DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
CARNINE LITTLE LEAGUE, INC.
DOCKET NO. 29-2002-0133

PROPOSED DEPARTMENTAL ORDER

Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Proposed Departmental Order.

Petitioner was the subject of an investigation conducted on December 22, 2003 by the Criminal Investigation Division of the Indiana Department of Revenue. The Department issued a letter dated February 28, 2002, in which Petitioner's bingo license was the subject of an emergency revocation. Petitioner's Indiana charity gaming license was suspended for five (5) years, and it was assessed civil penalties in the amount of eight thousand five hundred dollars ($8,500). The Petitioner protested in a timely manner.

FINDINGS OF FACTS

1) Petitioner protested the Department's proposed actions on March 1, 2002.
2) The Department acknowledged the Petitioner's appeal in a letter dated March 4, 2002.
3) The Department in a letter dated March 11, 2002 set an administrative hearing for Tuesday, May 14, 2002.
4) On Wednesday, May 8, 2002 the Indiana Department of Revenue by counsel requested an indefinite extension of time.
5) The extension was granted on May 8, 2002. At that time the Department's attorney was directed to file a status report in this matter every two weeks until a hearing date and time is requested.
6) Pursuant to IC 4-21.5-3-1 notice was given to the Petitioner on March 15, 2004 regarding a possible dismissal of its appeal.
7) Petitioner has failed to respond to the Department's correspondence.

STATEMENT OF LAW

1) IC 4-21.5-3-24 states, "(a) At any stage of a proceeding, if a party fails to:
(1) file a responsive pleading required by statute or rule;
(2) attend or participate in a prehearing conference, hearing, or other stage of the proceeding; or
(3) take action on a matter for a period of sixty (60) days, if the party is responsible for taking the action;
the administrative law judge may serve upon all parties written notice of a proposed default or dismissal order, including a statement of the grounds.
(b) Within seven (7) days after service of a proposed default or dismissal order, the party against whom it was issued may file a written motion requesting that the proposed default order not be imposed and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the administrative law judge may adjourn the proceedings or conduct them without the participation of the party against whom a proposed default order was issued, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.
(c) If the party has failed to file a written motion under subsection (b), the administrative law judge shall issue the default or dismissal order. If the party has filed a written motion under subsection (b), the administrative law judge may either enter the order or refuse to enter the order.
(d) After issuing a default order, the administrative law judge shall conduct any further proceedings necessary to complete the proceeding without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party. The administrative law judge may conduct proceedings in accordance with section 23 of this chapter to resolve any issue of fact.

CONCLUSIONS OF LAW

1) IC 4-21.5-3-24 states, "(a) At any stage of a proceeding, if a party fails to: (1) file a responsive pleading required by statute or rule; (2) attend or participate in a prehearing conference, hearing, or other stage of the proceeding; or (3) take action on a matter for a period of sixty (60) days, if the party is responsible for taking the action; the administrative law judge may serve upon all parties written notice of a proposed default or dismissal order, including a statement of the grounds.
2) The Petitioner's failure to respond to the Department's letters is grounds for a proposed dismissal order pursuant to IC 4-21.5-3-24.

PROPOSED DEPARTMENTAL ORDER

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

1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue, a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
2) Judicial review of a final order may be sought under IC 4-21.5-5.

THIS PROPOSED 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: ____________________

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Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:

MARINE CORPS LEAGUE #471, INC.

DOCKET NO. 29-2004-0138

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED DEPARTMENTAL ORDER

An administrative hearing was held on Wednesday, June 2, 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 Attorney Robert D. McMahan, 2901 Ohio Blvd. Suite 232, Terre Haute, Indiana 47803. Attorney Doug Klitzke 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

As a result of an investigation conducted on August 22, 2003, by the Criminal Investigation Division of the Indiana Department of Revenue, it was determined that the Petitioner was in violation of provisions of the Indiana Charity Gaming laws. Petitioner failed to protest within the statutorily prescribed time. See IC 4-32-8-1. Petitioner received a letter dated December 15, 2003 which stated "The Department hereby suspends the charity gaming license of Joseph A. Bray Det. #471, Marine Corps League for one (1) year effective with the receipt of this decision." The Petitioner requested a hearing in order to determine the extent of its suspension.

FINDINGS OF FACTS

1) The Criminal Investigation Division of the Indiana Department of Revenue conducted an investigation of the Petitioner on August 22, 2003. It was determined that the Petitioner was in violation of provisions of the Indiana Charity Gaming laws.

2) On December 15, 2003 the Department issued a letter outlining civil penalties and a suspension based upon the August 22, 2003 investigation. (Department's Exhibit 4).

3) The December 15, 2003 letter was addressed to Petitioner and mailed via certified mail to 3006 N. 16th Street, Terre Haute, Indiana 47804.

4) The letter was delivered and signed for on December 30, 2003 by Sherry Budd an "Operator" listed on Petitioner's CG-13PT.

5) The Petitioner had and continues to have three separate addresses.

6) The Petitioner's legal address and offices are located at 1563 Elizabeth Ave, Terre Haute, Indiana 47804. (Record at 17 and 32).

7) Petitioner conducts bingo at 7339 N. Clinton Road, Terre Haute, Indiana 47805. (Record at 10).

8) Petitioner's hall, club, and bar are located at 3006 N. 16th Street, Terre Haute, Indiana 47804. (Record at 32).

9) The 3006 N. 16th Street address in Terre Haute is where the Petitioner was licensed to sell pull tabs, tip boards, and punchboards only. (Department's exhibit 1).

10) The Department's witness stated at hearing that, "the [Department's] letter was sent to the location where the violations took place." (Record at 16).

11) In its letter of December 15, 2003 the Department stated, "The fact that Marine Corps League #471 continues to possess and operate electronic gambling devices during a licensed gaming event…The Department hereby suspends the charity gaming license of Joseph A. Bray Det. #471, Marine Corps League for one (1) year effective with the receipt of this decision." (Department's Exhibit #4).

12) The Petitioner received a letter dated June 24, 2003 accompanying its approved "Indiana Annual Bingo/Pull Tabs License Nbr. 100913." (Department's Exhibit #2).

13) The Petitioner's CG-13PT (Annual Bingo License / Pull Tabs, Tip Boards, and Punchboards Only) had an effective date of July 1, 2003 and an expiration date of June 30, 2004. The license number is 100913. (Department's Exhibit #1).

14) Petitioner's CG-13PT contains the name of the organization and its address and county. The form also states, "is hereby authorized by the State of Indiana to conduct a gaming event at 3006 N. 16th Street, Terre Haute, IN 47804." (Department's

Exhibit #1).
15) The Petitioner's CG-13 (Annual Bingo License) had an effective date of July 1, 2003 and an expiration date of June 30, 2004. The license number is 100913. (Department's Exhibit #1).
16) Petitioner's Annual Bingo License contains the name of the organization and its address and county. The form also states, "is hereby authorized by the State of Indiana to conduct a gaming event at 7339 N. Clinton Road, Terre Haute, IN 47805-1328." (Department's Exhibit #1).
17) The Department has one form that is used for bingo and pull tabs. (Record at 24).
18) There are no provisions in the Indiana Code for a pull tab only license. (Record at 25).
19) The Department's witness stated at hearing, "[W]e don't' have an application for just pull tabs only, because pull tabs only comes under annual bingo. That's why we have an annual bingo license. And in order to allow the organization to have pull tabs at one location, but to have their annual bingo at another, we permitted them to use this annual bingo license application also for pull tabs indicating a different address for their pull tabs only." (Record at 25).
20) When asked, "Now, does this organization sell pull tabs at their bingo operation, as well?" the Department's witness stated, "They are entitled to, yes." (Record at 25).

STATEMENT OF LAW

1) The Department's hearings are governed by IC 4-21.5 exclusively. (See IC 4-32-8-5. *As added by P.L.188-2003, SEC.3.).*
2) Pursuant to 45 IAC 18-8-4, the burden of proving that the Department's findings are incorrect rests with the individual or organization against which the department's findings are made. The department's investigation establishes a prima facie presumption of the validity of the department's findings.
3) IC 4-21.5-3-25(b) provides in pertinent part, "The administrative law judge shall regulate the course of the proceedings in conformity with any prehearing order and in an informal manner without recourse to the technical, common law rules of evidence applicable to civil actions in the courts…"
4) IC 4-21.5-2-26(a) states, "The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exemption to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence."
5) "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).
6) 45 IAC 18-1-33, "'Premises' means a building or a distinct portion of a building where charity gaming is conducted. A portion of a building is considered distinct if it has a separate mailing address and is not connected by a common roof or wall with another structure where gaming activities occur." *(Department of State Revenue; 45 IAC 18-1-33; filed Feb 28, 2003, 2:16 p.m.: 26 IR 2305)*
7) 45 IAC 18-1-38 provides, "Suspend. means that the qualified organization cannot conduct any gaming events or hold a license for a period of time specified by the department. The period of suspension begins at the time the organization receives notice from the department or when the organization exhausts all administrative remedies, whichever is later. *(Department of State Revenue; 45 IAC 18-1-38; filed Feb 28, 2003, 2:16 p.m.: 26 IR 2305).*
8) IC 4-32-8-1 states, " 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."
9) IC 4-32-9-1 provides, "A qualified organization may conduct the following activities in accordance with this article:

(1) A bingo event.
(2) A charity game night.
(3) A raffle event.
(4) A door prize event.
(5) A festival.
(6) The sale of pull tabs, punchboards, and tip boards."

10) IC 4-32-9-2 states, "Except as provided in section 3 of this chapter, a qualified organization must obtain a license from the department to conduct an allowable event."
11) IC 4-32-9-11 states, "A bingo license or special bingo license may also authorize a qualified organization to conduct door prize drawings and sell pull tabs, punchboards, and tip boards at the bingo event.

(b) A charity game night license may also authorize a qualified organization to conduct door prize drawings and sell pull tabs, punchboards, and tip boards at the charity game night.
(c) A raffle license may also authorize a qualified organization to conduct door prize drawings and sell pull tabs, punchboards, and tip boards at the raffle event.
(d) A door prize license may also authorize a qualified organization to sell pull tabs, punchboards, and tip boards at the door prize event."

12) 45 IAC 18-2-4(c) states, "A qualified organization may hold more than one (1) license at the same time."
13) 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..."
14) 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."
15) 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) According to IC 4-32-9-11, a bingo license or special bingo license may also authorize a qualified organization to conduct door prize drawings and sell pull tabs, punchboards, and tip boards at the bingo event.
2) It is questionable as to whether a licensed qualified organization can play bingo and sell pull tabs, punchboards and tip boards at one location three times a week, and then sell pull tabs, punchboards or tip boards at another location seven days a week. A literal reading of IC 4-32-9-11 may prohibit such a practice.
3) The Department's letter dated December 15, 2003 delivered to Petitioner's location where it sold pull tabs only and where the violation took place met the Department's notice requirements found in IC 6-8.1-5-1.
4) What is clear is that in Petitioner's case only one (1) license was issued, and that was License number 100913 and that is the license being suspended.

PROPOSED DEPARTMENTAL ORDER

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

The Petitioner's appeal is denied. Petitioner's license number 100913 is suspended and therefore, they are unable to conduct charity gaming for a period of one (1) year from the date of this decision.

1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue, a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
2) Judicial review of a final order may be sought under IC 4-21.5-5.

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

Dated: ____________________ ______________________________

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

0320010124.LOF

LETTER OF FINDINGS NUMBER: 01-0124
Adjusted Gross Income Tax–Net Operating Loss
For Tax Year 1999

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

I. Adjusted Gross Income Tax—Net Operating Loss

Authority: 45 IAC 3.1-1-109; IC § 6-3-1-1 *et seq.*

Taxpayer protests the denial of a net operating loss deduction from its adjusted gross income tax.

STATEMENT OF FACTS

Taxpayers operate two dine-in and carryout restaurants in Indiana, offering a daily buffet featuring pizza, spaghetti, and a salad bar. Taxpayers also have arcade/vending areas in each restaurant and award prizes on some of the games when players earn tickets. The investigative summary discovered that the shareholders of the S-Corporation, husband and wife, moved from Indiana to Kentucky in 1998 and failed to file an Indiana IT-40PNR for 1999, the tax year at issue. Taxpayers' power of attorney filed a protest concerning a failure to deduct a net operating loss from the S-Corporation's profits which would have reduced taxpayers' adjusted gross income tax. More facts will be added as necessary.

I. Adjusted Gross Income Tax—Net Operating Loss

DISCUSSION

Taxpayers, husband and wife, are the sole shareholders of the S-Corporation through which they operated two Indiana restaurants during the tax year at issue, 1999. Taxpayers lived in Indiana through part of the 1998 calendar year and then moved to Kentucky. The auditor, pursuant to 45 IAC 3.1-1-109, adjusted taxpayers' adjusted gross income tax because they failed to file an Indiana IT-40PNR for 1999. Indiana and Kentucky have a reciprocal agreement for individual income tax, which applies, only to salaries, wages, and tips. Business income is not part of this agreement. Subchapter S corporations are required to withhold adjusted gross income tax on any nonresident shareholders' portion of taxable income whether distributed or not.

Taxpayers' power of attorney filed a protest concerning a net operating loss, which was not at issue in the audit investigation. Further, taxpayers' power of attorney never contacted the Department with evidence to support the protest despite numerous letters sent to the power of attorney requesting information. Finally, taxpayers cannot deduct a net operating loss for Indiana adjusted gross income tax purposes because there is no corresponding loss on the federal return for the tax year at issue. The federal return is the beginning point for determining Indiana adjusted gross income tax. *See*, IC § 6-3-1-1 *et seq*.

FINDING

Taxpayers' protest is denied.

DEPARTMENT OF STATE REVENUE

0220020030.LOF

LETTER OF FINDINGS: 02-0030
Indiana Corporate Income Tax
For the Years 1995, 1996, and 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Money Received From the Sale of Computers and Related Services to Indiana Remarketers – Gross Income Tax.

Authority: IC 6-2.1-2-2(a)(2); IC 6-2.1-3-3; IC 6-8.1-5-1(b); 45 IAC 1.1-2-5(a); 45 IAC 1.1-2-5(d); 45 IAC 1.1-3-3(c); 45 IAC 1.1-3-3(c)(5).

Taxpayer argued that the money it receives from selling computers and computer-related services to Indiana remarketers is not subject to gross income tax.

II. Investment Income – Adjusted Gross Income Tax.

Authority: IC 6-3-1-20; IC 6-3-1-21; IC 6-3-2-2(b); IC 6-3-2-2(g) to (k); May Department Store Co. v. Indiana Dept. of State Revenue, 749 N.E.2d 651 (Ind. Tax Ct. 2001); 45 IAC 3.1-1-29; 45 IAC 3.1-1-30.

Taxpayer maintains that money it earns from investing excess funds in an "investment portfolio" is entirely "non-business income" for purposes of determining taxpayer's adjusted gross income.

STATEMENT OF FACTS

Taxpayer is in the business of building and selling computers and computer software. Taxpayer has business locations and personnel within the state. During 1995, 1996, and 1997 taxpayer filed consolidated tax returns. During 2001, the Department of Revenue (Department) conducted an audit review of taxpayer's tax returns and business records. This audit review resulted in the assessment of additional corporate income taxes. Taxpayer disagreed with portions of the conclusions contained within the audit report and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer explained the basis for its report. This Letter of Findings is the result of that hearing, the supplemental information taxpayer supplied, and the information contained within the original audit report.

DISCUSSION

I. Money Received From the Sale of Computers and Related Services to Indiana Remarketers – Gross Income Tax.

Taxpayer sells its computers, software, and related services using a variety of methods including sales to two out-of-state

"remarketers." Remarketer one was headquartered in California, and remarketer two was headquartered in Florida.

According to taxpayer, the sales to remarketer one were arranged in California with the equipment shipped from the point of manufacturer to the remarketer one's warehouse in Indianapolis.

According to taxpayer, the sales to remarketer two occurred in Florida with the computers being shipped to one of remarketer two's distribution centers located within Indiana.

Again – according to taxpayer – the taxpayer's in-state personnel were not involved in the sale of the computers, services, and associated software; the in-state personnel were not involved in the initiation, negotiation, or servicing of the either of these sales contracts.

The audit review assessed gross income tax on the money taxpayer received from remarketer one and from remarketer two at the "low" and "high" rates differentiating between the money taxpayer received for the sales of the computers and the money received for the provision of services related to those computers.

Gross income tax is imposed upon the "the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." IC 6-2.1-2-2(a)(2). However, "Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution." IC 6-2.1-3-3.

Taxpayer argues that the money received from the sale of computers and services to the two remarketers is not subject to gross income tax because the underlying sales transactions were unrelated to the taxpayer's Indiana sales personnel and Indiana sales locations. 45 IAC 1.1-3-3(c) states that "Gross income derived from the sale of tangible personal property in interstate commerce is not subject to the gross income tax if the sale is not completed in Indiana." The regulation provides an example relevant to the specific issue raised by taxpayer.

> A sale to an Indiana buyer by a nonresident with an in-state business situs or activities but the situs or activities are not significantly associated with the sale because [the sale] was initiated, negotiated, and serviced by out-of-state personnel, and the goods are shipped from out-of-state. The in-state business situs or activities will be considered significantly associated with the sale if the sale is initiated, negotiated, or serviced by in-state personnel. 45 IAC 1.1-3-3(c)(5).

In order to establish that the sales to the two remarketers were not associated with taxpayer's Indiana sales location and taxpayer's Indiana sales personnel, taxpayer has provided affidavits, a letter, and a copy of an e-mail all attesting to the notion that the sales to remarketer one were not "initiated, negotiated, or serviced by in-state personnel." However, the information taxpayer provided relates only to sales of computers to remarketer one; the information provides no insight into the sales made to remarketer two. In addition, the information provided by taxpayer dates back to taxpayer's sales to remarketer one made during 1990 through 1992. The information does not relate specifically to the remarketer one sales made during 1995 through 1997.

The Department does not challenge the veracity or the good intentions involved the taxpayer's efforts to establish that the sale of computer made to remarketer one and remarketer two were unrelated to taxpayer's instate activity. However, pursuant to IC 6-8.1-5-1(b), taxpayer has not met its burden of "proving that the proposed assessment is wrong...." Given the size, complexity, and dynamics of taxpayer's business, it is not possible to determine whether the 1995 through 1997 sales to remarketers one and two were similar in circumstances to the sales made to remarketer one during 1990 through 1992.

Taxpayer also argues that the money received from remarketer one and remarketer two – derived from the provision of computer services – was not subject to gross income tax because the services were related to the underlying interstate sales of computers. Taxpayer's argument misses the mark because whether or not the computers moved in interstate commerce is unrelated to the question of whether or not the income from the provision of services is subject to gross income tax. 45 IAC 1.1-2-5(a) provides that "Gross income derived from the provision of a service of any character within Indiana is subject to the gross income tax. This is true even when a service contract calls for the furnishing of tangible personal property in the performance of the contract." The same regulation further states that, "Gross income derived from the provision of a service within Indiana... on goods belonging to another is subject to gross income tax even though such property is moved in interstate commerce before or after the performance of the service." 45 IAC 1.1-2-5(d).

Taxpayer earned money because it provided services to remarketers one and two. Taxpayer provided the remarketers support documentation, advertising, and promotional materials. Taxpayer retained sales, warranty, and service records on behalf of the remarketers. Taxpayer conducted technical seminars and provided technical services for the remarketers. In consideration, the remarketers compensated taxpayer. That compensation is subject to the state's gross income tax.

FINDING

Taxpayer's protest is respectfully denied.

II. Investment Income – Adjusted Gross Income Tax.

The audit review found that money taxpayer earned in the form of "short term interest" constituted "business income." Taxpayer disagrees concluding that what it calls "Portfolio income" arose from transactions outside taxpayer's regular business activities and that the money should be classified as "non-business income." Taxpayer maintains that the acquisition of the securities

"did not arise out of or were not created in the regular course of [taxpayer's] trade or business operations and the purpose for acquiring the holding the securities was not related to or incidental to such trade or business operations." As a result, taxpayer maintains that the portfolio/security income should be allocated to the state in which taxpayer's headquarters is found.

Taxpayer states that it maintains a "substantial investment portfolio composed of various types of interest-bearing and discount securities and money-market investments." The investment portfolio was devised as a means of safely and profitably investing surplus cash with the goal of obtaining the most attractive return possible; taxpayer states that investment decisions are based strictly on prevailing "economic and market conditions" and are unrelated to the needs of taxpayer's "regular trade or business." According to taxpayer, it maintains an investment department at its out-of-state headquarters and that all activities related to the management of the investment portfolio originate within this department. In order to manage its investment portfolio, taxpayer maintains a staff of personnel who have no duties or responsibilities within taxpayer's core business operation. Taxpayer describes that core business as the "development, manufacture, rental, sale and service of technical, commercial and scientific products, mainly data processing... and office equipment and a wide range of support and systems management services." In sum, taxpayer maintains a department and personnel, distinct from its core computer business, dedicated to investing taxpayer's surplus cash.

For purposes of determining a taxpayer's adjusted gross income tax liability, business income is apportioned between Indiana and other states using a three factor formula. IC 6-3-2-2(b). In contrast, non-business income is allocated to Indiana or it is allocated to another state. IC 6-3-2-2(g) to (k). Therefore, "whether income is deemed business income or non-business income determines whether it is allocated to a specific state or whether it is apportioned between Indiana and other states [in which] the taxpayer is conducting its trade or business." May Department Store Co. v. Indiana Dept. of State Revenue, 749 N.E.2d 651, 656 (Ind. Tax Ct. 2001).

Taxpayer's argument, that this income constitutes "non-business income," is significant because if taxpayer is correct, all this income is allocated elsewhere and is not relevant in calculating taxpayer's Indiana adjusted gross income tax.

The benchmark for determining whether income can be apportioned is the distinction between "business income" and "non-business income." That distinction is defined by the Indiana Code as follows:

> The term "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitutes integral parts of the taxpayer's regular trade or business operation. IC 6-3-1-20.

"Non-business income," in turn, "means all income other than business income." IC 6-3-1-21. For purposes of calculating an Indiana corporation's adjusted gross income tax liability, business income is apportioned between Indiana and other states using a three-factor formula, while non-business income is allocated to Indiana or another state in which the taxpayer is doing business. May, 749 N.E.2d at 656. In that decision, the Tax Court determined that IC 6-3-1-20 incorporates two tests for determining whether the income is business or non-business: a transactional test and a functional test. Id. at 662-63. Under the transactional test, gains are classified as business income when they are derived from a transaction in which the taxpayer regularly engages. The particular transaction from which the income derives is measured against the frequency and regularity of similar transactions and practices of the taxpayer's business. Id. at 658-59.

Under the functional test, the gain arising from the sale of an asset will be classified as business income if the acquisition, management, and disposition of the property generating income constitutes an integral part of the taxpayer's regular trade or business operations. *See* IC 6-3-1-20.

Department regulations 45 IAC 3.1-1-29 and 45 IAC 3.1-1-30 provide guidance in determining whether income is business or non-business under the transactional test. 45 IAC 3.1-1-29 states in relevant part that, "Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is 'business income' or 'non-business income' is the identification of the transactions and activity which are the elements of a particular trade or business." 45 IAC 3.1-1-30 provides that, "[f]or purposes of determining whether income is derived from an activity which is in the regular course of the taxpayer's trade or business, the expression 'trade or business' is not limited to the taxpayer's corporate charter purpose of its principal business activity. A taxpayer may be in more than one trade or business, and derive business therefrom depending upon but not limited to some or all of the following:

> (1) The nature of the taxpayer's trade or business.
> (2) The substantiality of the income derived from the activities and the percentage that income is of the taxpayer's total income for a given tax period.
> (3) The frequency, number of continuity of the activities and transactions involved.
> (4) The length of time the property producing income was owned by the taxpayer.
> (5) The taxpayer's purpose in acquiring and holding the property producing income.

The functional test focuses on the property being disposed of by the taxpayer. Id. Specifically, the functional test requires examining the relationship of the property at issue with the business operations of the taxpayer. May, 749 N.E.2d at 664. In order to satisfy the functional test, the property generating income must have been acquired, managed, and disposed by the taxpayer in

a process integral to taxpayer's regular trade or business operations. Id. In May, the Tax Court defined "integral" as "part of or [a] constituent component necessary or integral to complete the whole." Id. at 664-65. The court concluded that petitioner retailer's sale of one of its retailing divisions was not "necessary or essential" to the petitioner's regular trade or business because the sale was executed pursuant to a court order that benefited a competitor and not the petitioner. Id. at 665. In effect, the court determined that because the petitioner was forced to sell the division in order to reduce its competitive advantage, the sale was not integral to the petitioner's own business operations. Id. Therefore, the proceeds from the division's sale were not business income under the functional test. Id.

The audit correctly concluded that the money received from the portfolio investments was "business income." The information offered by taxpayer itself demonstrates that it regularly engages in the sale and purchase of securities in order to maximize the value of its surplus cash assets. The sales and purchase of securities is such an ordinary part of taxpayer's business that it maintains a separate business division and hires personnel specifically dedicated for that purpose. The investment proceeds are properly classified as "business income" pursuant to the transactional test.

In addition, the income is properly classified as business income under the functional test because the sale and purchase of securities constitutes an integral part of the taxpayer's business. Therefore, the income meets the "functional test." Although taxpayer may be correct in stating that it is in the computer business and not the investment business, that distinction is irrelevant. The issue is not whether or not taxpayer is in the investment business, the issue is whether the investment income is "business" or "non-business" income. In this instance, there is nothing extraordinary taxpayer's investment of excess cash in order to maximize the value of that cash. To the contrary, the practice appears to be a day-to-day part of taxpayer's overall business; the investment income is neither unusual nor unexpected and falls squarely within the definition of "business income."

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

02-20020178.LOF

LETTER OF FINDINGS NUMBER: 02-0178
Gross Income Tax & Penalty
For the Years 1996-2000

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

ISSUES

I. Gross Income Tax-Indiana Source Income

Authority: Ind. Code § 6-8.1-5-1.

Taxpayer protests the assessment of gross income tax with respect to receipts that reflect Taxpayer's receipts for services provided for an Indiana manager.

II. Tax Administration - Penalty

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

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

STATEMENT OF FACTS

Taxpayer is a subsidiary of a corporation in the business of selling children's clothing at retail. The parent corporation is divided into two subsidiaries-the retail stores, and a management company providing services to the retail stores. In Indiana, Taxpayer operates a number of stores and has a district store manager living in Indiana.

Taxpayer was audited for the years in question. As a result of the audit, Taxpayer was assessed gross income tax with respect to a portion of its "other income" deemed attributable to services provided by the Indiana manager. Further, a portion of the "other income" was deemed to be Indiana sales, in the proportion of Taxpayer' payroll factors. Taxpayer protested the assessment, stating that the fees in question represent reimbursement for services rendered outside Indiana, and therefore were not Indiana gross income.

Taxpayer had been notified by letter of a hearing. A representative of the Taxpayer called with respect to the letter and affirmed the time and date of the hearing. However, on the date and time of the hearing, no representative of the Taxpayer either appeared at the Department or called the hearing officer. Accordingly, this letter of findings has been prepared based on the information in the file.

DISCUSSION

I. Gross Income Tax-Indiana Source Income

According to the audit report, the revenue for services provided by Taxpayer (listed by Taxpayer as "other income") should

be pro rated to Indiana based on its Indiana payroll to its overall payroll. Taxpayer maintains that the revenue that the auditor seeks to allocate is solely for a reimbursement for services performed and corporate overhead expenses incurred at its California headquarters, and therefore not subject to gross income tax. Further, Taxpayer maintains that the district sales manager located in Indiana did not produce income for Taxpayer, and that the manager did services in states other than Indiana. However, Taxpayer did not provide any additional information to substantiate that the auditor was incorrect-its burden, per Ind. Code § 6-8.1-5-1. Accordingly, the auditor's determination must be permitted to stand.

With respect to adjusted gross income tax, it is not entirely clear whether this was raised. The protest is in the nature of a gross income tax protest, though the amount Taxpayer has protested includes the adjusted gross income tax for 2000. Nevertheless, Taxpayer has not presented an argument sufficient to meet its statutory burden.

FINDING

Taxpayer's protest is denied.

II. Tax Administration-Penalty

DISCUSSION

Taxpayer argues that it is not subject to negligence penalties with respect to the additional taxes assessed against it. In particular, Taxpayer argues that the additional tax was due to its different, but reasonable, interpretation of the statute. Accordingly, it argues that it was not negligent in its tax returns for the years in question.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. Ind. Code § 6-8.1-10-2.1. The Indiana Administrative Code further provides:

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

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

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

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

45 IAC 15-11-2.

Taxpayer has presented an argument that its position was based on a reasonable interpretation of Indiana law, and accordingly was not negligent.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04-20020193.LOF

LETTER OF FINDINGS NUMBER: 02-0193
Sales/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-Exemptions

Authority: Ind. Code § 6-2.5-8-8.

Taxpayer protests the assessment of sales and use tax with respect to sales made to several customers Taxpayer believed were not subject to sales and use tax.

II. Tax Administration - Penalty

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

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

STATEMENT OF FACTS

Taxpayer is a seller of computer software, particularly anti-virus and security software. During the taxable years in question, taxpayer did not remit sales tax with respect to several purchases that taxpayer claimed were exempt for Indiana sales tax. During the course of audit, taxpayer was unable to provide exemption certificates or special exemption certificates for two customers. Audit assessed additional sales tax and penalty, and taxpayer filed a protest of tax with respect to two customers, and penalty with respect to the entire assessment.

I. Sales and Use Tax-Exemptions

DISCUSSION

Taxpayer protests the imposition of sales/use tax with respect to two vendors that taxpayer maintains are exempt from sales tax. Taxpayer has not provided a copy of the exemption certificates, required under Ind. Code § 6-2.5-8-8, and accordingly the protest must be denied.

FINDING

Taxpayer's protest is denied.

II. Tax Administration-Penalty

DISCUSSION

Taxpayer protests the imposition of the ten percent (10%) negligence penalty for all taxes that the Department has imposed.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. Ind. Code § 6-8.1-10-2.1. The Indiana Administrative Code further provides:

> (b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.
>
> (c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
>
> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;
> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
> (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
>
> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

45 IAC 15-11-2.

Taxpayer has failed to provide sales tax exemption certificates for the customers in controversy. The simple step of ensuring that taxpayer or customer provides an exemption certificate is a statutory requirement prior to conducting a potentially taxable transaction. Taxpayer has failed to meet the appropriate standard of care expected of a taxpayer.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20020194.LOF

LETTER OF FINDINGS NUMBER: 02-0194
Sales/Use Tax
For the Year 1997

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

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

ISSUES

I. Sales and Use Tax-Exemptions

Authority: Ind. Code § 6-2.5-8-8.

Taxpayer protests the assessment of sales and use tax with respect to sales made to several customers Taxpayer believed were not subject to sales and use tax.

II. Tax Administration - Penalty

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

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

STATEMENT OF FACTS

Taxpayer is a seller of computer software, particularly anti-virus and security software. During the taxable years in question, taxpayer did not remit sales tax with respect to several purchases that taxpayer claimed were exempt for Indiana sales tax. During the course of audit, taxpayer was unable to provide exemption certificates or special exemption certificates for two customers. Audit assessed additional sales tax and penalty, and taxpayer filed a protest of tax with respect to two customers, and penalty with respect to the entire assessment.

I. Sales and Use Tax-Exemptions

DISCUSSION

Taxpayer protests the imposition of sales/use tax with respect to two vendors that taxpayer maintains are exempt from sales tax. Taxpayer has not provided a copy of the exemption certificates, required under Ind. Code § 6-2.5-8-8, and accordingly the protest must be denied.

FINDING

Taxpayer's protest is denied.

II. Tax Administration-Penalty

DISCUSSION

Taxpayer protests the imposition of the ten percent (10%) negligence penalty for all taxes that the Department has imposed.

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

> (b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.
>
> (c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
>
> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;
> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
> (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.
>
> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

45 IAC 15-11-2.

Taxpayer has failed to provide sales tax exemption certificates for the customers in controversy. The simple step of ensuring that taxpayer or customer provides an exemption certificate is a statutory requirement prior to conducting a potentially taxable transaction. Taxpayer has failed to meet the appropriate standard of care expected of a taxpayer.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420020233.LOF

LETTER OF FINDINGS NUMBER: 02-0233
Sales and Use Tax
For the Years 1999-2000

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

ISSUES

I. Sales and Use Tax-Imposition of Sales Tax

Authority: IC 6-8.1-5-1 (b), IC 6-8.1-5-4, IC 6-2.5-2-1.

The taxpayer protests the imposition of sales tax.

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 certain items.

III. Tax Administration-Penalty

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

The taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

The taxpayer is a tattoo and piercing emporium featuring painless tattooing, surgical sterilization, custom work, cover ups, and body jewelry. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales tax, use tax, interest, and penalty for the tax period 1999-2000. The taxpayer protested the assessments of sales tax, use tax, and penalty. A hearing was held and this Letter of Findings results.

I. Sales and Use Tax-Imposition of Sales Tax

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. The tax is paid by the purchaser to the seller who holds the tax money as agent for the state. IC 6-2.5-2-1.

The taxpayer's taxable sales consisted of replacement earrings and body jewelry. The taxpayer filed sales tax returns on a quarterly basis in 1999 and a monthly basis in 2000. Prior to the completion of the audit, the taxpayer filed a sales tax return for the third quarter of 1999. The taxable sales reported on this return were not consistent with the amounts filed for the other three quarters of 1999. Since the figures could not be verified with the records the taxpayer provided, the average of the three periods reported previously was used to determine the amount of taxable sales for the third quarter of 1999. The taxpayer also did not file sales tax returns for October, November, and December of 2000. The average taxable sales from the reported months were used to determine the amount of taxable sales for the missing months. The taxpayer protested this assessment contending that some of the sales were exempt from the imposition of sales tax. No documentation was presented, however, to substantiate this contention. Therefore, the taxpayer did not sustain its burden of proving that the proposed assessment of sales tax was incorrect.

FINDING

The taxpayer's protest is denied.

II. Sales and Use Tax-Imposition of Use Tax

DISCUSSION

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). The taxpayer made purchases from various vendors with the description listed as "supplies." The taxpayer also purchased equipment, repair parts, office supplies, and subscriptions on which the department assessed use tax. The taxpayer protested this assessment claiming that it had actually paid sales tax on some of these items at the point of purchase. In support of this contention, the taxpayer submitted documentation such as receipts indicating that sales tax was paid at the time of purchase on some of the taxed items.

FINDING

The taxpayer's protest is sustained to the extent that the documentation indicates the taxpayer actually paid sales tax at the point of purchase on any of the items on which use tax was imposed in the audit.

III. 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 use reasonable care in determining the amount of tax due to the state each month. Further, the taxpayer disregarded its duty to keep adequate records and present them to the state upon request. These breaches of the taxpayer's duty constitute negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

42-20020363.LOF

LETTER OF FINDINGS NUMBER: 02-0363
IFTA
For the Years 1998 and 1999

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

ISSUES

I. IFTA—Record Keeping

Authority: IFTA P560.100; P560.200; P560.300. P530.100; IC 6-8.1-10-1(e); IC 6-8.1-5-1(b); IC 6-8.1-10-2.1.

Taxpayer protests that it should receive an increase in tax paid credit.

STATEMENT OF FACTS

Taxpayer is protesting for an increase in the tax paid credit. Specifically, the taxpayer argues that it should receive an increased credit for Ohio tax paid fuel. The Department contends that the taxpayer has not presented correct and sufficient records to allow an increase in the tax paid credit.

I. IFTA—Record Keeping

DISCUSSION

Indiana is a member of the International Fuel Tax Agreement ("IFTA"). IFTA rules P560.100 provide that—

Retail purchases must be supported by a receipt or invoice, credit card receipt, automated vendor generated invoice or transaction listing, or microfilm/microfiche of the receipt or invoice. Receipts that have been altered or indicate erasures are not accepted for tax-paid credits unless the licensee can demonstrate the receipt is valid.

Furthermore, IFTA P560.200 and P560.300 state the following:

Receipts for retail fuel purchases must identify the vehicle by the plate or unit number or other licensee identifier, as distance traveled and fuel consumption may be reported only for vehicles identified as part of the licensee's operation. [P560.200]

An acceptable receipt or invoice must include, but shall not be limited to, the following:

.005 Date of purchase;
.010 Seller's name and address;
.015 Number of gallons or liters purchased;
.020 Fuel type;
.025 Price per gallon or liter or total amount of sale;
.030 Unit numbers; and
.035 Purchaser's name [P560.300, parenthetical omitted]

Additionally the IFTA agreement has recordkeeping requirements. For instance, P530.100 states in part that "Failure to maintain records … may result in an assessment…."

With the IFTA requirements in mind, we can now turn to the taxpayer's argument. Taxpayer describes in correspondence its position:

Most of [Taxpayer's] assessment was generated from the fuel usage in the State of Ohio. We have previously paid the assessment unrelated to Ohio purchases. The vehicles that are used in Ohio stay in Ohio. The fuel that they use is either from

a bulk fuel storage tank that we have in Ohio and pay fuel tax in Ohio or from using Fleet Fueling cards at gas stations within Ohio.

And further:

We were not given any credit for tax paid on diesel fuel purchased in Ohio on our credit cards. The Fleet Fueling cards were used exclusively in Ohio and I have previously submitted the monthly Fleet Fueling statements showing the diesel fuel purchased including locations and monthly financial statements showing that the fuel purchased was indeed expensed to our Ohio division. *When fueling our equipment, our foremen wrote their pickup trucks number on the receipts regardless if they were fueling their pickup, backhoe, dump truck, etc. Our pickup trucks run on gasoline not diesel fuel so obviously diesel fuel was purchased for other equipment. I believe tax paid credit should be granted on the Fleet Fueling credit card purchases because it is reasonable that the diesel fuel was consumed by our equipment. (Italics added)*

The Department's position is that a fuel receipt with specific verification that the fuel was placed into a subject vehicle is needed to receive the tax paid credit. The Department determined the financial summary sheets the taxpayer provided were incomplete and not sufficient.

As noted by the IFTA language quoted earlier, IFTA requires a receipt or invoice that is vehicle specific (hence the "unit number" requirements). Taxpayer did not do this, therefore taxpayer is not entitled to an increase in tax paid credit.

Taxpayer also mentions towards the end of a letter to the Department that it would like penalties and interest abated. Interest cannot be waived by statute (IC 6-8.1-10-1(e)), and the taxpayer, who bears the burden of "proving the proposed assessment is wrong" under IC 6-8.1-5-1(b) has not developed any arguments on the penalty assessed per IC 6-8.1-10-2.1.

FINDING

Taxpayer's protests are denied.

DEPARTMENT OF STATE REVENUE

0220020501.LOF

LETTER OF FINDINGS: 02-0501
Indiana Corporate Income Tax
For 1998

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

ISSUE

I. Exclusion of Taxpayer's Telemarketing Subsidiary from Taxpayer's Consolidated Adjusted Gross Income Tax Return.

Authority: IC 6-3-2-2(a); IC 6-3-2-2(l); IC 6-3-2-2(m); IC 6-3-4-14(a); IC 6-3-4-14(b); 45 IAC 3.1-1-38; 45 IAC 3.1-1-110; 45 IAC 3.1-1-111.

Taxpayer argues that the Department of Revenue (Department) erred when it excluded taxpayer's telemarketing subsidiary from taxpayer's consolidated adjusted gross income tax return. Taxpayer maintains that, by virtue of the telemarketing subsidiary's activities within the state, it has established an Indiana nexus and that the telemarketing subsidiary should have been included in the calculation of its Indiana adjusted gross income.

STATEMENT OF FACTS

Taxpayer is an affiliated group of companies engaged in the funeral and cemetery business. Taxpayer submitted consolidated Indiana tax returns reporting its state income tax liabilities. The Department conducted an audit review of these returns making a number of adjustments. Included among those adjustments was a determination that taxpayer's telemarketing subsidiary should not have been included in the 1998 consolidated return. The decision to eliminate the telemarketing subsidiary had the result of increasing taxpayer's state income tax liability. Taxpayer challenged the decision resulting in various communications between the Department and the taxpayer the net result of which was that the Department declined to reverse its original decision excluding the subsidiary. Taxpayer submitted a protest, an administrative hearing was conducted during which taxpayer further explained the basis for its protest, and this Letter of Findings results.

DISCUSSION

I. Exclusion of Taxpayer's Telemarketing Subsidiary from Taxpayer's Consolidated Adjusted Gross Income Tax Return.

Taxpayer is a multi-state company which supplies consumers with funeral and cemetery services. As part of that business, taxpayer owns an out-of-state telemarketing subsidiary which sells consumers pre-need insurance policies. The telemarketing subsidiary has an Indiana business location which – during the relevant period and at various times – employed between one and seven part-time employees. These employees earned approximately $17,000 in total wages during 1998.

The telemarketing subsidiary conducts its Indiana operation from a location owned by one of taxpayer's other subsidiaries. The telemarketing company does not own any real property in Indiana. Taxpayer has submitted evidence indicating that telemarketing subsidiary owns approximately $1,000 worth of office furniture at the Indiana location. Taxpayer has submitted information indicating that the Indiana telemarketing subsidiary was "charged" with purchasing computer software containing residential telephone listings. This software cost approximately $2,700.

Taxpayer's telemarketing business works like this:

1. Telemarketing subsidiary hires part-time employees who work out of borrowed office space.
2. Telemarketing subsidiary's employees call Indiana residents soliciting the sale of pre-need insurance policies.
3. If the recipient of the phone call expresses interest, the telemarketer will send the prospective customer an insurance policy application form. The telemarketer does not sell the insurance policy; the telemarketer opens up the possibility that the prospective customer will complete the application and buy insurance from the related insurer.
4. Prospective customer sends a completed application to related insurance company. Related insurance company then decides whether to accept the application. If it does, the transaction is completed, one of taxpayer's local funeral homes is designated the beneficiary, and customer sends premium payments to related insurer.
5. Once related insurer begins to receive the insured's payments, the related insurer owes taxpayer a commission by virtue of the fact that telemarketing subsidiary solicited the sale of the underlying insurance policy.
6. Yet another of taxpayer's subsidiaries – acting as common paymaster – receives and then forwards the commissions to the individual telemarketer who originally invited the sale.

Therefore, telemarketing subsidiary's Indiana business consists of hiring part-time employees who facilitate the sale of insurance policies sold by a related insurer. In consideration of a completed sale insurer pays commissions to taxpayer's common paymaster subsidiary which then forwards those commissions to the originating telemarketer. Telemarketing subsidiary owns personal property consisting of office furniture and computerized phone lists.

The issue is whether taxpayer was correct when it decided to include the telemarketing subsidiary in its consolidated state income tax return.

IC 6-3-4-14(a) provides that, "An affiliated group of corporations shall have the privilege of filing a consolidated return with respect to the taxes imposed by IC 6-3."

The Department's regulation states that, "An affiliated group as defined in IC 6-3-4-14(b) may file consolidated returns for Adjusted Gross Income Tax and Supplemental Net Income Tax...." 45 IAC 3.1-1-110. The term, "affiliated group," is defined at 45 IAC 3.1-1-111 which provides that "The Adjusted Gross Income Tax Act adopts the definition of 'affiliated group' contained in Internal Revenue Code Section 1504, except that no member of the affiliated group may be included in the Indiana return unless it has adjusted gross income derived from sources within the state, as that phrase is defined in IC 6-3-2-2."

I.R.C. § 1504 defines, among other things, the degree of ownership which must exist before related businesses can be considered to be members of a federal "affiliated group." For purpose of this discussion, it will be assumed that taxpayer owns the telemarketing subsidiary and that there are no I.R.C. "ownership" questions which otherwise affect parties qualifications to be included as members of a federal "affiliated group."

However, qualifying under I.R.C. § 1504 – standing alone – is not sufficient to qualify the related businesses to file an Indiana consolidated tax return. In this situation, the telemarketing subsidiary must have received "adjusted gross income derived from sources with the state, as that phrase is defined in IC 6-3-2-2." 45 IAC 3.1-1-111.

IC 6-3-2-2(a) provides as follows:

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

(1) income from real or tangible personal property located in this state;
(2) income from doing business in this state;
(3) income from a trade or profession conducted in this state;
(4) compensation from a trade or profession conducted in this state; and
(5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property if the receipt from the intangible is attributable to Indiana under section 2.2 of this chapter.

The Department's regulation sets out a definition for "doing business" within the state. The regulation states:

For apportionment purposes, a taxpayer is "doing business" in a state if it operates a business enterprise or activity in such a state including, but not limited to:

(1) Maintenance of an office or other place of business in the state
(2) Maintenance of an inventory of merchandise or material for sale distribution, or manufacture, or consigned goods
(3) Sale or distribution of merchandise to customers in the state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution

(4) Rendering services to customers in the state
(5) Ownership, rental or operation of a business or of property (real or personal) in the state
(6) Acceptance of orders in the state
(7) Any other act in such state which exceeds the mere solicitation of orders so as to give the state nexus under P.L. 86-272 to tax its net income. 45 IAC 3.1-1-38.

Presumably, taxpayer maintains that the telemarketing subsidiary is "doing business" within Indiana because the subsidiary's employees makes phone calls from "an office or other place of business in the state" or because it is "[r]endering services to customers in the state." Id. However, even if taxpayer was able to demonstrate that telemarketing subsidiary earned its money from doing business within the state and even if taxpayer was able to demonstrate that its borrowed office space and part-time employees established the requisite Indiana nexus, the audit would have been justified in eliminating the telemarketing subsidiary from the consolidated return in order to more fairly reflect taxpayer's Indiana income. IC 6-3-2-2(l) provides as follows:

If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable;
(1) separate accounting;
(2) the exclusion of any one (1) or more of the factors;
(3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources within the state of Indiana; or
(4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

In addition, IC 6-3-2-2(m) provides:

In the case of two (2) or more organizations, trades or businesses owned or controlled directly or indirectly by the same interests, the department shall distribute, apportion, or allocate the income derived from sources within the state of Indiana between and among those organizations, trades, or businesses in order to fairly reflect and report the income derived from sources within the state of Indiana by various taxpayers.

IC 6-3-2-2(l), (m) provides the Department discretionary authority to adjust the allocation and apportionment provisions of the adjusted gross income tax in order to arrive at an equitable and accurate allocation of the taxpayer's Indiana income. The goal is to "fairly reflect... the income derived from sources with the state...." IC 6-3-2-2(m).

The telemarketing subsidiary has only a tenuous connection with this state. The telemarketing subsidiary did not own any real property in the state, owned a small amount of personal property here, and paid its part-time employees approximately $17,000 in wages during 1998. The $17,000 in Indiana wages represents less than one-tenth of a percent of its payroll "everywhere." On the basis of this tenuous relationship, taxpayer proposes to include the telemarketing subsidiary within the Indiana consolidated return and – as a result – import into Indiana a portion of its telemarketing subsidiary's $20,000,000 1998 losses. The Department is unable to conclude that such a result would fairly reflect taxpayer's Indiana adjusted gross income for 1998.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

02-20030023.LOF

LETTER OF FINDINGS NUMBER: 03-0023
Gross Income Tax
For the Years 1997-2001

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

ISSUES

I. Gross Income Tax-Unsegregated receipts

Authority: Ind. Code § 6-2.1-2-3; Ind. Code § 6-2.1-2-4; Ind. Code § 6-2.1-2-7.

Taxpayer protests the imposition of gross income tax at the high rate for payments with respect to contracts in which services and material were not otherwise separately stated, when taxpayer had other, separate contracts that broke out labor and materials separately, and other contracts for labor only and materials only.

II. Gross Income Tax-Asset sale proceeds

Authority: 11 U.S.C. § 1146(c); *In re 995 Fifth Avenue Associates, L.P.*, 963 F.2d 503, 511 (2nd Cir. 1992); *In re Jacoby-Bender,*

Inc. 40 B.R. 10 (Bankr. E.D.N.Y. 1984), *aff'd* 758 F.2d 840 (2nd Cir. 1985); *Aztar Indiana Gaming Corp. v. Indiana Dept. of State Revenue*, 806 N.E.2d 381 (Ind. Tax 2004).

Taxpayer protests the imposition of gross income tax with respect to sale proceeds of taxpayer with respect to a sale of property to a new corporation while taxpayer's business was in bankruptcy.

III. Tax Administration – Interest

Authority: Ind. Code § 6-8.1-10-1; 11 U.S.C. § 502(b)(2).

Taxpayer protests the imposition of interest after the date taxpayer filed for bankruptcy.

IV. Tax Administration - Penalty

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

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

STATEMENT OF FACTS

Taxpayer is a business engaged in automobile windshield repair and replacement. During the taxable years in question, taxpayer had several transactions, which can best be summarized into four categories: labor only, materials only, materials and labor, and "one-stop" transactions, in which labor and materials were not separately itemized. As a result of audit, Department reclassified receipts for "one-stop" transactions for gross income tax from the low (0.3%) rate to the high (1.2%) rate. In so doing, the Department used a cross-sample of receipts for one month, determined the percentage of receipts that were unsegregated receipts-approximately seventy-eight percent of its total receipts-to the total amount of all receipts for that month, then applied the percentage to total receipts for the years in question. Taxpayer agrees with the method for determining the percentage of receipts that were unsegregated; however, taxpayer protests the imposition of the tax at the higher rate on the entire amount of those receipts, rather than a percentage based on the material-labor ratio of the receipts that showed such amounts separately.

During 2000, taxpayer filed for bankruptcy. As part of the bankruptcy, taxpayer sold all of its capital assets other than real estate to a new corporation. Audit assessed gross income tax on the proceeds from the sale. Taxpayer has also protested this assessment, stating that the federal bankruptcy law forbids the assessment of this tax in the case of bankruptcy. Taxpayer also protests the assessment of interest from the date of its bankruptcy filing to present, stating that its bankruptcy order prohibits the assessment of post-petition interest, and protests the penalty for negligence.

I. Gross Income Tax-Unsegregated receipts

DISCUSSION

Taxpayer protests the imposition of gross income tax at the high rate. In general, a taxpayer's receipts from transactions stated in Ind. Code § 6-2.1-2-4-generally, the sale of tangible personal property- are taxable at a rate of 0.3%. Ind. Code § 6-2.1-2-3(a). However, receipts from other transactions are taxable at a rate of 1.2%. Ind. Code § 6-2.1-2-3(b). Further, if a taxpayer does not specify with respect to its records whether the transaction is subject to tax at the high rate or at the low rate, it is taxable at the high rate. Ind. Code § 6-2.1-2-7.

In this instance, taxpayer's records did not reflect what portion of the sales represented the products provided and what portion represented the labor to install the products. Even if taxpayer's method of setting forth the portions of material and labor is a reasonable representation of each portion, taxpayer has not separately stated the portions taxable at the low rate and at the high rate. Therefore, taxpayer is taxable on the unsegregated receipts at the high rate.

FINDING

Taxpayer's protest is denied.

II. Gross Income Tax-Asset sale proceeds

DISCUSSION

Taxpayer also protests the assessment of gross income tax with respect to its sale of operating assets as part of its bankruptcy reorganization. No apparent argument exists with respect to the proper imposition of the gross income tax other than the those related to the bankruptcy code. In particular, taxpayer argues that the gross income taxes imposed by Indiana would be in violation of 11 U.S.C. § 1146(c). That section states "[t]he issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax."

The statute in question has been held to be applicable generally for stamp or other nominal taxes associated with the transfer of property by written document. Elements include that the taxes

> (1) they are imposed only at the time of transfer or sale of the item at issue; (2) the amount due is determined by the consideration for, par value of, or value of the item being transferred; (3) the tax rate is a relatively small percentage of the consideration, par value or value of the property; (4) the tax is imposed irrespective of whether the transferor enjoyed a gain or suffered a loss on the underlying sale or transfer; and (5) in the case of state **[**26]** documentary transfer taxes, the tax must be paid as a prerequisite to recording.

In re 995 Fifth Avenue Associates, L.P., 963 F.2d 503, 512 (2nd Cir. 1992). In general, the court in that case noted that stamp taxes, undefined in the bankruptcy code, generally were nominal- less than one percent of the recited consideration. *Id.* at 511. However, in the case of income taxes imposed on associated gains with transfers of property, the statute has been held to not be

applicable. *Id.* at 513; *In re Jacoby-Bender, Inc.* 40 B.R. 10 (Bankr. E.D.N.Y. 1984), *aff'd* 758 F.2d 840 (2nd Cir. 1985). In these cases, the taxpayers, companies which had filed for bankruptcy, sold real estate in New York, and realized a gain on the sale of the property. New York sought to impose a gains tax of ten percent on the gain realized by taxpayer. Taxpayer, however, maintained that the bankruptcy laws prohibited assessment of the tax. The court, noting that the tax was only imposed on the gain from the sale, that the only use of consideration was measurement of the gain, and that the tax rate of ten percent was much greater than stamp taxes, permitted the gains tax assessment to stand.

In the present case, the gross income tax that the Department seeks to impose against taxpayer is different than a prohibited stamp or similar tax. While the tax has certain elements of the test provided by *955 Fifth Avenue Associates*- the taxes are only imposed at the time of transfer or sale of the item at issue, the gross income tax is measured by the proceeds of the sale, and the tax is imposed at low rates- either 0.3% or 1.2%- the gross income tax is not a state documentary transfer tax, and thus the issue of payment as a prerequisite for reporting does not arise. It is a tax on the privilege of receiving income derived from sources in the state of Indiana. *Aztar Indiana Gaming Corp. v. Indiana Dept. of State Revenue*, 806 N.E.2d 381 (Ind. Tax 2004) (*citing Miles v. Dep't of Treasury,* 209 Ind. 172, 199 N.E. 372 (Ind. 1935)). As such, the tax is not a stamp or similar tax, and accordingly the tax does not fall within the ambit of proscribed taxes under the federal bankruptcy code.

FINDING

Taxpayer's protest is denied.

III. Tax Administration-Interest

DISCUSSION

Taxpayer protests the imposition of interest from the date taxpayer filed for bankruptcy to present. Taxpayer argues that the filing of the bankruptcy petition precludes the Department from assessing interest against the taxpayer, and therefore this should be waived.

Under Ind. Code § 6-8.1-10-1, interest cannot be waived by the Department. However, because of the Bankruptcy Court's ruling, post-petition interest cannot be assessed under 11 U.S.C. § 502(b)(2).

FINDING

Taxpayer's protest is sustained.

IV. Tax Administration-Penalty

DISCUSSION

Taxpayer protests the imposition of the ten percent (10%) negligence penalty for all taxes that the Department has imposed.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC 6-8.1-10-2. 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.

With respect to taxpayer's protest, taxpayer's failure to properly compute and remit tax on a substantial majority of its total receipts, despite clear statutory authority, does not give rise to an inference of reasonable care by the taxpayer. However, for the taxable year of its bankruptcy, 2001, taxpayer has presented reasonable cause for that year only.

FINDING

Taxpayer's protest is denied for taxable years 1997-2000. Taxpayer's protest is sustained with respect to taxable year 2001.

DEPARTMENT OF STATE REVENUE

0220030155.LOF

LETTER OF FINDINGS NUMBER: 03-0155
Gross Income Tax
For the Years 1997- 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. Gross Income Tax-Imposition

Authority: IC 6-8.1-5-1(b), IC 6-2.1-2-2(a)(2), IC 6-2.1-3-3, 45 IAC 1.1-3-3(d)(6).

The taxpayer protests the imposition of gross income tax on the income from certain sales.

STATEMENT OF FACTS

The taxpayer is an international corporation that manufactures over six thousand (6000) products. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional gross income tax, interest, and penalty. The taxpayer protested the assessment of gross income tax on certain sales. A hearing was held on this issue. This Letter of Findings results.

I. Gross Income Tax-Imposition

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.

The taxpayer sells a chemical product to an Indiana manufacturer. The product is produced and shipped from the taxpayer's out of state plant. The taxpayer has a dedicated fleet of railcars that run between the taxpayer's manufacturing plant to the Indiana buyer's plant. At any given time, roughly 15-20 railcars are in transit to the Indiana buyer and 10-15 are returning to the manufacturing plant. The inventory remains in the rail car in Indiana for an average of two days before being delivered to the buyer. The contract states that "... title and risk of loss for all product sold hereunder shall pass to Buyer upon delivery of Product to Buyer's plant..." The product is not delivered to the plant until it is removed from the rail car. The taxpayer bills the customer twice monthly. The buyer is required to pay for the product on a net cash basis within 30 days from the date on which title to each shipment of the product passes from the taxpayer to the buyer.

Indiana imposes a gross income tax on "the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." IC 6-2.1-2-2(a)(2). Pursuant to this statute, the department assessed gross income tax on the taxpayer's receipts from the sale of the product to the Indiana manufacturing concern. The taxpayer protested this assessment.

The taxpayer argued that previous audits did not impose gross income tax on the proceeds from these sales of product pursuant to the interstate commerce exemption found at IC 6-2.1-3-3 as follows:

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

The taxpayer argued that the transactions in this audit period were essentially the same as the exempt transactions from the previous audits. The only change was the provision stating that title to the property changes when the property is delivered to the manufacturing plant in Indiana. Since this change was instituted merely to accommodate the need for the buyer to show productivity improvement, the taxpayer considers it inconsequential. The taxpayer errs in this conclusion. No matter the reason for the change in contractual terms, the contract during the audit period clearly stated that the taxpayer owned the property until such time as it was unloaded at the buyer's facility. The buyer pays a pre-determined price for the product it receives at its manufacturing plant in Indiana.

The term "sale" is defined in BLACK'S LAW DICTIONARY, page 1337, (6th Edition, 1990.) as follows:

> ... Transfer of property for a fixed price in money or its equivalent. A contract between two parties, called, respectively, the "seller" (or vendor) and the "buyer" (or purchaser), by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property....

Since the revision of the contract, the taxpayer manufactures product in another state, ships the product to Indiana, stores the product in Indiana and then transfers title and possession of the product for a certain price to the purchaser in Indiana. This is a sale that takes place in Indiana. This is the exact situation described as subject to the Indiana gross income tax at 45 IAC 1.1-3-3(d)(6).

The taxpayer cited an unpublished Indiana Tax Court Case in support of its argument. Since the case is unpublished, it cannot be used as precedent by other taxpayers.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120040082.LOF

LETTER OF FINDINGS: 04-0082
Indiana Individual Income Tax
For 2000

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

I. Legitimacy of Assessment Document.

Authority: IC 6-8.1-5-1(a); 44 U.S.C.S. §§ 3501-3520; 44 U.S.C.S. § 3501(1); 5 C.F.R. § 1320.7 (1990).

Taxpayer maintains that the notice of proposed assessment is a "bootleg" document because it is unsigned and because the assessment notice does not have an "OMB" number.

II. Definition of Income.

Authority: Ind. Const. art X, § 8; IC 6-3-1-3.5 et seq.; IC 6-3-1-9; IC 6-3-1-12; IC 6-3-1-15; I.R.C. § 61; I.R.C. § 61(a); I.R.C. § 62; New York v. Graves, 300 U.S. 308 (1937); United States v. Supplee-Biddle Hardware Co., 265 U.S. 189 (1924); Doyle v. Mitchell, 247 U.S. 179 (1918); Stratton's Independence v. Hobert, 231 U.S. 399 (1913); Wilcox v. Commissioner of Internal Revenue, 848 F.2d 1007 (9th Cir. 1988); Coleman v. Commissioner of Internal Revenue, 791 F.2d 68 (7th Cir. 1986); United States v. Koliboski, 732 F.2d 1328 (7th Cir. 1984); United States v. Romero, 640 F.2d 1014 (9th Cir. 1981); United States v. Ballard, 535 F.2d 400 (8th Cir. 1976); United States v. Connor, 898 F.2d 942. 943 (3rd Cir. 1990) Snyder v. Indiana Dept. of State Revenue, 723 N.E.2d 487 (Ind. Tax Ct. 2000); Thomas v. Indiana Dept. of State Revenue, 675 N.E.2d 362 (Ind. Tax. Ct. 1997); Richey v. Indiana Dept. of State Revenue, 634 N.E.2d 1375 (Ind. Tax Ct. 1994).

Taxpayer argues that only corporate profits are subject to federal and state taxes. Because taxpayer is not a corporation, and did not receive corporate "income," taxpayer is of the opinion that he did not obtain taxable income.

STATEMENT OF FACTS

Taxpayers are Indiana residents who prepared and submitted a joint state tax return. For simplicity's sake, both parties are hereinafter simply referred to as "taxpayer." Except for the amount of money claimed as a refund, taxpayer filled out the return with "zeroes." The taxpayer's form was due on April 16, 2001.

On November 26, 2003, the Department of State Revenue (Department) sent taxpayer a notice of "Proposed Assessment" indicating that the Department had determined taxpayer owed additional state income tax. On January 18, 2004, taxpayer submitted a protest setting forth various arguments to the effect that taxpayer did not owe the tax. The protest was assigned to the Hearing Officer on February 27, 2004. However – despite repeated requests to do so – taxpayer declined the opportunity to take part in an administrative hearing in which taxpayer would have been provided the opportunity to explain the basis for taxpayer's protest. In addition, taxpayer declined the opportunity to submit additional written materials further explaining the basis for the protest.

Accordingly, this Letter of Findings has been written based upon the assertions contained within taxpayer's January 2004 protest letter. As best that could be discerned from the protest letter, taxpayer's arguments have been set out below.

DISCUSSION

I. Legitimacy of Assessment Document.

Taxpayer challenges the facial legitimacy of the November 2003 notice of "Proposed Assessment." It is taxpayer's contention that because the document does not have an OMB number, it is a "bootleg" document and that it is entitled to "simply ignore it." Taxpayer's reference is – presumably – to the Paperwork Reduction Act of 1980, 44 U.S.C.S. §§ 3501-3520, which was intended to "minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government." 44 U.S.C.S. § 3501(1). In implementing the statutory provision, the Office of Management and Budget, has promulgated regulations requiring that certain government numbers contain a control number. *See* 5 C.F.R. § 1320.7 (1990).

Taxpayer's complaint as to the absence of an OMB number is not well founded because neither the Paperwork Reduction Act nor the implementing regulations are applicable to documents prepared and issued by the state of Indiana.

Taxpayer also complains that the notice of proposed assessment is not signed. It is somewhat difficult to determine the specific nature of taxpayer's grievance. Although a personalized notice of proposed assessment might have certain advantages, there is nothing in the statutes or regulations which require that a notice of proposed assessment have a signature. It is sufficient that the

document place the taxpayer on notice of a potential tax deficiency and that the taxpayer be provided with the means by which to challenge that assessment. The statutes simply 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 unpaid tax on the basis of the best information available." IC 6-8.1-5-1(a).

Taxpayer's challenge as to the legitimacy of the November 2003 notice is entirely unfounded.

FINDING

Taxpayer's protest is denied.

II. Definition of Income.

Taxpayer argues that he did not receive "income" during the year 2000. Liberally construed, taxpayer's argument is that – for purposes of determining income tax liability – "income" can only be derivative of corporate activity. Therefore, as an individual Indiana resident who by definition did not receive "corporate" income, taxpayer is not subject to the adjusted gross income tax because the ordinary income received by individuals is not "taxable income."

Taxpayer has provided a number of Supreme Court cases which purportedly support taxpayer's basic contention. For example, taxpayer cites to Doyle v. Mitchell, 247 U.S. 179 (1918); Stratton's Independence v. Hobert, 231 U.S. 406 (1913) and United States v. Ballard, 535 F.2d 400 (8th Cir. 1976) – as supporting his contention that the individual income tax can only be assessed against corporate gain. Taxpayer predicates this conclusion on selected case citations which, when taken together, purportedly limits the definition of "taxable income" to the definition originally established under the Civil War Income Tax Act of 1867. However, setting aside the question of the validity of taxpayer's legal analysis, taxpayer's conclusion concerning the definition of corporate income tax is totally irrelevant.

Taxpayer's legal analysis stands for nothing more than, when read in isolation and selectively divorced from the factual setting under which the decisions were reached, a legal argument can be proposed which will support any legal conclusion no matter how fanciful that conclusion is. Taxpayer cites to cases in which the Court was asked to determine what constituted *corporate income* under the corporate income and excise taxes in effect at the time the Court reached its conclusion. To apply Supreme Court decisions limited to determining the efficacy and application of corporate income taxes to issues related to individual income tax may yield a certain desired result but the entire process is not legally, intellectually, or logically sound.

For example, taxpayer cites to United States v. Supplee-Biddle Hardware Co., 265 U.S. 189 (1924) as supporting the proposition that only corporations are subject to income tax. The issue in that case was whether or not life insurance proceeds received by a hardware company were subject to income tax. Id. at 193-94. The Supreme Court disagreed with the government's contention that the life insurance proceeds were taxable income holding that "It is reasonable that the purpose of [the Revenue Act of 1918] to exclude the proceeds of life insurance policies from taxation in the case of individuals should be given the same effect in adapting its application to corporations, and that such proceeds should be excluded whether by the direction of the insured they were to specially named beneficiaries or were to inure to the estate of the insured." Id. at 194. In the Supplee-Biddle case, the appellant won its argument; the hardware company did not have to pay income tax on life insurance proceeds. Id. However, there is nothing in this case – nor in the cited companion cases – which stand for the proposition that ordinary individuals are not subject to federal – or by extension – state income taxes.

Taxpayer cites to numerous cases each of which will not be addressed here. It is sufficient to say that the cases simply do not get the taxpayer where he wants to go. Nowhere in Supplee-Biddle or in any of the other cited cases, did the court find that individuals were not responsible for reporting their income and paying tax on that income.

The United States Supreme Court has clearly stated that the wages of individual citizens may be subjected to an adjusted gross income tax. In New York v. Graves, 300 U.S. 308 (1937), Justice Stone stated "That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized." Id. at 312.

Since that 1937 decision, the Federal courts have consistently, repeatedly, and without exception, determined that individual wages are income. United States v. Connor, 898 F.2d 942. 943 (3rd Cir. 1990) ("Every court which has ever considered the issue has unequivocally rejected the argument that wages are not income"); Wilcox v. Commissioner of Internal Revenue, 848 F.2d 1007, 1008 (9th Cir. 1988) ("First, wages are income."); Coleman v. Commissioner of Internal Revenue, 791 F.2d 68, 70 (7th Cir. 1986) ("Wages are income, and the tax on wages is constitutional."); United States v. Koliboski, 732 F.2d 1328, 1329 n. 1 (7th Cir. 1984) ("Let us now put [the question] to rest: WAGES ARE INCOME. Any reading of tax cases by would-be tax protesters now should preclude a claim of good-faith belief that wages – or salaries – are not taxable") (Emphasis in original); United States v. Romero, 640 F.2d 1014, 1016 (9th Cir. 1981) ("Compensation for labor or services, paid in the form of wages or salary, has been universally held by the courts of this republic to be income, subject to the income tax laws currently applicable.... [Taxpayer] seems to have been inspired by various tax protesting groups across the land who postulate weird and illogical theories of tax avoidance all to the detriment of the common weal [sic] and of themselves.").

In addressing the identical issue, the Indiana Tax Court has held that, "Common definition, an overwhelming body of case law by the United Sates Supreme Court and Federal circuit courts, and this Court's opinion... all support the conclusion that wages are income for purposes of Indiana's adjusted gross income tax." Snyder v. Indiana Dept. of State Revenue, 723 N.E.2d 487, 491 (Ind.

Tax Ct. 2000). *See also* Thomas v. Indiana Dept. of State Revenue, 675 N.E.2d 362 (Ind. Tax Ct. 1997); Richey v. Indiana Dept. of State Revenue, 634 N.E.2d 1375 (Ind. Tax Ct. 1994).

As set out in the Indiana Constitution, "The general assembly may levy and collect a tax upon income, from whatever source derived, at such rates, in such manner, and with such exemptions as may be prescribed by law." Ind. Const. art X, § 8. The Indiana General Assembly exercised its constitutional prerogative by imposing an adjusted gross income tax on individuals and corporations. IC 6-3-1-3.5 et seq. In doing so, the General Assembly defined an individual subject to the adjusted gross income tax as a "natural born person, whether married or unmarried, adult or minor." IC 6-3-1-9.

Taxpayer further argues that nowhere in the Internal Revenue Code is there a definition of "income." Taxpayer errs. I.R.C. § 61(a) states as follows:

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
> (2) Gross income derived from business;
> (3) Gains derived from dealings in property;
> (4) Interest;
> (5) Rents;
> (6) Royalties;
> (7) Dividends;
> (8) Alimony and separate maintenance payments;
> (9) Annuities;
> (10) Income from life insurance and endowment contracts;
> (11) Pensions.

Under I.R.C. § 62, taxpayer begins calculating his adjusted gross income by starting with "gross income" as defined under I.R.C. § 61. According to his W2 forms, taxpayer apparently received ""wages, tips, other compensation" during 2000. Therefore, taxpayer must include those amounts as part of his reported "gross income." Taxpayer is then entitled to take whatever adjustments and deductions are available to him in determining the amount of adjusted gross income. Thereafter, the taxpayer is required to report the Federal adjusted gross income on his Indiana return and begin the process of calculating his Indiana tax liability.

Taxpayer is of the opinion that, with just the right combination of semantic technicalities, he can render himself immune from Federal and state tax liability. There is not one single Federal or state court case which supports such a far-fetched notion. Wishful thinking aside, given that taxpayer received gross income (I.R.C. § 61) in 2000, is an "individual" under IC 6-3-1-9, was a resident of Indiana for the year 2000 (IC 6-3-1-12), and is a "taxpayer" as defined within (IC 6-3-1-15), the statutes imposing the Indiana individual income tax apply with full force to taxpayer's income.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

30-20040133.LOF

LETTER OF FINDINGS: 04-0133
Riverboat Wagering Tax
For Tax Period July 2002-June 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Riverboat Wagering Tax—Flexible Scheduling

Authority: IC 4-33-13-1; IC 4-33-13-1.5

The Department and taxpayer interpret the language of IC 4-33-13-1.5 differently. The parties disagree on how the riverboat wagering tax should be calculated.

STATEMENT OF FACTS

Taxpayer is an Indiana company authorized to engage in lawful gambling activities in Indiana. Taxpayer, holder of a Riverboat Owner's License, operates a riverboat casino. Following the passage of enabling legislation (effective date July 1, 2002), taxpayer implemented flexible scheduling ("dockside gambling") on August 1, 2002.

Under this new legislation, riverboats engaged in dockside gambling paid Indiana riverboat wagering tax ("wagering tax") based on a graduated rate schedule. The graduated rate is applied to the "adjusted gross receipts received beginning the date flexible scheduling is implemented under IC 4-33-6-21." IC 4-33-13-1.5(b), version b. In July 2002, taxpayer paid wagering tax based on the flat tax rate of 22.5%. Starting August 1, 2002, taxpayer paid wagering tax based on the graduated rate schedule. In determining which tax rate to apply under the graduated schedule, taxpayer did not take into account the adjusted gross receipts received in July 2002. Instead, taxpayer remitted wagering tax at the 15% tax rate for the first $25 million of adjusted gross receipts that it received beginning August 1, 2002.

In 2003, the General Assembly amended IC 4-33-13-1.5. With amendments retroactive to July 1, 2002, the General Assembly deleted the language applying the graduated schedule "beginning the date that flexible scheduling is implemented under IC 4-33-6-21." In its stead, the General Assembly added the following language:

> If a riverboat implements flexible scheduling during any part of a period beginning July 1 of each year and ending June 30 of the following year, the tax rate imposed on the adjusted gross receipts received while the riverboat implements flexible scheduling shall be computed as if the riverboat had engaged in flexible scheduling during the entire period beginning July 1 of each year and ending June 30 of the following year.

IC 4-33-13-1.5(g).

Taxpayer acknowledges that it is liable for an additional amount of wagering tax. In recognition of the retroactive nature of the imposition statute, the General Assembly permitted the waiver of any penalties and interest associated with the retroactive provisions "if the riverboat pays the unpaid balance due in two (2) equal installments" on July 1, 2003, and July 1, 2004. P.L. 224-2003, § 48(e).

The Department calculated taxpayer's wagering tax liability (i.e., the unpaid balance due) and determined that taxpayer owed $4,390,402.24. An additional assessment was proposed. Taxpayer believes this assessment overstates its tax liability by $1,646,401. Taxpayer protests this additional assessment to the extent the amount due exceeds $2,744,001.24.

DISCUSSION

I. Riverboat Wagering Tax—Flexible Scheduling

This protest concerns the meaning of IC 4-33-13-1.5(g), which states:

> If a riverboat implements flexible scheduling during any part of a period beginning July 1 of each year and ending June 30 of the following year, the tax rate imposed on the adjusted gross receipts received while the riverboat implements flexible scheduling shall be computed as if the riverboat had engaged in flexible scheduling during the entire period beginning July 1 of each year and ending June 30 of the following year.

IC 4-33-13-1.5(g).

This protest also concerns, tangentially, the meaning of IC 4-33-13-1.5(h), which states:

> If a riverboat:
> (1) implements flexible scheduling during any part of a period beginning July 1 of each year and ending June 30, of the following year; and
> (2) before the end of that period ceases to operate the riverboat with flexible scheduling;
> the riverboat shall continue to pay a wagering tax at the tax rates imposed under subsection (b) [i.e., the graduated rate structure] until the end of that period as if the riverboat had not ceased to conduct flexible scheduling.

IC 4-33-13-1.5(h).

Taxpayer contends the language of IC 4-33-13-1.5(g) and (h) stand for the proposition that "regardless of when a riverboat either begins or ends flexible scheduling during a twelve-month period, the General Assembly intends that one tax rate structure—the graduated tax rate structure—be applied to determine the total wagering tax paid for that period." Taxpayer is mistaken.

Analysis

In Indiana, lawful riverboat gambling activities may be conducted in one of two ways—riverboats may provide gambling excursions or riverboats may implement flexible scheduling (i.e., offer dockside gambling). If gambling excursions are provided, the wagering tax is computed based on a flat rate of 22.5%. IC 4-33-13-1(b). If dockside gambling is offered, the wagering tax is computed based on a graduated rate schedule. IC 4-33-13-1.5(b).

The General Assembly included language in the respective imposition statutes regarding computation of the wagering tax to account for those situations in which a riverboat changes its mode of operations during the statutory twelve-month period (i.e., from July 1 through June 30 of the following year, the "twelve-month period"). That is, to account for those situations in which a riverboat ceases to provide gambling excursions in favor of dockside gambling—or ceases the latter for the former.

IC 4-33-13-1.5(h) provides guidance on how the wagering tax will be calculated after a riverboat has changed its mode of operations from dockside gambling to gambling excursions during the twelve-month period. IC 4-33-13.1.5(h), however, is silent on how the tax was calculated before this change occurred. IC 4-33-13-1.5(h) does not establish a single rate structure for the entire twelve-month period.

Similarly, IC 4-33-13-1.5(g) provides guidance on how the wagering tax will be calculated after a riverboat has changed its mode of operations during the twelve-month period from gambling excursions to dockside gambling. IC 4-33-13.1.5(g), likewise, is silent on how the tax was calculated before this change occurred. IC 4-33-13-1.5(g) does not establish a single rate structure for the entire twelve-month period.

Taxpayer's interpretation of IC 4-33-13-1.5(g) confuses (1) the imposition of the wagering tax based upon a graduated rate schedule with (2) the selection of the proper graduated rate. A condition precedent to the imposition of the wagering tax based on the graduated rate schedule is the implementation of flexible scheduling.

> If a riverboat implements flexible scheduling…the tax rate imposed on the adjusted gross receipts received while the riverboat implements flexible scheduling shall be computed….
>
> IC 4-33-13-1.5(g). (Emphasis added.)

Once flexible scheduling has been implemented, the graduated rate selected is determined by referencing the total adjusted gross receipts received during the entire statutory twelve-month period.

> [T]he tax rate…shall be computed as if the riverboat had engaged in flexible scheduling during the entire period beginning July 1 of each year and ending June 30 of the following year.
>
> Id. (Emphasis added.)

Noncode language included with the 2003 wagering tax amendments supports the Department's interpretation of IC 4-33-13-1.5(g).

> Wagering taxes imposed under IC 4-33-13-1.5 on adjusted gross receipts received on or after the date that the riverboat implemented flexible scheduling under IC 4-33-6-21 must be calculated and deposited using a graduated wagering tax rate selected (as stated in IC 4-33-13-1.5) through a calculation that includes "adjusted gross receipts received during the period beginning July 1 of each year and ending June 30 of the following year."
>
> P.L. 224-2003, § 48(d) (effective July 1, 2002 (retroactive)). (Emphasis added.)

The General Assembly enacted legislation that is clear, concise, and unambiguous. Once taxpayer implemented flexible scheduling on August 1, 2002, taxpayer should have included its adjusted gross receipts received beginning July 1, 2002, in determining the proper graduated tax rate. Taxpayer, though, failed to do so. Furthermore, taxpayer's assertion that it should have used the graduated rate schedule to compute wagering taxes for tax periods prior to its implementation of flexible scheduling directly conflicts with the language of IC 4-33-13-1.5(g).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420040150.LOF

LETTER OF FINDINGS NUMBER: 04-0150
Sales and Withholding Tax
Responsible Officer
For the Tax Period December, 2000-May, 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

1. Sales 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).

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

STATEMENT OF FACTS

The Indiana Department of Revenue, hereinafter referred to as the "department," assessed sales, withholding taxes, interest and penalty against the taxpayer as a responsible officer of a corporation that did not properly remit said taxes during the tax period December, 2000 through May, 2002. The taxpayer protested the assessment of tax and penalty. This Letter of Findings is based upon the documentation in the file.

1. Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

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

The proposed sales tax liability was issued under authority of IC 6-2.5-9-3 that provides as follows:
An individual who:
(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
(2) has a duty to remit state gross retail or use taxes to the department;
holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

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

The taxpayer provided significant documentation evidencing that he left his association with the corporation by November 6, 2000. Since the taxpayer was not an employee, officer, or member of the corporation from December 2000 through May, 2002, the taxpayer cannot be held personally responsible for trust taxes that the corporation did not remit to the state.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0320040189P.LOF

LETTER OF FINDINGS NUMBER: 04-0189P
Withholding Tax
For the month December 2003

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late payment of a monthly withholding tax return. The withholding return in question is December 2003.

The taxpayer is a company located in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be waived as the filing of the withholding tax return was inadvertently late due to the transition of one accounting services provider to another accounting services provider. Furthermore, the taxpayer states the taxpayer has a good compliance record in filing tax returns and this payment record should be a factor in waiving the penalty.

With regard to the payment history, the Department points out that the taxpayer has had several late filings in the past. The Department does not feel the taxpayer has established a good payment history that would be a factor in waiving the penalty.

45 IAC 15-11-2(b) states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer."

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

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0220040214P.LOF

LETTER OF FINDINGS NUMBER: 04-0214P
Income Tax
For the Years 1999-2001

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

ISSUE

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

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

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

STATEMENT OF FACTS

The taxpayer is in the business of providing planning services for business meetings. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional income tax, interest, and penalty. The taxpayer protested the imposition of the ten percent (10%) negligence penalty. The taxpayer was given ample opportunity to schedule a hearing on the protest and/or submit additional information. Since the taxpayer did neither, this finding is based on the information in the file.

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

DISCUSSION

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

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to 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 taxpayer had a duty to properly report its income from Indiana. Due to the taxpayer's carelessness in not assigning a branch number to its Carmel, Indiana office, some of its Indiana income was reported to Michigan. This breach of the taxpayer's duty to report its Indiana income constituted negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420040215P.LOF

LETTER OF FINDINGS NUMBER: 04-0215P
Tax Administration–Penalty
For the Years 1999-2001

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

ISSUE

I. Tax Administration—Penalty

Authority: 45 IAC 15-11-2

Taxpayer protests the 10% negligence penalty.

STATEMENT OF FACTS

The penalty was proposed in the first instance because the auditor determined taxpayer had reported exempt sales for which there were no valid exemption certificates. Further, taxpayer failed to accrue and remit use tax on marketing items shipped to Indiana customers. Taxpayer was aware of its duty to report such sales. Taxpayer argues that it had no intent to deprive the Department of the revenue owed. Taxpayer also argues that since the error percentages in the audit were so small, the penalty assessment is unfair. An audit conducted in 1993 had revealed similar issues regarding failure to have valid exemption certificates and failure to accrue and remit use tax.

I. Tax Administration-Penalty

DISCUSSION

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

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

The Department finds the taxpayer did not act with reasonable care. Taxpayer freely admits mistakes were made, but argues it did not act in a willfully negligent manner. Taxpayer also cites its good payment history. However, taxpayer has known since 1993 of its responsibilities regarding valid exemption certificates and accruing and remitting use tax. The Department denies taxpayer's request to abate the 10% penalty assessment.

FINDING

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

DEPARTMENT OF STATE REVENUE

04-20040234P

LETTER OF FINDINGS NUMBER: 04-0234P
Income 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.

ISSUE

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

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

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

STATEMENT OF FACTS

The taxpayer is in the business of manufacturing and selling PVC pipe, vinyl siding, vinyl windows, asphalt shingles, and insulation. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional income tax, interest, and penalty. The taxpayer protested the imposition of the ten percent (10%) negligence penalty. The taxpayer was given ample opportunity to schedule a hearing on the protest and/or submit additional information. Since the taxpayer did neither, this finding is based on the information in the file.

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

DISCUSSION

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

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to 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 taxpayer did not pay sales tax or self assess use tax on materials used in the manufacturing of samples as clearly required by the law. This breach of the taxpayer's duty to read and follow instructions provided by the department constitutes negligence.

FINDING

The taxpayer's protest is denied.

INDIANA BOARD OF TAX REVIEW
NONRULE POLICY DOCUMENT 2004-02
Re: Preparation Of Agency Record
August 18, 2004

This policy document is issued to provide notice to parties intending to appeal an Indiana Board of Tax Review (IBTR) decision to the Tax Court of the process the agency uses for preparing and transmitting the official agency record of administrative proceedings.

1. Pursuant to Ind. Code § 6-1.5-2-1, the IBTR was created effective January 1, 2002. At the same time IC 4-21.5, the Administrative Orders and Procedures Act (AOPA), was amended to include appeals taken from decisions of the IBTR by naming the Indiana Tax Court as the venue for such appeals. Ind. Code § 4-21.5-5-6(e).

2. Pursuant to Ind. Tax Court Rule 3(E), a petitioner shall request the IBTR to prepare a certified copy of the agency record within thirty (30) days after filing the petition. *Id.* The Petitioner shall transmit a certified copy of the record to the Tax Court within thirty (30) days after having received notification from the IBTR that the record has been prepared. *Id.* Further, the agency shall charge the petitioner with reasonable cost of preparing the agency record. Ind. Code § 4-21.5-5-13(d).

3. Accordingly, the following procedures will be followed when an agency record is requested by a petitioner from the IBTR:

a. An instrument (check, money order, etc.) in the amount of $50 will accompany any request for an agency record filed with the IBTR. The instrument will be made payable to the IBTR. This $50 is a non-refundable administrative fee and will be deducted from the final payment made when the agency record is delivered to the Petitioner.

b. Upon completion of the agency record the Petitioner will be notified as to when the agency record may be picked up and the total balance due for its preparation (total cost minus the $50 administrative fee). The balance due must be paid to the IBTR prior to the agency record being released to the Petitioner.

c. The cost of preparing the agency record will be charged to the petitioner as follows:

(1) Transcription of hearing tape(s) will be charged at $3.80 per page.
(2) Duplicate tapes(s) will be charged at $5.00 per tape.
(3) Copying charge will be $.10 per image.
(4) Any other cost incurred in preparing the agency record.