxpayer's out-of-state and in-state cemeteries.

In *Indiana Department of State Revenue v. E.W. Bohren, Inc.*, 178 N.E.2d 438 (Ind. 1961), the Indiana Supreme Court cited the failure of the taxpayer in that case to segregate intrastate from interstate receipts as one basis for its denying that taxpayer the interstate commerce exemption of U.S. CONST. article I, § 8, clause 3 and a predecessor to former IC § 6-2.1-3-3. 178 N.E.2d at 442. As statutory support for this part of its rationale, the court cited to a predecessor to former IC § 6-2.1-2-7. Subsection (b) of the latter statute required gross income taxpayers to separate on their records gross income that was taxable at different rates (the lower rate presumably being zero where part of the receipts were eligible for an exemption). *Id.* Subsection (c) subjected the entire gross income to the higher applicable rate if the taxpayer failed to properly segregate the income that would otherwise be taxable at the lower rate. *Id.*

The Department finds both *E.W. Bohren* and former IC § 6-2.1-2-7(b) and (c) to be persuasive analogous authority on the present issue. The question of whether receipts were earned in interstate commerce can be closely related, although not necessarily identical, to the question of whether an out-of-state business or legal situs earned those receipts. If failure to segregate receipts can be a basis for denying the interstate commerce exemption, then it can also be a proper basis for denying an exclusion from gross income of receipts from a taxpayer's out-of-state business or legal situses. The protestant has failed to submit any evidence that the taxpayer made such a segregation of receipts. For this reason, and because of the previously mentioned irrelevance of the pre-need trusts' situses, the protestant has failed to meet its burden of proof on this issue.

FINDING

The protest is denied as to this issue.

VIII. Gross Income Tax—Deductions from Gross Income—Inter-Company Transactions

DISCUSSION

A. THE "INTERCOMPANY CHARGES" AND "OVERHEAD ALLOCATIONS" ADJUSTMENTS

The taxpayer reported certain receipts it described as "Intercompany Charges" under "Other Income" on each of its federal Forms 1120 for the audit period. It also reported its "Overhead Allocations" under "Other Deductions" at Line 28 on its Forms 1120 for fiscal years 1994 and 1995. The auditor disallowed in full or in part the inter-company transaction deductions from gross income that the taxpayer had claimed for these receipts under former IC § 6-2.1-4-6(a) on its Forms IT-20 for the audit period. The work papers indicate that the auditor based the disallowance in part because he could not identify the affiliates that had paid on the various "Intercompany Charges" and "Overhead Allocations" and could not establish whether the taxpayer had included these subsidiaries in the Indiana affiliated group. The auditor disallowed the deduction in full for fiscal year 1993, and partly disallowed the deductions for fiscal years 1994 and 1995. He did allow the deductions for these latter years as to certain receipts described in the Audit Summary as "Intercompany Eliminations." (The implementing regulation, former 45 IAC § 1-1-166, stated in pertinent part that "receipts from *intercompany* sales of property and payments of dividends, rents, interest and service charges may be *eliminated* from gross receipts." *Id* (emphases added)). However, the auditor also disallowed the deductions for fiscal 1994 and 1995 as to both "Intercompany Charges" and "Overhead Allocations," less the respective amounts for these years of the "Intercompany Eliminations," each of which was smaller than the respective sums of the other two categories. Thus, the net effect of the adjustments for these years was to disallow the deductions in part.

B. THE PROTESTANT'S ARGUMENT

The protestant objects to these adjustments on the ground that the auditor allegedly failed to recognize that certain subsidiaries were qualified to do business in Indiana. It indicated in its protest letter that the taxpayer was entitled to deduct "Intercompany Charges" in all three years of the audit period attributable to six such subsidiaries, which the Department will call Subsidiaries 1 through 6. The protestant also indicated in its protest letter that the taxpayer was entitled to deduct "Overhead Allocations" in fiscal years 1994 and 1995 of three such companies. Subsidiary 1 was among these latter subsidiaries. The Department will identify the other two as Subsidiaries 7 and 8.

C. MOST, BUT NOT ALL, OF THE SUBSIDIARIES IN ISSUE WERE AUTHORIZED TO DO BUSINESS IN INDIANA FOR MOST OF THE AUDIT PERIOD.

The protestant is correct to recognize that authorization to do business in Indiana is one of the conditions of entitlement to claim the inter-company transactions deduction. Former IC § 6-2.1-4-6(a), which granted this deduction, stated that

[e]xcept as provided in subsections (b) and (c), [which are not in issue here,] each taxable year an affiliated group or corporations filing a consolidated return pursuant to IC 6-2.1-5-5 is entitled to a deduction from the gross income reported on such a return. The amount of the deduction equals the total amount of gross income received during the taxable year from transactions *between members of the group* that are incorporated or *authorized to do business in Indiana*.

Id (emphases added). (Incorporation, or authorization to do business, in Indiana was also a condition of eligibility to file a consolidated gross income tax return by virtue of former IC § 6-2.1-5-5(b). *Id.*)

However, the protestant has not submitted any evidence to substantiate its assertion that Subsidiaries 1 through 8 were authorized to do business in Indiana. The Department therefore has searched the on-line records of the Business Services Division of the office of the Indiana Secretary of State under the names of each of these subsidiaries to learn whether they were authorized to do business in Indiana during the audit period, and if so for which year/s. The results of that search are summarized in the following table:

Subsidiary No.	Fiscal Year 1993	Fiscal Year 1994	Fiscal Year 1995
1	Not authorized	Authorized (03/31/1994)	Authorized (but withdrew 12/28/1995)
2	Not authorized	Not authorized	Not authorized
3	Not authorized	Authorized (04/14/1994)	Authorized (but withdrew 12/28/1995)
4	Not authorized	Authorized (04/06/1994)	Authorized (but merged 05/30/1995)
5	Not authorized	Authorized (4/14/1994)	Authorized (but withdrew 12/28/95)
6	Not authorized	Authorized (04/14/1994)	Authorized (but merged 12/31/1995)
7	Not applicable	Authorized (04/07/1994)	Authorized (but merged 12/31/1995)
8	Not applicable	Not authorized	Not authorized

It is thus clear from the above table that the auditor was correct to deny the inter-company transactions deduction for fiscal year 1993 in its entirety, for Subsidiary 2 for the entire audit period and for Subsidiary 8 for fiscal years 1994 and 1995. It is also clear that Subsidiaries 1 and 3 through 7 were authorized to do business in Indiana in the latter two fiscal years.

D. HOWEVER, THE PROTESTANT HAS SUBMITTED NO EVIDENCE THAT BOTH PARTIES TO THE "INTERCOMPANY CHARGES" AND "OVERHEAD ALLOCATIONS" TRANSACTIONS WERE AUTHORIZED TO DO BUSINESS IN INDIANA

What is not clear, however, is whether each of the "Intercompany Charges" and "Overhead Allocations" arose "from transactions *between members of the group that* [were] incorporated or *authorized to do business in Indiana*." IC § 6-2.1-4-6(a) (1988) (1993) (repealed 2003) (emphases added). The taxpayer did not produce any records during the audit, and the protestant did not submit any records to the hearings officer, indicating that both parties to each transaction in these two categories were incorporated or authorized to do business in this state. The parent, which was party to the "Overhead Allocations," admittedly was an Indiana corporation, but in the absence of records the Department cannot simply assume that all of the transactions that generated the receipts in this category were between the parent and Subsidiaries 1, 7 or 8. Similarly, the Department cannot assume that all of the "Intercompany Charges" were paid to Subsidiaries 1 through 6 by, or that one of these subsidiaries received such charges from, a company that was incorporated or authorized to do business in Indiana. The unidentified parties to these transactions may have been members of the taxpayer's federal affiliated group, but not of its Indiana affiliated group. The auditor therefore was correct to deny the inter-company deductions for fiscal years 1994 and 1995 as well.

FINDING

The protest is denied as to this issue.

IX. Tax Administration—Amending Returns—Departmental Authority to Amend

Gross Income Tax—Imposition on Domiciliary—Source State of Gross Income—(Insurance Commissions)(Fiscal Year Ending 09/30/1994)

Gross Income Tax—Deductions from Gross Income—Bad Debt Deductions (All Years)

DISCUSSION

The protestant has asked the Department to amend the taxpayer's return for fiscal year 1994 to remove certain insurance commission gross income from the taxpayer's Ohio and Kentucky subsidiaries that the protestant alleges that the taxpayer erroneously included in that return. The protestant also asks that the Department amend the taxpayer's returns for all three years of the audit period to include deductions for certain alleged bad debts that the taxpayer failed to claim. The two adjustments combined, if granted, would not generate any refunds.

Strictly speaking, neither of these requests is a protest issue, since the protestant is not requesting these adjustments in response to anything that the auditor did or failed to do. Nevertheless, in the interest of efficiency and completeness, and because the requested insurance commissions adjustment relates to Issue IV of this protest on the same subject, the Department will address the protestant's requests in this letter.

The protestant cannot claim that it is, or the taxpayer was, ignorant of the Indiana income tax laws and their reporting deadlines. "All persons are charged with the knowledge of the rights and remedies prescribed by statute." *Middleton Motors, Inc. v. Ind. Dep't of State Revenue,* 380 N.E.2d 79, 81 (Ind. 1978). Nor can the protestant seriously claim that it or its two predecessors were unable, or in need of the Department's help, to comply with those deadlines. The taxpayer and its first successor in interest operated, and the protestant operates, a complex multi-jurisdictional business requiring sophisticated management. Therefore, the taxpayer and both its successors were perfectly capable of timely and appropriately amending the taxpayer's Indiana income tax returns. In this connection the Department notes that in the summer of 1996 the taxpayer's first successor in interest filed Forms IT-20X (Amended Corporation Income Tax Return) for the taxpayer for fiscal years 1992, 1993 and 1994 to conform the original returns to the adjustments the IRS made in its audit of the taxpayer for those years. It would have been a simple matter for the first successor in interest to draft the amended returns for fiscal years 1993 and 1994, and to draft an amended return for fiscal year 1995, to include the changes the protestant now requests. The fact that it did not do so may not be the protestant's fault, but that circumstance does not enable the protestant to take the place of the General Assembly and to convey power on the Department that the legislature did not grant.

Lastly, even if the Department were authorized to make the amendment requested for 1994 in particular and the protestant had requested it timely, the Department would not grant it. In the absence of contrary evidence, the insurance commission gross income in question was earned in Indiana for the reasons given under Issue IV. The Department fully incorporates the Discussion of that issue by reference here.

FINDING

The protestant's requests for the Department to amend the taxpayer's Indiana income tax return for fiscal year 1995, and to further amend its Indiana income tax returns for fiscal years 1993 and 1994, are denied.

X. Tax Administration—Negligence Penalty (Inter-Company Service Charges Adjustment)

DISCUSSION

The auditor recommended, and on review the Audit Division approved, proposing the assessment of ten percent negligence penalties on the parts of the proposed assessments levied on inter-company service charges. The protestant requests that the Department waive these penalties. It makes general allegations that the taxpayer did not act negligently and made good faith efforts to comply with the Indiana tax laws, and that the Department has made no showing that the taxpayer engaged in willful neglect or bad faith.

As mentioned under Issue I above, under IC § 6-8.1-5-1(b) (1998) the person against whom a proposed assessment is made has the burden of proof that it is wrong. As to penalties in particular, "[a] person who wishes to avoid the penalty imposed under [IC § 6-8.1-10-2.1(a) and (b) (1998)] must make an affirmative showing of all facts alleged as a reasonable cause for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust[.]" IC § 6-8.1-10-2.1(e). *See also* 45 IAC § 15-11-2(c) (2001) requiring a taxpayer to "affirmatively establish[,]" specifying the standard for the existence of, and enumerating the factors that may be considered in determining the presence or absence of, reasonable cause). The burden of proof is not on the Department to show willful neglect or bad faith. The protestant has made no factual showing of reasonable cause why the Department should waive the proposed negligence penalties, and has accordingly failed to meet its burdens of production and proof on this issue.

FINDING

The protest is denied as to this issue.

DEPARTMENT OF STATE REVENUE

02-990630.LOF

LETTER OF FINDINGS NUMBER: 99-0630
Adjusted Gross Income Tax
For the Years 1992-1997

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. Adjusted Gross Income Tax-Net Operating Losses

Authority: Ind. Code § 6-3-2-2.6; 45 IAC 3.1-1-9; I.R.C. § 382.

Taxpayer protests the assessment of taxes based on the auditor's disallowance of net operating loss carryforwards after the taxpayer had merged with another company.

II. Tax Administration - Penalty

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

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

STATEMENT OF FACTS

Taxpayer is a company engaged in heating, ventilation, air conditioning and refrigeration manufacturing and sales. Taxpayer filed consolidated returns for federal tax purposes for several years; however, taxpayer filed Indiana returns for only one entity with Indiana nexus for those years. Prior to 1988, taxpayer's predecessor was a publicly-traded corporation with significant net operating losses. In 1988, taxpayer's predecessor became a closely-held corporation. Between 1988 and 1991, taxpayer incurred further net operating losses, with some offsets. In late 1991, taxpayer's predecessor and another affiliated company merged to form taxpayer's present business. On taxpayer's Indiana corporate income tax returns, taxpayer carried over predecessor's net operating losses. On taxpayer's pro forma federal tax return for taxpayer, no net operating loss carryforward was shown.

Upon audit, the Department made several adjustments, including the disallowance of taxpayer's net operating loss carryovers from the predecessor. All other issues have been resolved with the exception of net operating loss carryovers and penalties, which taxpayer has protested.

I. Adjusted Gross Income Tax-Net Operating Losses

DISCUSSION

Taxpayer protests the imposition of adjusted gross income tax, and more particularly the disallowance of net operating loss carryovers after its merger. Ind. Code § 6-3-2-2.6 states:

> (a) This section applies to a corporation or a nonresident person, for a particular taxable year, if the taxpayer's adjusted gross income for that taxable year is reduced because of a deduction allowed under Section 172 of the Internal Revenue Code for a net operating loss. For purposes of section 1 of this chapter, the taxpayer's adjusted gross income, for the particular taxable year, derived from sources within Indiana is the remainder determined under STEP FOUR of the following formula:
>
> STEP ONE: Determine, in the manner prescribed in section 2 of this chapter, the taxpayer's adjusted gross income, for the taxable year, derived from sources within Indiana, as calculated without the deduction for net operating losses provided by Section 172 of the Internal Revenue Code.
>
> STEP TWO: Determine, in the manner prescribed in subsection (b), the amount of the taxpayer's net operating losses that are deductible for the taxable year under Section 172 of the Internal Revenue Code, as adjusted to reflect the modifications required by IC 6-3-1-3.5, and that are derived from sources within Indiana.
>
> STEP THREE: Enter the larger of zero (0) or the amount determined under STEP TWO.
>
> STEP FOUR: Subtract the amount entered under STEP THREE from the amount determined under STEP ONE.
>
> (b) For purposes of STEP TWO of subsection (a), the modifications that are to be applied are those modifications required under IC 6-3-1-3.5 for the same taxable year during which each net operating loss was incurred. In addition, for purposes of STEP TWO of subsection (a), 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. Also, for purposes of STEP TWO of subsection (a), the following procedures apply:
>
> (1) The taxpayer's net operating loss for a particular taxable year shall be treated as a positive number.
>
> (2) A modification that is to be added to federal adjusted gross income or federal taxable income under IC 6-3-1-3.5 shall be treated as a negative number.
>
> (3) A modification that is to be subtracted from federal adjusted gross income or federal taxable income under IC 6-3-1-3.5 shall be treated as a positive number.
>
> (4) A net operating loss under this section shall be considered even though in the year the taxpayer incurred the loss the taxpayer was not subject to the tax imposed under section 1 of this chapter because the taxpayer was:
>
> (A) a life insurance company (as defined in Section 816(a) of the Internal Revenue Code); or
>
> (B) an insurance company subject to tax under Section 831

In effect, three prongs must occur for a deduction for net operating losses to offset Indiana adjusted gross income. First, a corporation must have incurred a net operating loss in a given year. Second, a corporation must have some portion of its Indiana adjusted gross income apportionable or allocable to Indiana for the year in which the net operating loss is incurred. Third, a corporation must have its adjusted gross income on its federal return reduced by a net operating loss for the taxable year in which it seeks to use the offset for Indiana purposes. Once a corporation meets these three prongs, the portion of the net operating loss deemed to be incurred to Indiana sources may be carried back and carried forward in the same manner as taxpayer may elect on its federal return. 45 IAC 3.1-1-9. If a corporation is deemed to have acquired a predecessor's net operating loss for federal tax purposes, then the net operating loss is treated as passing to the successor corporation for Indiana purposes as well. *Id.*

In this case, audit stated that taxpayer was not able to carry its net operating losses forward from 1992, after a corporate reorganization. In particular, the auditor noted that, due to the fact that taxpayer is a different corporation from the predecessor, the taxpayer was unable to carryforward its predecessor's net operating losses. The auditor also noted that I.R.C. § 382, which limits the use of certain tax attributes in the event of an ownership change, precluded the taxpayer's use of net operating loss carryforwards.

Relevant to this analysis is I.R.C. § 382(g). Under I.R.C. § 382(g), net operating losses are partially or totally limited if taxpayer experiences an increase of fifty percent of the aggregate shares owned by shareholders owning five or more percent of the corporation over a three-year period. In the merger, taxpayer's overall ownership did not change; instead, two predecessor corporations with common ownership merged. As a result, the taxpayer was able, within the meaning of federal law, to carry forward the net operating losses of its predecessor, and thus its carryover was otherwise permitted under Indiana law.

Taxpayer has maintained that its lack of carryover of net operating losses on its pro forma tax returns for the separate company failed to show the net operating loss because of an internal error in its preparation of those returns. Regardless of this issue, taxpayer has otherwise properly computed its net operating losses in accordance with Indiana law for the years in question.

FINDING

Taxpayer's protest is sustained.

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:

> (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's has provided sufficient information that its position was not negligent, but rather due to the exercise of reasonable care on the part of taxpayer.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

1820010162.LOF

LETTER OF FINDINGS: 01-0162
Financial Institutions Tax
For the Years 1992 through 1996

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

ISSUES

I. Constitutionality of the Indiana Financial Institutions Tax.

Authority: U.S. Const. art. I, § 8; Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1974); IC 6-5.5-1-12; IC 6-5.5-1-12, 13; IC 6-5.5-1-17(a); IC 6-5.5-1-18; IC 6-5.5-2-1(a); IC 6-5.5-2-2; IC 6-5.5-2-3; IC 6-5.5-3-1(6); IC 6-5.5-5-1(a).

Taxpayer argues that it does have an Indiana nexus and that the imposition of the Financial Institutions Tax (FIT) violates the Commerce Clause and is unconstitutional.

II. Computational Errors.

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

Taxpayer maintains that the Department of Revenue (Department) audit report contains numerous computational errors; taxpayer asks that the Department's audit personnel return to taxpayer's out-of-state business location and explain the basis for the audit report's methodology and conclusions.

III. Abatement of the Ten-Percent Negligence Penalty.

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

Taxpayer states that because of the Department's mistaken conclusions as to the applicability of the FIT and because of the Department's numerous computation errors, the ten-percent negligence penalty should be abated in its entirety.

STATEMENT OF FACTS

Taxpayer is an out-of-state bank holding company. Taxpayer – along with its subsidiaries – provides a variety of consumer and commercial financial services. Beginning in 1999 and extending through 2001, the Department conducted an audit review of taxpayer's 1992 through 1996 business records and tax returns. The final audit report was completed in February 2001. The report found that taxpayer had failed to submit FIT returns and that it owed unpaid taxes for three of the years considered during the review process. As a result, in May 2001 the Department issued notices of "Proposed Assessment" for 1992, 1993, and 1996 in which taxpayer was billed for additional tax. Taxpayer determined that the assessments were incorrect and submitted a protest to that effect during June 2001.

There is nothing in the record indicating that the Department acted on the protest letter until June 2003 when the original protest was submitted for administrative review. There is nothing in the record which indicates that taxpayer chose to pursue its initial protest after it submitted the 2001 protest letter.

Taxpayer was notified in June 2003 that its protest was being administratively reviewed and that it was entitled to participate in a hearing and to submit additional information justifying the basis for the protest. From June 2003 until May 2004, taxpayer took no further action and declined the opportunity to participate in an administrative hearing or to provide additional documentation to substantiate the protest. Consequently, this Letter of Findings is based upon the contents of the original June 2001 protest letter and on phone conversations which took place with taxpayer's representative.

DISCUSSION

I. Constitutionality of the Indiana Financial Institutions Tax.

Taxpayer maintains that it is not subject to Indiana's FIT because it does not have nexus with the state and that the Department's attempt to assess the tax offends the Commerce Clause (U.S. Const. art. I, § 8). Taxpayer asks the Department to "please withdraw this assessment."

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

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

(1) A holding company.

(2) A regulated financial corporation.

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

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

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

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

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

The Department must disagree with taxpayer's contention that the assessment of the FIT is unconstitutional because, during 1992 through 1996, taxpayer owned subsidiaries which were doing business within Indiana and because those subsidiaries were earning money from business activities conducted within the state. Taxpayer does not challenge the determination that the subsidiaries were members of taxpayer's "unitary group" as defined under IC 6-5.5-1-18. Taxpayer's constitutional argument does not avoid the fact that it was required to file a combined return reporting the financial activities of the unitary group under IC 6-5.5-5-1(a). "[A] unitary group consisting of least two (2) taxpayers *shall file* a combined return covering all the operations of the unitary business and including all of the members of the unitary business." Id. (*Emphasis added*).

Taxpayer has provided nothing upon which to base its conclusion that the FIT assessment was not based upon a fair apportionment of the unitary group's business, that the assessment was unrelated to the services the subsidiaries received from this state, or that assessment impedes interstate commerce.

Taxpayer is a banking holding company conducting – by means of its subsidiaries – the business of a financial institution within Indiana. Therefore, it was required to timely file FIT returns reporting the adjusted gross income of its unitary group. To the extent that taxpayer challenges the constitutionality of the FIT as applied to non-resident companies having only an "economic nexus" with Indiana, the Department declines to address the question because the Department will not overturn a tax scheme crafted by the state legislature based upon taxpayer's facial constitutional challenge and because the Department does not agree with taxpayer's argument that it has only an abstract economic presence within this state.

FINDING

Taxpayer's protest is denied.

II. Computational Errors.

Taxpayer argues the FIT assessment is erroneous because the original audit report contains numerous and substantial mistakes. As taxpayer states, "There are too many corrections that need to be made to the audit's workpapers, that they can't be all listed in this protest." Among other errors, taxpayer complains that the audit workpapers employ an "Indiana credit factor" but does not explain how the factor was calculated. Taxpayer maintains that the amount of gross receipts does not take into account foreign branch gross income and that there are errors in the calculation of foreign source income and foreign gross receipts. In addition, taxpayer complains that the audit relied upon information contained within its annual report "but does not take into account that there is foreign source income in these numbers."

Taxpayer failed to file FIT returns for the years considered by the audit review. IC 6-8.1-5-1(a) states that, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis for the best information available to the department." At the time the Department conducted the audit review, taxpayer was unable to provide the requested information because – according to the taxpayer – the information simply did not exist. Taxpayer explained that because of changes in its structure, mergers with other banks, the discharge of certain key personnel, and because of certain storage problems – including a warehouse fire – it was not possible to provide the detailed financial information requested. Because the information was not available, the Department extrapolated information from 1996 in order to project income for 1992 through 1995. In addition, the department relied upon information contained with taxpayer's annual and 10-K reports.

Taxpayer now complains that the methodology employed by the audit was flawed. However, taxpayer has provided no specific basis for challenging the audit report's conclusions. Instead – seeing itself deeply aggrieved – expects that the Department will return to its corporate headquarters, reexamine the same incomplete records, and arrive at different results after having explained and justified each and every step of the audit process.

The original audit examination was conducted over a period extending from approximately 1999 through 2001. There is not a shred of substantive evidence which would justify revisiting this lengthy audit process based simply upon taxpayer's dissatisfaction with the results of the original audit when that report was based upon the information – albeit incomplete – which the taxpayer itself supplied to the audit. In addition, it should be noted that taxpayer declined the opportunity to provide additional information during the 11-month administrative review process and declined the opportunity to take part in an administrative hearing during which it would have the opportunity to more fully explain the basis for its complaint.

Faced with a taxpayer which failed to file FIT returns for five years, the audit relied upon the abbreviated information which taxpayer provided. The audit was entirely justified in making "a proposed assessment of the amount of the unpaid tax on the basis for the best information available to the Department." IC 6-8.1-5-1(a). After the Department's audit personnel reviewed the available records, after the personnel consulted with taxpayer's representatives, and after those personnel prepared the final audit report, it was the taxpayer's responsibility to provide a basis for refuting that report. IC 6-8.1-5-1(b) states that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Taxpayer has not met its burden of demonstrating that the proposed assessments are incorrect.

FINDING

Taxpayer's protest is denied.

III. Abatement of the Ten-Percent Negligence Penalty.

Taxpayer asks that the Department exercise its discretion to abate the ten-percent negligence penalty. In its June 2001 protest letter, taxpayer maintains simply that "no penalties should be assessed."

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

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

Taxpayer did not file FIT tax returns, was audited during by the Department, and was assessed for three years of unpaid taxes. Taxpayer is a substantial, sophisticated business receiving large amounts of money from sources within Indiana. Taxpayer's larger constitutional question aside, the decision to overlook this state's FIT is not the evidence of the "ordinary business care and prudence" expected of an "ordinary reasonable taxpayer" that would warrant abatement of the ten-percent negligence penalty.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020061.LOF

LETTER OF FINDINGS NUMBER: 02-0061
Sales and Use Tax
For the Years 1998-1999

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

ISSUES

I. Sales and Use Tax-Utilities

Authority: IC 6-8.1-5-1, IC 6-8.1-5-4, IC 6-2.5-2-1, IC 6-2.5-3-2 (a), IC 6-2.5-5-5.1.

The taxpayer requests a credit for sales taxes paid on utilities.

II. Sales and Use Tax-Imposition of Use Tax

Authority: IC 6-2.5-3-2(a).

The taxpayer protests the imposition of use tax on several items.

STATEMENT OF FACTS

The taxpayer is a roofing contractor. The Indiana Department of Revenue, hereinafter referred to as the "department," audited the taxpayer and assessed additional sales and use tax, interest, and penalty. The taxpayer protested a portion of this assessment and requested a credit for a portion of the sales taxes paid on utilities. The department requested several items of documentation from the taxpayer. The taxpayer did not provide the requested documentation. A hearing was scheduled and the taxpayer's representative was notified. No one appeared on behalf of the taxpayer. This Letter of Findings is based upon the contents of the file.

I. Sales and Use Tax-Utilities

DISCUSSION

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1. Taxpayers are required to keep and produce at the department's request any books and records necessary for the department to determine the taxpayer's correct tax liability. IC 6-8.1-5-4.

Indiana imposes a sales tax on the transfer of property in a retail transaction. IC 6-2.5-2-1. Complementary to the sales tax, Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana when no sales tax was paid at the time of purchase. IC 6-2.5-3-2 (a). Purchases of electricity in Indiana are subject to the sales/use tax unless they are "consumed in the direct production of other tangible personal property in his business of manufacturing" IC 6-2.5-5-5.1. During the audit period, the taxpayer paid sales tax on its purchases of electricity. The taxpayer requested a credit for sales taxes paid on the electricity that was consumed in its direct production process. However, the taxpayer never presented the department with any documentation to substantiate its request for credit. The taxpayer did not sustain its burden of proving that the department's refusal to grant a credit was incorrect.

FINDING

The taxpayer's protest is denied.

II. Sales and Use Tax-Imposition of Use Tax

DISCUSSION

Pursuant to IC 6-2.5-3-2(a), the department assessed use tax on several items of tangible personal property which the taxpayer purchased and used. These items included additional capital assets, a hyster, small tools, supplies for a contract job, copper coil, crane rentals, and paint. The taxpayer was asked to submit specific documentation for each item that would prove that use tax was not due on the item. The taxpayer failed to submit any of this documentation. Therefore, the taxpayer did not sustain its burden of proving that the use tax was improperly imposed on the protested items.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020435.LOF

LETTER OF FINDINGS NUMBER: 02-0435
Sales and Use Tax
For the Years 1998- 2000

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

ISSUE

I. Sales and Use Tax-Imposition

Authority: IC 6-8.1-5-1, IC 6-2.5-3-2 (a), IC 6-2.5-5-3 (b), 45 IAC 2.2-5-8.

The taxpayer protests the imposition of use tax.

II. Tax Administration-Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b). 45 IAC 2.2-5-8 (c),

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

STATEMENT OF FACTS

The taxpayer manufactures metal component sheets cut to customer specifications. The taxpayer slits, shears, levels, and cuts metal sheets for use in the manufacture of automobiles, appliances, computer housings, farm equipment, and a variety of other manufactured products. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use tax, interest, and penalty. The taxpayer protested the assessment of use tax on replacement parts for certain cranes and the penalty. A hearing was held on these issues. This Letter of Findings results.

I. Sales and Use Tax-Imposition

DISCUSSION

The taxpayer purchased parts to overhaul overhead cranes for bay 2 and bay 3 without paying sales tax at the point of purchase or self assessing use tax. The overhead cranes for bay 2 and 3 are used to move heavy metal coils from trucks into storage 30% and 40% of the time respectively. The cranes are used to remove the metal coils from storage to the first production machine 70% and 60% of the time for bays 2 and 3 respectively. The taxpayer protested the department's assessment of use tax on the percentage of the repair parts used for moving the metal coils from storage to the spindle.

Indiana imposes an excise tax on tangible personal property stored, used or consumed in Indiana. IC 6-2.5-3-2 (a). There are several statutory exemptions from the use tax. All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. The taxpayer bears the burden of showing that any item meets the tests to qualify for exemption.. IC 6-8.1-5-1.

The taxpayer contends that the protested replacement parts for the overhead cranes in Bays 1 and 2 qualified for exemption from the use tax pursuant to the following provisions of IC 6-2.5-5-3 (b):

> Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.
>
> This exemption is clarified at 45 IAC 2.2-5-8 (c) as follows:
>
> The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.
>
> The exemption is explained as applying to repair and replacement parts of exempt machinery at 45 IAC 2.2-5-8(h)(2):
>
> Replacement parts, used to replace worn, broken, inoperative or missing parts or accessories on exempt machinery and equipment, are exempt from tax.

The regulation concerns the exemption of machinery if it is used in an integral and essential manner in the production process. To qualify for exemption, machinery must have an immediate effect on the production of the end product. It can only have an immediate effect if it touches and affects the raw material in such a way as to actually change it. Machinery is exempt only if it is used during the production process, not before the production process begins or after the production process ends. In the taxpayer's situation, the integrated production process begins at the first machine that has an immediate effect on the product. That first step in the integrated production process would be the spindle holding the coils for the slit-to-length or shearing machines. The movement of steel from storage to this point does not qualify for exemption.

The taxpayer contends that the taxability of the subject tangible personal property should be governed by the following example set out at 45 IAC 2.2-5-8(f)(12):

> A crane is used 40% of the time for the purpose described in Example (8), and 60% of the time to move raw materials from the stockpile to a production machine for processing. The taxpayer is entitled to an exemption equal to 60% of the gross retail income attributable to the transaction in which the crane was purchased.
>
> The purpose referred to in the previous example is found at 45 IAC 2.2-5-8(f)(8) as follows:
>
> A truck is used on the federal highway and must be registered with the Indiana bureau of motor vehicles for highway use. The truck is used to transport a finished component part from the last step of a production process to be introduced into another integrated production process at another business location. The truck is taxable.

The taxpayer's example of exempt transportation does not apply in this situation. Example 12 refers to moving material from a stockpile in an integrated production process to a machine in that process rather than moving material to the beginning of an integrated production process as in example 8. The first step in the taxpayer's integrated production process is the spindle holding the steel for treatment by machines. The cranes at issue move raw material to that first step. Therefore, example 8 more closely resembles taxpayer's situation. The truck in example 8 is taxable. Likewise, the taxpayer's cranes and their repair parts are taxable.

FINDING

The taxpayer's protest is denied.

I. Tax Administration-Penalty

DISCUSSION

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

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

The taxpayer failed to pay sales tax or self assess use tax on several clearly taxable items such as office supplies, office telephones, office computers, logo golf balls, and warehouse supplies. In a previous audit, the taxpayer was also assessed additional use tax on office supplies. The taxpayer's inattention to its duty to pay these taxes during this audit period constitutes negligence.

FINDING

The taxpayer's protest is denied.

Nonrule Policy Documents

DEPARTMENT OF STATE REVENUE

0420020568.LOF

LETTER OF FINDINGS NUMBER: 02-0568
Sales and Use Tax
For the Years 1999- 2000

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

ISSUES

I. Tax Administration- Interest

Authority: IC 6-8.1-5-1(b), IC 6-8.1-10-1(a)(e).

The taxpayer protests the imposition of interest.

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

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

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

STATEMENT OF FACTS

The taxpayer operated a gas station. After an audit, the taxpayer was assessed additional sales and use tax, interest, and penalty. The taxpayer protested the assessment of penalty and interest and a hearing was scheduled. The taxpayer failed to appear. This Letter of Findings is based upon the documentation in the file.

I. Tax Administration- Interest

DISCUSSION

All tax assessments are presumed to be accurate and taxpayers bear the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b).

The department assessed interest against the taxpayer pursuant to IC 6-8.1-10-1(a) as follows:

> If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

In this case, the taxpayer had a sales and use tax deficiency. The department, pursuant to the terms of the statute, imposed interest. IC 6-8.1-10-1(e) states that "the department may not waive the interest imposed under this section." Therefore, the department has no authority to waive the interest assessment.

FINDING

The taxpayer's protest is denied.

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

DISCUSSION

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

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's 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 purchased miscellaneous supplies on which sales tax was not paid at the point of purchase. The taxpayer's disregard of its duty to self assess and remit use tax on these purchases constitutes negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030148.LOF

LETTER OF FINDINGS NUMBER: 03-0148
Sales Tax and Withholding Tax
Responsible Officer
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.

ISSUES

1. Sales Tax and Withholding Tax-Responsible Officer Liability

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

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

STATEMENT OF FACTS

The taxpayer was an incorporator and secretary of a corporation that did not properly remit collected sales and withholding taxes to the state during the tax period 2000-2002. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed the additional sales taxes, withholding taxes, interest and penalty against the taxpayer as a responsible officer. The taxpayer protested the assessment of tax and penalty. A hearing was held and this Letter of Findings results.

1. Sales Tax and Withholding Tax-Responsible Officer Liability

DISCUSSION

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

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

An individual who:

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

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

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

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

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

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

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

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

The taxpayer was one of the incorporators and the secretary of the corporation. She was a signatory on the bank accounts. She prepared payment vouchers for the remittance of taxes to the state. She received regular reports from the accountant that should have made her aware of the tax liability. As an example, the 2001 year end statement indicated that the corporation had serious financial problems and had not remitted all of the collected sales taxes to the state. The taxpayer was on notice that the proper taxes were not being remitted. She had the authority to remit those taxes on behalf of the corporation and chose not to. Therefore, she exercised control over the decision of not remitting the trust taxes. In accord with the finding of the Safayan case, the taxpayer had the requisite duty to remit trust taxes to the state. Therefore, she was a responsible officer, personally liable for those corporate taxes.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120030440.LOF

LETTER OF FINDINGS NUMBER: 03-0440
Adjusted Gross Income Tax
For the Year 2000

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

concerning a specific issue.

ISSUE

I. Adjusted Gross Income Tax-Disallowance of Exemptions

Authority: IC 6-8.1-5-1(b), IC 6-3-1-35(a)(3),(4), IC 6-3-1-3.5(a)(5)(A), 26 USCA 151(c)(1)(B), 26 USCA 151(d)(2), 45 IAC 3.1-1-5(b)(4).

The taxpayer protests the disallowance of certain exemptions.

STATEMENT OF FACTS

In 2000, the taxpayer had a son who was 19 years old and a full time student. The taxpayer claimed his son as an exemption on his 2000 IT-40 on line 8 and as an additional exemption on line 9. The taxpayer did not claim his son as an exemption on his 2000 federal 1040; thus allowing the son to take advantage of the federal education credits on his own federal return. The Indiana Department of Revenue, hereinafter referred to as the "department," disallowed the exemptions. The taxpayer protested the disallowance and a telephone hearing was held. This Letter of Findings results.

I. Adjusted Gross Income Tax-Disallowance of Exemptions

DISCUSSION

All tax assessments are presumed to be accurate and taxpayers bear the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b).

The taxpayer argues that he was legitimately entitled to claim all exemptions on his state return even though he chose to claim only one exemption on the corresponding federal return. The taxpayer maintains that his decision, not to claim his dependent child on the federal return, did not preclude him from claiming that child on the state return.

Insofar as relevant to the taxpayer's "Line 8" deductions, IC 6-3-1-3.5(a)(3),(4) states that the Indiana taxpayer is to "Subtract one thousand dollars ($1,000.), or in the case of a joint return filed by a husband and wife, subtract for each spouse one thousand dollars ($1,000). Subtract one thousand dollars ($1,000) for each of the exemptions provided by Section 151 (c) of the Internal Revenue Code." Insofar as relevant to the taxpayer's "Line (9)" deductions, IC 6-3-1-3.5(a)(5)(A) permits an Indiana taxpayer to "subtract one thousand five hundred dollars ($1,500) for each of the exemptions allowed under Section 151(c)(1)(B) of the Internal Revenue Code for taxable years beginning after December 31, 1996."

The statutory formula is straightforward; an Indiana taxpayer may claim a $1,000 exemption on line 8 of his Indiana return if that exemption is allowed under Section 151(c) The Indiana taxpayer may claim a $1,500 deduction on line 9 of his Indiana return if that exemption is allowed under Section 151(c)1)(B). There is nothing apparent in the statute which requires-as a condition precedent to claiming those Indiana exemptions-that the taxpayer first claim the identical exemptions on his federal return.

The explanatory language on the 1999 IT-40 return is equally straightforward: line eight on the form states that the taxpayer is to report the "[n]umber of exemptions claimed on your federal return." The IT-40 also states that the taxpayer is entitled to claim an "a]dditional exemption for certain dependent children" and to report that number on line nine.

Relevant to line eight, the Department's accompanying instructional booklet states that, "You are allowed a $1,000 exemption on your Indiana tax return for each *exemption you claim on your federal return.*" (Emphasis added.) Relevant to line nine, the booklet states that, "An additional exemption, which has been increased to $1,500, is allowed for certain dependent children." On their face, the IT-40 directions would seem to preclude taxpayer from claiming the dependent child on his state return when he declined to report the otherwise qualifying dependent child on the federal return. The mandatory nature of the instructional language is reinforced by 45 IAC 3.1-1-5(b)(4) which directs the taxpayer to "[s]ubtract $1000 for each exemption taken on the Federal return for taxpayer or spouse aged 65 or above..." and to subtract "$500 [now $1,500] *for each exemption taken on the Federal return* for a qualified dependent." (Emphasis added.)

The instructions printed on the Indiana tax form, the accompanying instructional booklet, and the Department's regulation preclude an Indiana taxpayer from claiming an exemption unless the exemption has also been claimed on the corresponding federal return.

Additionally, the taxpayer argued that the Indiana law concerning the dependent exemptions requires only that the taxpayer be allowed to take the child as a dependent on a federal return. The law does not require that the child actually be taken as an exemption on the federal return. However, each federal exemption can only be used by one taxpayer. 26 USCA 151(d)(2) states as follows:

> In the case of an individual with respect to whom a deduction under this section is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual's taxable year begins, the exemption amount applicable to such individual shall be zero.

In this case, the child used his federal deduction for personal exemption on his own federal return. Therefore, the taxpayer was not allowed to take it on his return even though the son met the other requirements for consideration as a dependent. Consequently, the taxpayer was not entitled to take the child as a dependent on his state return either.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

03-20030443P.LOF

LETTER OF FINDINGS NUMBER: 03-0443P
Withholding Tax
For the Calendar Year 2002

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

II. Tax Administration - Interest

Authority: IC 6-8.1-10-1

The taxpayer protests the interest assessment.

STATEMENT OF FACTS

The late penalty and interest were assessed on the late payment of required Indiana withholding for non-resident partners for the calendar year 2002.

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 a Department employee. Furthermore, the taxpayer feels the requirement that the partnership withhold is moot since the nonresident partners file Indiana tax returns.

With regard to the misinformation, the Department points out that the conversation with the Department employee happened two weeks after the due date for the filing of the withholding return. As there is no way the conversation with the Department employee could allow for a timely filing of the withholding return, the taxpayer fails to establish reasonable cause on this point.

With regard to the Indiana regulation which requires partnership withholding, Indiana law requires the Department to follow the law in applying guidelines for tax compliance. As Indiana regulation 45 IAC 3.1-1-107(a) states the partnership is required to withhold on nonresident partners, the Department is required by law to see that the taxpayer in question properly withholds.

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 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.

I. Tax Administration – Interest

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

DEPARTMENT OF STATE REVENUE

0220040012.LOF

LETTER OF FINDINGS NUMBER: 04-0012
Adjusted Gross Income Tax
For the Year 2000

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

concerning a specific issue.

ISSUE

I. Adjusted Gross Income Tax-Disallowance of Exemptions

Authority: IC 6-8.1-5-1(b), IC 6-3-1-3.5(a)(3),(4), IC 6-3-1-3.5(a)(5)(A), 26 USCA 151(c)(1)(B), 26 USCA 151(d)(2), 45 IAC 3.1-1-5(b)(4).

The taxpayer protests the disallowance of certain exemptions.

STATEMENT OF FACTS

In 2000, the taxpayer had a son who was 19 years old and a full time student. The taxpayer claimed his son as an exemption on his 2000 IT-40 on line 8 and as an additional exemption on line 9. The taxpayer did not claim his son as an exemption on his 2000 federal 1040; thus allowing the son to take advantage of his personal exemption on his own federal return. The Indiana Department of Revenue, hereinafter referred to as the "department," disallowed the exemptions. The taxpayer protested the disallowance and a hearing was held. This Letter of Findings results.

I. Adjusted Gross Income Tax-Disallowance of Exemptions

DISCUSSION

All tax assessments are presumed to be accurate and taxpayers bear the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b).

The taxpayer argues that he was legitimately entitled to claim all exemptions on his state return even though he chose not to claim his son's exemption on the corresponding federal return. The taxpayer maintains that his decision, not to claim his dependent child on the federal return, did not preclude him from claiming that child on the state return.

Insofar as relevant to the taxpayer's "Line 8" deductions, IC 6-3-1-3.5(a)(3),(4) states that the Indiana taxpayer is to "Subtract one thousand dollars ($1,000.), or in the case of a joint return filed by a husband and wife, subtract for each spouse one thousand dollars ($1,000). Subtract one thousand dollars ($1,000) for each of the exemptions provided by Section 151 (c) of the Internal Revenue Code." Insofar as relevant to the taxpayer's "Line (9)" deductions, IC 6-3-1-3.5(a)(5)(A) permits an Indiana taxpayer to "subtract one thousand five hundred dollars ($1,500) for each of the exemptions allowed under Section 151(c)(1)(B) of the Internal Revenue Code for taxable years beginning after December 31, 1996."

The statutory formula is straightforward; an Indiana taxpayer may claim a $1,000 exemption on line 8 of his Indiana return if that exemption is allowed under Section 151(c) The Indiana taxpayer may claim a $1,500 deduction on line 9 of his Indiana return if that exemption is allowed under Section 151(c)1)(B). There is nothing apparent in the statute which requires-as a condition precedent to claiming those Indiana exemptions-that the taxpayer first claim the identical exemptions on his federal return.

The explanatory language on the 1999 IT-40 return is equally straightforward: line eight on the form states that the taxpayer is to report the "[n]umber of exemptions claimed on your federal return." The IT-40 also states that the taxpayer is entitled to claim an [a]dditional exemption for certain dependent children" and to report that number on line nine.

Relevant to line eight, the Department's accompanying instructional booklet states that, "You are allowed a $1,000 exemption on your Indiana tax return for each *exemption you claim on your federal return.*" (Emphasis added.) Relevant to line nine, the booklet states that, "An additional exemption, which has been increased to $1,500, is allowed for certain dependent children." On their face, the IT-40 directions would seem to preclude taxpayer from claiming the dependent child on his state return when he declined to report the otherwise qualifying dependent child on the federal return. The mandatory nature of the instructional language is reinforced by 45 IAC 3.1-1-5(b)(4) which directs the taxpayer to "[s]ubtract $1000 for each exemption taken on the Federal return for taxpayer or spouse aged 65 or above..." and to subtract "$500 [now $1,500] *for each exemption taken on the Federal return* for a qualified dependent." (Emphasis added.)

The instructions printed on the Indiana tax form, the accompanying instructional booklet, and the Department's regulation preclude an Indiana taxpayer from claiming an exemption unless the exemption has also been claimed on the corresponding federal return.

Additionally, the taxpayer argued that the Indiana law concerning the dependent exemptions requires only that the taxpayer be allowed to take the child as a dependent on a federal return. The law does not require that the child actually be taken as an exemption on the federal return. However, each federal exemption can only be used by one taxpayer. 26 USCA 151(d)(2) states as follows:

> In the case of an individual with respect to whom a deduction under this section is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual's taxable year begins, the exemption amount applicable to such individual shall be zero.

In this case, the child used his federal deduction for personal exemption on his own federal return. Therefore, the taxpayer was not allowed to take it on his return even though the son met the other requirements for consideration as a dependent. Consequently, the taxpayer was not entitled to take the child as a dependent on his state return either.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320040059P.LOF

LETTER OF FINDINGS NUMBER: 04-0059P
Withholding Tax
For the months July & 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; West Publishing Co. v. Ind. Dept of Revenue (1988), Ind. Tax. 524 N.E.2d 1329, 1333.

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of monthly withholding tax returns for the months July & August 2003.

The taxpayer is a company located in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the penalty should be waived as the error was the result of misinformation from a Department employee.

The taxpayer's computer system was affected by a computer virus. The taxpayer was unable to operate the parallel system as the parallel system (which was at the taxpayer's POA office) was also affected by said computer virus. Because of this situation, the taxpayer was unable to obtain the information necessary to complete the withholding tax returns.

The Department states the taxpayer could have made an estimated payment. Both the taxpayer and the Department agree an estimated tax payment could have been made.

However, according to the taxpayer's POA, the POA was not aware an estimated payment was allowed by the Department. The POA called the Department prior to the due date to find out what could be done about the situation. The POA talked to an unidentified clerk in Taxpayer Services. The POA asked the clerk what could be done but received no answer.

With regard to the misinformation from the Department employee, the taxpayer provides no clear evidence that the Department employee made a misrepresentation. "The state will not be estopped 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 State Revenue (1988), Ind. Tax 524 N.E.2d 1329, 1333. Thus, as the taxpayer is unable to provide clear evidence of a misrepresentation from a Department employee, the taxpayer fails to establish reasonable cause for filing late.

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 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.

DEPARTMENT OF STATE REVENUE

43-20040139.LOF

LETTER OF FINDINGS NUMBER: 04-0139
Underground Storage Tank Fees
For The Tax Periods 1991-2003

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

concerning a specific issue.

ISSUE

I. Underground Storage Tank Fees – Imposition

Authority: Ind. Code § 6-8.1-1-1, Ind. Code § 6-8.1-1-6, Ind. Code § 13-11-2-150; Ind. Code § 13-11-2-158; Ind. Code § 13-23-12-1; Ind. Code § 29-1-7-23; *Ind. Dept. of State Revenue v. Estate of Riggs,* 735 N.E.2d 340 (Ind. Tax 2000)

Taxpayer protests the assessment of the underground storage tank owner registration fee.

STATEMENT OF FACTS

Taxpayer was assessed underground storage tank fees for the periods of 1991 through 2003. Taxpayer is the estate of a decedent ("Decedent") who operated a gas station prior to his death on October 2, 2001. Decedent had operated the gas station jointly with his brother, who passed away on January 8, 1999 and whose interest in the real estate on which the filling station was located passed to Decedent. Taxpayer protests the assessment of the fees for the years in question.

I. Underground Storage Tank Fees – Imposition

DISCUSSION

The underground storage tank fee is administered by the Indiana Department of Revenue per IC § 6-8.1-1-6 which states in relevant part: "The provisions of this article apply for the purposes of imposing, collecting, and administering the listed taxes." The fee is based on IC §13-23-12-1 and constitutes a listed tax by inclusion in the definition of "Listed taxes" at IC § 6-8.1-1-1.

IC 13-23-12-1 states:

(a) Each year the owner of an underground storage tank that has not been closed before July 1 of any year under:

(1) rules adopted under IC 13-23-1-2; or

(2) a requirement imposed by the commissioner before the adoption of rules under IC 13-23-1-2;

shall pay to the department of state revenue an annual registration fee.

(b) The annual registration fee required by this section is as follows:

(1) Ninety dollars ($90) for each underground petroleum storage tank.

(2) Two hundred forty-five dollars ($245) for each underground storage tank containing regulated substances other than petroleum.

(c) If an underground storage tank consists of a combination of tanks, a separate fee shall be paid for each tank.

The term "owner" is defined by Ind. Code § 13-11-2-150, which states:

(a) "Owner", for purposes of IC 13-23 except as provided in subsection (b), means:

(1) for an underground storage tank that was:

(A) in use on November 8, 1984; or

(B) brought into use after November 8, 1984;

for the storage, use, or dispensing of regulated substances, a *person* [emphasis added] who owns the underground storage tank; or

(2) for an underground storage tank that is:

(A) in use before November 8, 1984; but

(B) no longer in use on November 8, 1984;

a person who owned the tank immediately before the discontinuation of the tank's use.

(b) "Owner", for purposes of IC 13-23-13, does not include a person who:

(1) does not participate in the management of an underground storage tank;

(2) is otherwise not engaged in the:

(A) production;

(B) refining; and

(C) marketing;

of regulated substances; and

(3) holds indicia of ownership primarily to protect the owner's security interest in the tank.

Further, Ind. Code § 13-11-2-158 states in relevant part:

(a) "Person", for purposes of:

(1) IC 13-21;

(2) air pollution control laws;

(3) water pollution control laws; and

(4) environmental management laws, except as provided in subsections (c), (d), (e), and (h);

means an individual, a partnership, a copartnership, a firm, a company, a corporation, an association, a joint stock company, a trust, *an estate* [emphasis added], a municipal corporation, a city, a school city, a town, a school town, a school district, a school corporation, a county, any consolidated unit of government, political subdivision, state agency, a contractor, or any other legal entity.

***

(d) "Person", for purposes of IC 13-23, has the meaning set forth in subsection (a). The term includes a consortium, a joint venture, a commercial entity, and the United States government.

Taxpayer states that it did not own the property where the tanks were situated until October 2001. Further, Taxpayer states that Decedent's estate is also not the proper taxpayer because the interest in the property transferred to the decedent's heirs at the time of his death, and cites *Ind. Dept. of State Revenue v. Estate of Riggs,* 735 N.E.2d 340 (Ind. Tax 2000) for that proposition. With respect to the period prior to Decedent's death, Taxpayer was not the owner of the property in question. While the legal ownership passes to Decedent's heirs at the moment of death, an estate is an intermediary step to effect that transfer, and until the final transfer of title is effected, the estate, as a separate entity, is acting as a fiduciary for those heirs. Ind. Code § 29-1-7-23. At the time of billing, Taxpayer was the owner of the property, as defined by Ind. Code § 13-11-2-150, until such time as the property could properly be titled in the name of decedent's heirs. Further, within the meaning of Ind. Code §§ 13-11-2-150 and -158, Taxpayer, an estate, is a person responsible for payment of the fees in question, and thus is liable under Indiana law.

FINDING

The Taxpayer's protest is sustained in part and denied in part. Taxpayer is not liable for any fees due prior to October 2, 2001. However, Taxpayer is liable for fees subsequent to the aforementioned date to present.

DEPARTMENT OF STATE REVENUE

2820040217.LOF

LETTER OF FINDINGS NUMBER: 04-0217
Controlled Substance Excise Tax
For the Year 2003

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

ISSUE

I. Controlled Substance Excise Tax-Imposition

Authority: IC 6-7-3-5, IC 6-8.1-5-1(b).

The taxpayer protests the assessment of controlled substance excise tax.

STATEMENT OF FACTS

The taxpayer was arrested for possession of controlled substances. The local prosecutor requested in writing that the Indiana Department of Revenue assess the Controlled Substance Excise Tax. A Record of Jeopardy Finding, Jeopardy Assessment Notice and Demand was issued on March 31, 2004, in a base tax amount of $23,253.75. The taxpayer filed a protest to the assessment. The taxpayer's representative waived the hearing and requested that the department's decision be based upon the documentation in the file. This Letter of Findings results.

I. Controlled Substance Excise Tax-Imposition

DISCUSSION

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of controlled substances in the State of Indiana. The taxpayer bears the burden of proving that the assessment of tax is incorrect. IC 6-8.1-5-1(b). The arresting officer's report and Indiana State Police Laboratory report indicate that the taxpayer was in possession of marijuana. Therefore, the Controlled Substance Excise Tax was properly imposed in this situation.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

2820040218.LOF

LETTER OF FINDINGS NUMBER: 04-0218
Controlled Substance Excise Tax
For the Year 2003

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

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

ISSUE

I. Controlled Substance Excise Tax-Imposition

Authority: IC 6-7-3-5, IC 6-8.1-5-1(b).

The taxpayer protests the assessment of controlled substance excise tax.

STATEMENT OF FACTS

The taxpayer was arrested for possession of controlled substances. The local prosecutor requested in writing that the Indiana Department of Revenue assess the Controlled Substance Excise Tax. A Record of Jeopardy Finding, Jeopardy Assessment Notice and Demand was issued on March 31, 2004, in a base tax amount of $23,253.75. The taxpayer filed a protest to the assessment. The taxpayer's representative waived the hearing and requested that the department's decision be based upon the documentation in the file. This Letter of Findings results.

I. Controlled Substance Excise Tax-Imposition

DISCUSSION

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of controlled substances in the State of Indiana. The taxpayer bears the burden of proving that the assessment of tax is incorrect. IC 6-8.1-5-1(b). The arresting officer's report and Indiana State Police Laboratory report indicate that the taxpayer was in possession of marijuana. Therefore, the Controlled Substance Excise Tax was properly imposed in this situation.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE
REVENUE RULING #2004-01 ST
June 28, 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 it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

1. Sales/Use Tax – Application of Sales/Use Tax to Purchase, Storage, Use and/or Consumption of Tangible Personal Property Utilized in Generating Electric Power – Manufacturing Exemption

Authority: IC 6-2.5-5-3, IC 6-2.5-5-5.1, IC 6-2.5-1-27

The taxpayer requests the Department to rule whether or not the taxpayer's purchase, storage, use and/or consumption of tangible personal property used in an electric generating facility, including all power generation equipment and certain related consumables, such as syngas, is exempt from sales/use tax under the manufacturing exemption.

2. Sales/Use Tax - Application of Sales/Use Tax to Purchase, Storage, Use and/or Consumption of Tangible Personal Property Utilized in Generating Electric Power – Pollution Control Exemption

Authority: IC 6-2.5-5-30

The taxpayer requests the Department to rule whether or not the taxpayer's purchase, storage, use and/or consumption of tangible personal property used in an electric generating facility, including all power generation equipment, is exempt from sales/use tax under the pollution control exemption.

STATEMENT OF FACTS

The taxpayer is a developer and manufacturer of electric power generators. In cooperation with certain customers, the taxpayer is demonstrating its technology in an effort to provide electricity through a method that will be "cleaner" than traditional methods commonly utilized. The taxpayer's technology generates electric power using fossil fuels through an electrochemical reaction without combustion which is unlike conventional fossil fuel power plants. By eliminating combustion, greater efficiencies are achieved while pollution is dramatically reduced.

In order to perform the dual purpose of providing customers with energy and to demonstrate its ability to generate cleaner energy more efficiently than current generation equipment, the taxpayer will install and operate syngas-fueled electric power generators at various sites. Specifically, the taxpayer has entered into a cooperative arrangement with an energy company and a federal government agency to develop a project using the taxpayer's electric power generating technology at an Indiana facility. Under the arrangement between the taxpayer and the energy company, the two parties will work together to provide energy at the Indiana facility. The Indiana facility is a seller of electricity. Under a subcontract between the Indiana facility and the taxpayer, the taxpayer will supply "cleaner" electricity to the Indiana facility. The emissions of SOx and NOx associated with the production of electricity from the taxpayer's units will be below current and anticipated future environmental standards.

Under the terms of the applicable subcontract with the Indiana facility, the Indiana facility will provide the facility site, interconnect equipment, utility support, fuel supply and agree to purchase power from the demonstrated use of the taxpayer's technology. The taxpayer's electric power generator will be installed in the Indiana facility and will deliver power into the Indiana facility's system through the interconnect provided by the Indiana facility. The Indiana facility will utilize the power produced by the taxpayer's electric power generator at the Indiana facility. The Indiana facility will be responsible for obtaining all licenses and permits or amendments to its current licenses and permits required for the installation and operation of the taxpayer's electric power generator.

Under the terms of the controlling agreements, the taxpayer's on-site facility will produce power using its electric power generator, specifically, a syngas-fueled power generator. The Indiana facility will provide the fuel and will receive a reimbursement from the taxpayer for the fuel cost, land lease and other costs incurred by the Indiana facility. In turn, the Indiana facility will take the electricity produced by the taxpayer's electric power generator and will provide the taxpayer with a price adjustment for the electricity cost. This price adjustment is based on the number of kilowatts produced at the taxpayer's facility and delivered to the Indiana facility. The Indiana facility will consume all of the electric power generated by the electric power generator and the taxpayer will be compensated for such electric power through the price adjustment clause of the operating agreement.

ISSUE #1 – DISCUSSION

The taxpayer requests the Department to rule whether or not the taxpayer's purchase, storage, use and/or consumption of tangible personal property used in an electric generating facility, including all power generation equipment and certain related consumables, such as syngas, is exempt from sales/use tax under the manufacturing exemption.

IC 6-2.5-5-3(b) states:

> Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquired it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.

IC 6-2.5-5-5.1(b) states:

> Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture. This exemption includes transactions involving acquisitions of tangible personal property used in commercial printing.

IC 6-2.5-5-5.1(a) and IC 6-2.5-1-27 provide that electricity is defined as tangible personal property.

Here, the taxpayer is producing electricity at the Indiana facility and selling the electricity to the Indiana facility. That being the case, the taxpayer's production of electricity falls within the ambit of the above exemption statutes entitling the taxpayer to purchase, store, use and/or consume tangible personal property that is directly used or consumed in direct production exempt from sales/use tax.

This conclusion remains valid regardless of the taxpayer's dual purpose of providing customers with energy and demonstrating its ability to generate cleaner energy more efficiently.

ISSUE #1 – RULING

The Department rules that the taxpayer's purchase, storage, use and/or consumption of tangible personal property used in an electric generating facility, including all power generation equipment and certain related consumables, such as syngas, is exempt from sales/use tax under the manufacturing exemption to the extent it is directly used or consumed in direct production of electricity.

ISSUE #2 – DISCUSSION

The taxpayer requests the Department to rule whether or not the taxpayer's purchase, storage, use and/or consumption of tangible personal property used in an electric generating facility, including all power generation equipment, is exempt from sales/use tax under the pollution control exemption.

IC 6-2.5-5-30 states in relevant part:

> Sales of tangible personal property are exempt from the state retail tax if:
>
> 1. the property constitutes, is incorporated into, or is consumed in the operation of a device, facility, or structure predominantly used and acquired for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards; and
> 2. the person acquiring the property is engaged in the business of manufacturing, processing, refining, mining or agriculture.

It is clear then, for tangible personal property to be eligible for the environmental quality compliance exemption the tangible personal property must have been acquired for the purpose of complying with any state, local or federal environmental quality statute, regulation or standard. The taxpayer has not indicated that the purchase of its technology is required to comply with any environmental quality statute, regulation or standard at this time, hence, the tangible personal property used for this technology is not exempt from sales/use tax under the pollution control exemption (environmental quality compliance exemption).

ISSUE #2 – RULING

The Department rules that the taxpayer's purchase, storage, use and/or consumption of tangible personal property used in an electric generating facility, including all power generation equipment, is not exempt from sales/use tax under the pollution control exemption (environmental quality compliance exemption).

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated herein, are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in a statute, a regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.