DEPARTMENT OF STATE REVENUE
DEPARTMENTAL NOTICE #3
NOVEMBER, 2004
INTEREST RATES FOR CALENDAR YEAR 2005

This document does not meet the definition of a "statement" required to be published in the *Indiana Register* under IC 4-22-7-7. However, under IC 6-8.1-10-1(c), the Commissioner is required to establish, on or before November 1 of each year, the applicable interest rates for tax overpayments and underpayments that will take effect for the immediately succeeding calendar year. The purpose of this notice is to inform the public of the interest rates that will be effective for the calendar year beginning January 1, 2005.

The rate of the interest for an excess tax payment is the percentage rounded to the nearest whole number that equals the average investment yield on state money for the state's previous fiscal year, excluding pension fund investments, as published in the Auditor of State's comprehensive annual financial report. Based on this calculation, the rate of interest for an excess tax payment for calendar year 2005 will be one percent (1%).

The rate of interest for an underpayment of tax is the percentage rounded to the nearest whole number that equals two (2) percentage points above the average investment yield on state money for the state's previous fiscal year, excluding pension fund investments, as published in the Auditor of State's comprehensive annual financial report. Based on this calculation, the rate of interest for an underpayment of tax for calendar year 2005 will be three percent (3%).

For taxpayer information, attached is a list of comparable percentages applicable in previous calendar years.

Indiana Department of State Revenue
Kenneth L. Miller,
Commissioner

YEAR	OVERPAYMENTS	DELINQUENT PAYMENTS
1989	10%	10%
1990	10%	10%
1991	10%	10%
1992	8%	8%
1993	7%	7%
1994	7%	7%
1995	4%	6%
1996	5%	7%
1997	5%	7%
1998	5%	7%
1999	5%	7%
2000	5%	7%
2001	6%	8%
2002	6%	8%
2003	4%	6%
2004	2%	4%
2005	1%	3%

DEPARTMENT OF STATE REVENUE

<u>IN REGARDS TO THE MATTER OF:</u>
WESTWOOD COUNTRY CLUB OF SPEEDWAY, INC.
A/K/A WESTWOOD RECREATION CLUB
DOCKET NO. 29-2004-0108

<u>FINDINGS OF FACT, CONCLUSIONS OF</u>
<u>LAW AND PROPOSED DEPARTMENTAL ORDER</u>

An administrative hearing was held on Tuesday, May 11, 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, Westwood Country Club of Speedway, Inc., was represented by William J. Wood of Wood, Tuohy, Gleason, Mercer, & Herrin, Bank One Center Tower, 111 Monument Circle, Suite 3400, P.O. Box 44942, Indianapolis, Indiana 46244-0942. Attorney Doug Klitzke appeared on behalf of the Indiana Department of State Revenue.

The Petitioner was allowed to submit additional exhibits for the Department's review subsequent to the hearing. The Department did not have any objections to the two exhibits and therefore they were admitted as Petitioner's Exhibits G and H.

A hearing was conducted pursuant to IC 4-21.5 et seq., evidence was submitted, and testimony given. The Department maintains a record of the proceedings. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law, and Proposed Departmental Order.

REASON FOR HEARING

Petitioner was the subject of an investigation conducted on December 22, 2003 by the Criminal Investigation Division of the Indiana Department of Revenue. The Department issued a letter dated March 10, 2004, in which Petitioner's bingo license was suspended for two (2) years, and Petitioner was assessed civil penalties in the amount of seven thousand five hundred dollars ($7,500). The Petitioner protested in a timely manner.

FINDINGS OF FACTS

1) The Criminal Investigation Division of the Indiana Department of Revenue conducted an investigation of Petitioner. (Record at 7).

2) During the Department's investigation, it was determined that the Petitioner did not list Kenneth Magee as an operator.

3) "The Club's accountant, Mr. Heze Clark, filled out the initial bingo application forms. Since then Ms. Christoph [Club manager] has died of cancer and Mr. Shaw [Club president] is suffering from senility and is no longer the Club president. Mr. Shaw and Ms. Christoph conducted an operation with no financial records transferring from one set of officers to the next. Mr. Magee became more interested in the Club's affairs as a result of these two occurrences and began filling out spreadsheets and other membership reports to assist the officers in keeping better records of the Club's financial position, and total revenue, including revenue from Club activities and a spreadsheet showing the bingo operation. At no time did Mr. Magee participate in the running of a gaming event.…[E]ach year the annual licensing reports were simply filled out based on the prior year information of ownership, as when the original bingo application was made. Mr. Nichols did not advert to the fact that the Club had previously deeded its facilities to the LLC to cover the LLC's investment with a lease and repurchase agreement. Mr. Nichols simply continued the same erroneous filing showing…the Club still owned the property."(Page 2-3 of Petitioner's Pre-Hearing Brief).

4) When the Petitioner submitted its CG-2R (Annual Bingo Renewal Application) in October of 2002 it indicated that it owned the facility where the bingo operation was conducted. (Department's Exhibit 1).

5) For the license renewal periods ending October 2003, the Petitioner indicated on its Form CG-2R that it owned the bingo facilities. (Department's Exhibit 2).

6) In the year 1997 the Petitioner was facing foreclosure. It owed $108,000 in operating expenses which included $53,000 in back taxes. The first mortgage, held by National City Bank, including late fees amounted to $218,000. (Page 1 of Petitioner's Pre-Hearing Brief).

7) In January of 1998 seventeen members of Petitioner's organization lent Petitioner $30,000. (Page 1 of Petitioner's Pre-Hearing Brief).

8) Petitioner began charity gaming operations in 1999. (Page 2-3 of Petitioner's Pre-Hearing Brief).

9) In 2001, Petitioner faced foreclosure again. Mr. Magee and five other members of Petitioner's organization loaned Petitioner $460,000. Of this amount, Mr. Magee personally loaned Petitioner $25,000 and his family trust loaned Petitioner $151,000. (Page 1-2 of Petitioner's Pre-Hearing Brief).

10) A Warranty Deed dated June 11, 2001 was entered into between the Petitioner (Grantor) and Kenneth E. Magee Trustee of the B&N Revocable Trust (Grantee). (Petitioner's Exhibit A).

11) The Petitioner entered into an agreement in lieu of foreclosure with B & N Revocable Trust (B&N) on June 22, 2001. The agreement provides that the Petitioner would convey its real estate to B&N subject to the foreclosure judgment, the mortgages, and the delinquent taxes. (Department's Exhibit 5).

12) The June 22, 2001 agreement with B&N in lieu of foreclosure also states that B&N consented to the operation of bingo by the Petitioner without additional rent so long as the Petitioner has a valid license, but the lease was not conditioned on the continued validity of a license. (Department's Exhibit 5).

13) B&N additionally agreed to lease back the premises to Petitioner with an option to purchase. (Department's Exhibit 5).

14) On June 22, 2001 the Petitioner also entered into a lease with Westwood Club LLC. The lease requires that the lessee (Petitioner) pay the base rental of $2,000 per month in advance, and all property taxes, assessment and user fees on the property and improvements. The Petitioner must pay all premiums for property and casualty insurance in connection with the premises, and the cost of all maintenance, upkeep, repairs and replacement. (Department's Exhibit 6).

15) Petitioner argues that the $2,000 per month payment plus taxes and insurance are attributable to the ownership of the

business operation and not to the bingo operation. (Record at 31).
16) The lease entered into by the Petitioner does not make a distinction between the amount of rent paid for the business operation and the portion that may be attributable to the operation of its gaming activities. (Department's Exhibit #6).
17) A Special Warranty Deed was entered into on August 6, 2001 between Kenneth E. Magee as Trustee of the B&N Revocable Trust (Grantor) and Westwood Club LLC (Grantee). (Department's Exhibit G).
18) On December 11, 2003 the Petitioner entered into a Memorandum of Understanding (MOU) with Westwood Club LLC. The MOU detailed that conditions under which the Petitioner was entitled to buy back the property in question at the expiration of the lease on June 22, 2006. (Petitioner's Exhibit H).
19) The spreadsheets generated by Mr. Magee, actually include more information than is required on the Department's CG-NSR (Indiana Department of Revenue Charity Gaming Nightly Summary Report); however, the spreadsheets were for his own edification as an investor who had loaned Petitioner a substantial amount of money. (Petitioner's Exhibit C).
20) George W. Nichols was not a resident of Marion County during the time periods in question (Page 3 of Petitioner's Pre-Hearing Brief and Record at 52). The Department in its letter of March 10, 2004, merely points out this fact, and does not impose any civil penalties or suspensions as a result. Therefore, this issue is moot.
21) On March 10, 2004, the Petitioner's bingo license was suspended for two (2) years, and assessed civil penalties in the amount of seven thousand five hundred dollars ($7,500).

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) Pursuant to 45 IAC 18-1-30, the term "Operator" means, "a member of a qualified organization who is:

(1) an Indiana resident;
(2) in good standing with the department; and
(3) in addition to the forgoing *[sic., foregoing]*, the following individuals are also operators:

(A) A bartender licensed with the alcohol and tobacco commission if the bartender sells only pull-tabs, tip boards, or punchboards.
(B) Any person who accounts for money received at the charity gaming event.
(C) Any person who keeps records of the charity gaming event.
(D) Any person who announces the letter-number combination at a bingo event.

(Department of State Revenue; 45 IAC 18-1-30; filed Feb 28, 2003, 2:16 p.m.: 26 IR 2304)
4) Pursuant to 45 IAC 18-3-2(e), "Rent paid for leased facilities cannot exceed two hundred dollars ($200) per day and cannot be based on the revenue generated by the event. Additional moneys shall not be paid for utilities, janitorial expenses, security, set up and tear down expenses, or any other expenses. These expenses must be included in the two hundred dollar ($200) rent limitation per day. The facility cannot be leased for more than two (2) days in a calendar week. A facility is owned when an organization holds a fee simple estate in the facility. A facility is leased when an organization enters into a written agreement to occupy the facility which gives rise to the relationship of lessor and lessee, regardless of the terms of the lease. The lease of a facility for an allowable event must be in writing.
5) IC 4-32-9-20 states, "Except as provided in subsection (d), if facilities are leased for an allowable event, the rent may not:

(1) be based in whole or in part on the revenue generated from the event; or
(2) exceed two hundred dollars ($200) per day.
(b) A facility may not be rented for more than three (3) days during a calendar week for an allowable event.

(c) If personal property is leased for an allowable event, the rent may not be based in whole or in part on the revenue generated from the event.

(d) If a qualified organization conducts an allowable event in conjunction with or at the same facility where the qualified organization or its affiliate is having a convention or other meeting of its membership, facility rent for the allowable event may exceed two hundred dollars ($200) per day. A qualified organization may conduct only one (1) allowable event under this subsection in a calendar year.

6) A qualified organization that rents a facility for multiple functions including charity gaming may still only pay $200 per day. The yearly rental may not exceed $73,000 ($200 x 365 days).
7) A qualified organization that rents a facility for charity gaming three (3) nights a week may still only pay $200 per day. The yearly rental may not exceed $31,200 ($200 x 52 x 3 days).
8) 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…"

9) 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."
10) "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).
11) 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...(4) Commission of fraud, deceit, or misrepresentation."
12) 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."

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

(1) Suspend or revoke the license.
(2) Lengthen a period of suspension of the license.
(3) Prohibit an operator or an individual who has been found to be in violation of this article from associating with charity gaming conducted by a qualified organization.
(4) Impose an additional civil penalty of not more than one hundred dollars ($100) for each day the civil penalty goes unpaid.

CONCLUSIONS OF LAW

1) The Department's investigation revealed that Petitioner leased the facility from Westwood Club, LLC with an option to purchase.
2) Each year, the annual licensing reports were simply filled out based on the prior year information regarding ownership of Petitioner's property. The Petitioner simply continued the same erroneous filing showing the Club still owned the property. This constitutes a misrepresentation of the facts, a violation of IC 4-32-12-1(a)(4).
3) The lease entered into by Petitioner does not make a distinction between the amount of rent attributable to the business operation and the operation of its charitable gaming activities.
4) The lease at issue requires that Petitioner pay a base rent of $2,000 per month plus taxes, utilities, and maintenance a violation of IC 4-32-9-20.
5) Pursuant to 45 IAC 18-1-30, the term "Operator" means, "Any person who keeps records of the charity gaming event." Mr. Magee's spreadsheets were for his own edification as an investor who had loaned Petitioner a substantial amount of money and his actions do not rise to the level of an operator for the purposes of 45 IAC 18-1-30. Mr. Magee did not call bingo, nor did he sell paper, pulltabs, punchboards, or tipboards. He did not handle the money either during or after the nightly gaming events. Mr. Magee did not prepare the nightly summary reports nor did he manage or participate in the running of the charity gaming events.

PROPOSED DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge orders the following:
The Petitioner's appeal is denied in part and sustained in part. Petitioner's license to conduct charity gaming is suspended for two (2) years. The Petitioner is hereby liable for civil penalties in the amount of seven thousand dollars ($7,000).

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

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LETTER OF FINDINGS NUMBER: 02-0238
Gross Income Tax
For the Years 1995-1998

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

ISSUE

I. Gross Income Tax - Imposition

Authority: IC 6-8.1-5-1(b), IC 6-2.1-2-2, IC 6-2.1-1-9, 45 IAC 1.1-6-2, First National Leasing and Financial Corp. v. Indiana Department of Revenue, 598 N.E.2d 640, (Ind. Tax 1992).

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

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

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

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

STATEMENT OF FACTS

During the audit period the taxpayer filed a financial institutions tax return with two of its affiliates who were engaged with the taxpayer in making loans and extending credit to businesses. Upon examination of the taxpayer's records, it was learned that the taxpayer did not meet the qualifications to be a financial institution under the financial institutions tax law. Therefore, the Indiana Department of Revenue, hereinafter referred to as the "department," performed a corporate income tax audit on the taxpayer. As a result of the audit, the department assessed gross income tax on the taxpayer's receipts from the leasing of aircraft, railcars, and manufacturing equipment located in Indiana. The department also assessed penalty and interest. The taxpayer protested the gross income tax and penalty assessments and a hearing was held. This Letter of Findings results.

I. Gross Income Tax - Imposition

DISCUSSION

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

Indiana imposes a gross income tax on the "taxable gross income derived from activities or businesses or any other sources within Indiana" of a nonresident taxpayer. IC 6-2.1-2-2. The department assessed gross income tax on the taxpayer's income from leases of aircraft, railcars, and machinery in Indiana. The taxpayer contended that its lease income was not derived from an Indiana source and therefore not subject to the Indiana gross income tax. The issue to be determined in this case is whether the taxpayer's lease income was actually derived from an Indiana source and was therefore subject to the Indiana gross income tax.

The gross income tax law concerning the taxability of income from intangibles such as the taxpayer's leases is clarified at 45 IAC 1.1-6-2 as follows:

(b) Except as provided in subsection (c), receipts derived from an intangible are included in gross income.

(c) Receipts derived from an intangible are not included in gross income under the following situations:

(1) The intangible forms an integral part of:

(A) a trade or business situated and regularly carried on at a business situs outside Indiana; or

(B) activities incident to such trade or business.

(2) The intangible does not form an integral part of a trade or business situated and regularly carried on at a business situs in Indiana, and the taxpayer's commercial domicile is located outside of Indiana.

(3) The receipts from the intangible are otherwise excluded from gross income under IC 6-2.1-1-2 or 45 IAC 1.1-3-3(c)(7).

(d) In determining whether an intangible forms an integral part of a trade or business or activities incident thereto under subsection (c) it is the connection of the intangible itself to such trade or business or activities incident thereto that is the controlling factor. The physical location of the evidence of the intangible (share of stock, bond, etc.) is not a controlling factor. Also, any activities related to the sale of an intangible occur after the fact and are never determinative.

(e) As used in this section, "commercial domicile" means the nerve center of the taxpayer where a majority of the activities and functions of the business are performed. The department will include the following types of activities in making a determination of commercial domicile.

(1) The location of management and administrative activities connected with each location, such as policy and investment decisions.

(2) The location of meetings of the board of directors.

(3) The residence of executives and their offices.
(4) The location of books and records.
(5) The location of payment on income from intangibles of the taxpayer.
(6) The information from annual and quarterly reports of the taxpayer.

The Indiana Tax Court also dealt with the issue of the gross income taxability of a nonresident taxpayer's receipts from leases in First National Leasing and Financial Corp. v. Indiana Department of Revenue, 598 N.E.2d 640, (Ind. Tax 1992). In that case, First National leased equipment to another corporation which used the equipment in its train derailment business. The Court set out a three part inquiry for analyzing whether or not gross income from an intangible is subject to Indiana gross income tax. First the income must be gross income. Secondly the gross income must be derived from sources within Indiana. Finally the gross income that is derived from sources within Indiana must be subject to the Indiana gross income tax. In the first step of the analysis, the Court determined that First National actually received gross income from the leases of property used in Indiana. The Court next analyzed whether the gross income was derived from activities in Indiana. The leased equipment included several mobile items such as big over-the-road trucks, tractors, lowboy trailers, pick-up trucks, cranes, miscellaneous generators, light plants, and caterpillar tractors with side booms for lifting. That equipment was stored and used a portion of the time in Indiana. First National does not have control over the equipment nor does it know where the equipment is actually located at any particular time. All commercial activities such as negotiations and signing of documents related to the lease agreements took place outside Indiana. The Court determined that the First National's lease income derived from sources outside of Indiana. Therefore the income was not subject to the Indiana gross income tax.

The taxpayer's offices, administrative personnel, administrative services, board of directors, and books and records were all outside of Indiana. The taxpayer's lease income derives from leases that were negotiated, executed, and maintained outside of Indiana.

The taxpayer contends that its lease income was identical to the non taxable income of First National. As regards the airplanes and rail cars, the taxpayer's argument is persuasive. The gross income received from the leases of airplanes and rail cars is not derived from Indiana activities.

The taxpayer's argument is not persuasive as to the income from the lease of the manufacturing equipment. This is distinguishable from the leases of rail cars, airplanes, and mobile car derailment equipment where the taxpayers had no control over the location of the leased items. In those transactions, the taxpayers would have received their lease payments whether or not the leased items ever went through Indiana. As to the manufacturing machinery, there would be no lease income if the taxpayer had not agreed to lease the machinery to be used at the factory in Indiana. That makes the location and use of the heavy machinery at the Indiana factory an essential and integral part of the transaction as contemplated in the previously cited 45 IAC 1.1-6-2(c). The gross income from the lease of manufacturing machinery is derived from Indiana activities.

Finally it is necessary to determine if the gross income is taxable. The taxpayer contended that the taxpayer's income from the machinery lease must be computed following special rules because it qualified as a "qualified lessor" pursuant to IC 6-2.1-1-9(2) as follows:

"Qualified lessor" means a taxpayer that:
(A) acquires title to tangible personal property solely for the purpose of leasing it to others;
(B) has no other purpose of ownership in the property; and
(C) leases the property to another under a lease agreement which has a term of at least five (5) years and which requires the lessee to make rental payments, over the term of the lease, equal to the sum of: (i) the cost of the property, plus (ii) finance charges.

The provisions of the sample lease indicate that the taxpayer did meet the requirements to be considered a "qualified lessor." Therefore the taxpayer's gross income tax liability must be computed by reducing its total rental receipts by the "cost of the tangible property so leased" pursuant to IC 6-2.1-1-9(b).

FINDING

The taxpayer's protest to the gross income tax assessed on the income received from leases of airplanes and rail cars is sustained. The taxpayer's protest to the gross income tax assessed on the income received from leases of manufacturing machinery is to be recomputed pursuant to the provisions of IC 6-2.1-1-9(b).

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

DISCUSSION

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

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

the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

When the taxpayer and the affiliated corporations reorganized due to changes in economic conditions, they had a duty to reanalyze their tax filing status and modify it to fit the new situation. The taxpayer's inattention to this duty constituted negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER: 02-0512
Indiana Gross Retail Tax
For the Years 1994 through 2000

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

ISSUES

I. Gross Retail Tax Assessment.

Authority: IC 6-2.5-2-1(a); IC 6-2.5-2-1(b); IC 6-2.5-9-3; IC 6-8.1-5-1(a); IC 6-8.1-5-1(b); 45 IAC 2.2-6-8(a).

Taxpayer maintains that for purposes of determining taxpayer's gross retail (sales) tax liability, the Department of Revenue (Department) overestimated the total amount of taxpayer's gross retail sales.

II. Abatement of Penalty.

Authority: IC 6-8.1-10-2.1; IC 6-8.1-10-4(a); 45 IAC 15-5-7(f)(3); 45 IAC 15-11-2(b).

Taxpayer asks that the Department exercise its discretion to abate the 100 percent fraud penalty assessed at the time of the original audit examination.

STATEMENT OF FACTS

Taxpayer is a company in the business of manufacturing and selling candy at retail. Taxpayer states that it has been in business since 1994. During 2001 and 2002, the Department conducted an audit review of taxpayer's business records and tax returns. As a result of that review, the Department determined that taxpayer underpaid the amount of sales tax due to the state. Accordingly, the Department imposed an assessment of additional sales tax for the years at issue. Taxpayer disagreed with the audit's methodology and conclusions and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer further explained the basis for its protest. This Letter of Findings results.

DISCUSSION

I. Gross Retail Tax Assessment.

Taxpayer makes retail sales of candy from multiple locations. The Department determined that during 1994 through 1998, taxpayer failed to maintain records sufficient to adequately document the total amount of its gross retail sales. Therefore, the Department calculated the taxpayer's gross retail sales based upon the best information available.

For 1994 and 1995, the audit relied upon a federal Revenue Agent Report (RAR) containing IRS determinations, findings, and adjustments for those years. The RAR calculated taxpayer's income by multiplying taxpayer's production costs by 1.5. For example, if taxpayer spent $100 producing candy during a certain time, the RAR concluded that taxpayer received $150 as income when it sold the candy. For those years in which it was possible to determine gross sales based upon the taxpayer's own records, the audit relied on those records and did not use the 1.5 multiplier.

Taxpayer disagreed with the audit's methodology and the determinations as to the total amount of taxable gross receipts. Taxpayer produced records which purported to establish a lesser amount of gross receipts. In addition, taxpayer maintained that the federal RAR itself was factually flawed and that the Department's conclusions – in which it relied upon that report – were unwarranted.

Taxpayer maintained that the audit's reliance on the 1.5 multiplier resulted in an overstatement of its gross annual receipts. Taxpayer asserted that the 1.5 multiplier did not take into account candy which was spoiled, lost, or which was given away. In addition, taxpayer believes that the audit's determination did not take into consideration infusions of cash which were made into the business. According to taxpayer, because its business obtained unrefunded cash investments, the business was able to pay for productions costs such that the production of the candy did not necessarily result in corresponding gross receipts.

In addition, taxpayer challenges the audit's conclusion as the amount of its taxable gross receipts because the audit failed to take into account the seasonal nature of taxpayer's business and the difference in sales which were attributable to the various retail locations.

In summary, taxpayer's maintains that the assessment of sales tax is incorrect because the audit did not rely on the best information available.

In reviewing the taxpayer's records, the audit found that records of sales receipts were incomplete. In 1995, the audit found that the sales invoices were unavailable for approximately 90 percent of the year. For 1996, sales invoices were unavailable for approximately 94 percent of the time. In 1997, sales invoices were unavailable for the entire year. In contrast, taxpayer's actual invoices for 2000 indicated that it had approximately $7,000 in sales; however, for that same period, taxpayer paid sales tax based upon approximately $15,000 in gross sales. The audit documented similar disparities for each of the remaining years considered during the audit.

IC 6-2.5-2-1(a) imposes an "excise tax, known as the state gross retail tax... on retail transactions made in Indiana." The person who buys tangible personal property in a retail transaction is responsible for the tax and "pay[s] the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as an agent for the state." IC 6-2.5-2-1(b). Once the retail merchant collects the sales tax, the merchant has a responsibility to forward that amount to the state. IC 6-2.5-9-3 states that "An individual who: (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and 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."

45 IAC 2.2-6-8(a) provides that "[i]n determining the retail merchants' tax liability for a particular reporting period, the retail merchant shall multiply the retail merchant's total gross retail income from taxable transactions made during the reporting period...." However, in taxpayer's own circumstances, this responsibility is complicated by the fact that there is no sure and certain way of determining taxpayer's "total gross retail income." In those situations in which the merchant has not maintained adequate records, the Department is authorized to make an assessment based upon the best information available. IC 6-8.1-5-1(a) states that "[i]f the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department."

Having done so, the audit's conclusion – based upon the best information available – is presumed correct. IC 6-8.1-5-1(b) states that "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment [was] made."

Taxpayer challenges the audit's conclusions on numerous grounds, but none of these challenges are sufficient to rebut the audit's original determination as to the amount of gross retail sales. The assessments are based upon a methodology which may be subject to criticism – founded or unfounded – but the methodology chosen is entirely reasonable especially given the fact that the audit was faced with so little original documentation upon which to base an alternative conclusion. In addition, taxpayer overlooks the fact it is faced with a problem entirely of its own making. By any stretch of the imagination, taxpayer's record keeping was haphazard. It was taxpayer's initial and primary responsibility to collect sales tax from its customers, forward that tax to the state, and to maintain minimally adequate records substantiating its gross retail sales. Having failed to meet its responsibilities, taxpayer cannot now be heard to complain of the audit's reconstruction of taxpayer business activities. Taxpayer is second-guessing the audit's methodology after taxpayer itself placed the audit in the position of ever having to apply that methodology.

FINDING

Taxpayer's protest is respectfully denied.

II. Abatement of Penalty.

At the time the original audit report was prepared, the Department assessed a 100 percent penalty on the amount of the consequent assessment.

The 100 percent penalty was assessed because of the substantial disparity between the amount of taxes taxpayer received from its customers and the amount of taxes which it forwarded to the Department. IC 6-8.1-10-4(a) states that, "If a person fails to file a return or to make a full tax payment with that return with the fraudulent intent of evading the tax, the person is subject to a penalty. (b) The amount of the penalty imposed for a fraudulent failure described in subsection (a) is one hundred percent (100%) multiplied by: (1) the full amount of the tax, if the person failed to file a return; or (2) the amount of the tax that is not paid, if the person failed to pay the full amount of tax."

The Indiana regulation, 45 IAC 15-5-7(f)(3), states:

A person who files a return which makes a false representation(s) with knowledge or reckless ignorance of the falsity will be deemed to have filed a fraudulent return. There are five elements to fraud.

(A) Misrepresentation of a material fact: A person must truthfully and correctly report all information required by the Indiana Code and the department's regulations. Any failure to correctly report such information is a misrepresentation of a material fact. Failure to file a return may be a misrepresentation.

(B) Scienter: This is a legal term meaning guilty knowledge or previous knowledge of a state of facts, such as evasion of tax, which it was a person's duty to guard against. A person must have actual knowledge of the responsibility of reporting the information under contention. However, the reckless making of statements without regard to their truth or falsity may serve as an imputation of scienter for purpose of proving fraud.

(C) Deception: Deception operates on the mind of the victim of the fraud. If a person's actions or failure to act causes the department to believe a given set of facts which are not true, the person has deceived the department.
(D) Reliance: Reliance also concerns the state of mind of the victim and is generally considered along with deception. If the person's actions, failure to act, or misrepresentations cause the department to rely on these acts to the detriment or injury of the department, the reliance requirement of fraud will be met.
(E) Injury: The fraud instituted upon the department must cause an injury. This can be satisfied simply by the fact that the misrepresentation(s) caused the department not to have collected the money which properly belongs to the state of Indiana.
In order to demonstrate fraud, the department is required to prove all of the above elements are present. This must be shown by clear and convincing evidence.

The Department is unable to conclude that the five elements necessary to establish fraud have been proven "by clear and convincing evidence." Instead, the Department finds that the ten-percent negligence penalty required under IC 6-8.1-10-2.1 is appropriate because the underreporting of gross sales resulted from the taxpayer's own negligence. Department regulation, 45 IAC 15-11-2(b), defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id. Taxpayer's failure to maintain records sufficient to determine its annual receipts and the amount of sales tax due the state does not constitute the "care, caution, or diligence... expected of an ordinary reasonable taxpayer." Id.

FINDING

To the extent that taxpayer has challenge the imposition of the 100 percent fraud penalty, taxpayer's protest is sustained. The imposition of the ten-percent negligence penalty is fully warranted.

DEPARTMENT OF STATE REVENUE

0420030013.LOF

LETTER OF FINDINGS NUMBER: 03-0013
Tax Administration—Refunds and Interest Calculations
For Tax Years 1999, 2000, 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—Refunds and Interest Calculations

Authority: IC § 6-2.5-6-10; IC § 6-8.1-3-3; IC § 6-8.1-6-1; IC § 6-8.1-9-1; IC § 6-8.1-10-1; 45 IAC 2.2-3-9

Taxpayer alleges that the refund amount and interest calculated thereon were calculated in error.

STATEMENT OF FACTS

Taxpayer is a lump sum contractor specializing in providing and installing insulation in new construction. In March of 2002, taxpayer submitted a claim for refund for tax years 2000 and 2001. The Department was unable to locate the refund claim and taxpayer refiled it. During that process, the Department issued the requested refund amount in July of 2002, based on the supplier's statement that tax had been paid twice over a period of 18 months. The Department conducted an audit for tax years 1999, 2000, and 2001 in October of 2002. The audit reduced the requested refunds that had already been issued to taxpayer. The auditor also made other adjustments which resulted in additional liabilities for the years under audit. Additional facts will be added as necessary.

I. Tax Administration—Refunds and Interest Calculations

DISCUSSION

Taxpayer's claim for refund alleges that the refund amount received in 2002 was insufficient and that the Department erroneously calculated the interest on that amount. Taxpayer argues that because a sales and use tax audit for tax years 1992, 1993, and 1994 did not inform him that he would be denied the 1% collection allowance if he continued his then-current collect and remit procedures, the refund and interest should be higher. In addition, taxpayer argued that since the Department was at fault for losing the original refund request and taxpayer had to refile the request, any interest on the assessment that accrued was due to the Department's error, not taxpayer's. Taxpayer argues that the erroneous refund amount issued to it before the audit was solely due to the Department's own negligence. Taxpayer provides and installs insulation for new construction, mostly as a subcontractor in the new housing industry. Taxpayer obtains lump sum bids with no reference to sales tax, and acts as a contractor for the completion of the job. Customers do not receive invoices that break out sales tax. Taxpayer calculates the materials cost of each job and produces an internal invoice that calculates tax on the materials portion of each job. Taxpayer remits tax to the Department based on the materials used in the taxable jobs.

Taxpayer alleges that the auditor in the 1992-1994 audit "OK'd" its method of remittance, but that the auditor in the 1999-2001 audit warned taxpayer to comply with the Department's collection and remittance rules in the future. Taxpayer argues it is being punished for doing something that the Department itself approved in the prior audit. However, the original audit did not directly address taxpayer's collection method.

Taxpayer's dilemma rests on understanding the sales and use tax collection and remittance schemes. Taxpayer engages in lump sum contracting. Taxpayer owes sales tax on all purchases used in such contracts. If taxpayer does not pay sales tax, then taxpayer must accrue and remit use tax. See, 45 IAC 2.2-3-9. The previous audit did not specifically address this issue. While it may be that taxpayer was reporting tax the same way, and the previous auditor did not address it, this situation does not rise to the level of an estoppel or statutory reliance pursuant to IC § 6-8.1-3-3. Pursuant to IC § 6-2.5-6-10, taxpayer must actually collect sales tax from its customers in order to obtain the 1% collection allowance. As a lump sum contractor, taxpayer was remitting use tax that it incurred and not remitting sales tax that it had collected. The auditor adjusted taxpayer's 1999-2001 tax liabilities by removing the 1% collection allowance. That removal adjusted the refund amount downward; therefore, mathematically speaking, the interest on the refund amount also was calculated downward because of the lower refund amount.

Additionally, when taxpayer filed a claim for refund in March of 2002 pursuant to IC § 6-8.1-9-1, the amount stated in the clam was based on a statement from the insulation supplier. Both the supplier and taxpayer remitted sales tax to the Department for a period of 18 months, a situation causing taxpayer to file its refund request. But, during the audit currently at issue, the auditor compared tapes and invoices and discovered that the total did not agree with the refund claim amount which was higher. The auditor therefore adjusted the figures according to the tapes and invoices, which also impacted taxpayer's tax liabilities. Instead of being owed a refund, taxpayer ended up having to return the refunded amounts, plus interest. Taxpayer claims that interest being calculated on the amount he had to return to the Department was never discussed with him, his accountant, or his representative. Taxpayer also argues that if the Department had not lost its refund claim and had completed the 1999-2001 audit in a more timely fashion, taxpayer's interest liability would be much less. Finally, taxpayer argues that since the State had the use of its money for approximately 18 months, taxpayer should not now be assessed interest. *See*, IC § 6-8.1-10-1.

Interest is not waivable. *See*, IC § 6-8.1-10-1. Interest should be calculated from the date of the refund. That date became the new due date of the return pursuant to IC § 6-8.1-6-1.

FINDING

Taxpayer's protest concerning interest calculated on reduced refunds, additional liabilities, and the proper refund amount owed to him, is denied.

DEPARTMENT OF STATE REVENUE

02-20030030.LOF

LETTER OF FINDINGS NUMBER: 03-0030
Adjusted Gross Income Tax & Penalty
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. Unitary Filing Requirement - Adjusted Gross Income tax

Authority: Ind. Code § 6-3-2-2**;** *Allied-Signal Corp. v. Director, Division of Taxation,* 504 U.S. 768, 781 (1992); *Exxon Corp. v. Dept. of Revenue of Wisconsin*, 447 U.S. 207 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980).

Taxpayer protests the Department's disallowance of unitary returns for the years at issue.

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

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

Taxpayer argues that, if the Department does not permit Taxpayer to be part of a unitary corporate income tax return, that any requirement for separate filing be prospective in nature only.

III. Tax Administration - Penalty

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

Taxpayer protests the imposition of penalty with respect to its quarterly payments of tax.

STATEMENT OF FACTS

The taxpayer, a wholly-owned subsidiary of another corporation ("Parent"), operates a manufacturing plant in Indiana. Parent owned many subsidiaries, including Taxpayer. For a period of several years, Parent filed unitary returns, both after a prior

Department audit and on two subsequent occasions when the Department audited Parent. As a result of the current audit, Department determined that for taxable years 1998 and 1999, Taxpayer was not permitted to file unitary returns with two subsidiaries with whom it had filed the returns, based on a lack of Indiana nexus and lack of distortion of income, and accordingly assessed additional tax against taxpayer and, for 1999, penalty for underpayment of quarterly income tax as determined after audit.

I. Unitary Filing Requirement - Adjusted Gross Income tax

DISCUSSION

The issue in this case is whether the taxpayer is required to file income tax returns separately from Parent, as opposed to filing unitary returns.

A taxpayer is permitted to file a unitary return upon request to the Department. Ind. Code § 6-3-2-2(q). The Department or the taxpayer, upon request, is permitted to deviate from the standard apportionment formula under Ind. Code § 6-3-2-2(l) which states:

> 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 determining whether one or more corporations can properly file a unitary return, one must look at (1) functional integration; (2) centralization of management; and (3) economies of scale. *Allied-Signal Corp. v. Director, Division of Taxation,* 504 U.S. 768, 781 (1992) *(citing F.W. Woolworth Co. v. Taxation and Revenue Dep't. of New Mexico,* 458 U.S. 354, 364 (1982)).

In this particular case, taxpayer argues that the three businesses for which it filed a unitary return were part of its automotive group, the businesses had interlocking directors, and the parent was able to achieve significant cost savings on many business expenses due to economies of scale, and that these factors dictate that the taxpayer properly filed unitary returns for the years in question. Taxpayer further argues that a distortion of income would result if taxpayer is not permitted to file unitary returns. In particular, the taxpayer argues that Parent incurs many expenses on behalf of subsidiary, and that without Parent's incurring the expenses on behalf of the taxpayer and other subsidiaries, each individual business would incur greater expenses than its share of the Parent's expenses incurred on its behalf. Finally, taxpayer argues that the other subsidiaries for which it had filed a unitary return had sufficient nexus for Indiana purpose, with one subsidiary having an office and employee in Indiana in addition to sales, and another having an employee in Indiana in addition to its sales.

Taxpayer has provided sufficient evidence to indicate that it had common management and economies of scale at some level for the common operation necessary to allow for unitary status. However, with respect to functional integration, the test is whether the taxpayer was part of one large business enterprise for an overarching common purpose. An example of such an enterprise would be a vertically integrated business. *See, e.g., Exxon Corp. v. Dept. of Revenue of Wisconsin*, 447 U.S. 207 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980).

Taxpayer's argument that the businesses are part of the same overarching group, and therefore properly subject to unitary filing, is questionable. Taxpayer is a producer of metal parts for automobiles. The other businesses that constituted Taxpayer's unitary group were more oriented toward producing technologically advanced components for automobiles. While all three businesses produced items for automobiles, here it does not appear that the three constituted separate parts of a larger, integrated business whole.

Finally, with respect to the distortion of income issue, the primary basis for Ind. Code § 6-3-2-2(l) is to more effectively represent the income of an enterprise within a state. Given the Taxpayer's situation and that of the subsidiaries, it appears that Taxpayer's argument dovetails into its economy of scale argument, rather than some other form of distortion. Accordingly, it is difficult to find a distortion in this case sufficient to permit Taxpayer to file as a part of a unitary return.

FINDING

Taxpayer's protest is denied.

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

Taxpayer argues that, if it is not sustained on the substantive issue of whether it is properly subject to unitary treatment for the years in question, then such treatment should be prospective only in treatment. Taxpayer argues that it had been allowed to file (and indeed, required to file, after audit review) unitary returns since the 1970's, and thus the determination of unitary filing should be allowed to stand today, even if Taxpayer is otherwise denied that treatment for the years in controversy.

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

In *City Securities Corp. v. Dept. of State Revenue*, 704 N.E.2d 1122 (Ind. Tax 1998), plaintiff taxpayer argued that the

Department could not impose gross income tax on the gain realized from the sale of tax-exempt bonds, because that gain had been treated as exempt for 42 years. *Id.* at 1128. Plaintiff taxpayer argued that, in the absence of a new rule or regulation, the Department's assessment of gross income taxes against the gain realized from the sale of the tax-exempt bonds was invalid. *Id*. at 1129. The Tax Court found that – despite the intervening adoption of regulations to the contrary – the Department could not impose the additional taxes when the Department had permitted plaintiff taxpayer to claim an exemption from the taxes subsequent to the adoption of the intervening regulations. *Id*. Nevertheless, the Tax Court also held that plaintiff taxpayer, having been placed on notice of its additional tax liability, was responsible for paying the tax on a prospective basis. *Id*.

Here, Taxpayer had filed its returns for several years on a unitary basis, at the insistence and consent of Department auditors. This allowance of filing for several years through numerous changes is similar to the company in *City Securities*, which had been permitted an exemption for several years even though a contrary regulation existed. Accordingly, while Taxpayer and the other subsidiaries cannot be said to be unitary after review, the fact that Taxpayer and other subsidiaries had filed for several years as a unitary filer at the Department's insistence and with the Department's blessing through several audits leads to the conclusion that Taxpayer and subsidiaries should be permitted to file a unitary return for the taxable years in controversy. However, for periods after Taxpayer was put on notice by the auditor's changes, Taxpayer is not permitted to be a unitary filer. Taxpayer's alternative arguments dealing with estoppel and its future filing status as either a separate filer or a member of a consolidated group will not be addressed.

FINDING

Taxpayer's protest is sustained.

III. Tax Administration - Penalty

DISCUSSION

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

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

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

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

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

45 IAC 15-11-2.

Taxpayer had filed its income tax returns as a unitary filer for several years predating the current audit. Though the current audit found that its unitary filing status was not correct for the years protested in this letter of findings, taxpayer's filing as a unitary taxpayer was the exercise of reasonable care by the taxpayer, and not negligence within the meaning of the statute or regulation.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04-20030085.LOF

LETTER OF FINDINGS NUMBER: 03-0085
Sales and Use Tax
For the Years 1999-2001

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

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

ISSUE

I. Sales and Use Tax - Imposition

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

The taxpayer protests the assessment of sales tax on certain transactions.

STATEMENT OF FACTS

The taxpayer is a retailer of jewelry, wristwatches, wall and desk clocks, and batteries for watches and clocks. The taxpayer also provides services such as restringing pearls and installing batteries. The Indiana Department of Revenue, hereinafter referred to as the "department," conducted an audit for the years 1999-2001 by sampling the taxpayer's sales invoices for nine months. The taxpayer protested the imposition of sales tax on certain transactions during the sample months. A hearing was held. This Letter of Findings results.

I. Sales and Use Tax - Imposition

DISCUSSION

The taxpayer protests the assessment of sales tax on four particular transactions during the sample months. Two of the transactions involved the purchase of jewelry that was mailed to the purchaser's out-of-state address. The other two were transactions where the purchased items were returned to the taxpayer, resulting in no sale.

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

Retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. A retail transaction is defined generally as the acquisition and subsequent transfer of ownership of tangible personal property for consideration in the retail merchant's normal course of business. IC 6-2.5-4-1(b).

The taxpayer sold a strand of pearls and a diamond with mounting. Each of these transactions took place in the taxpayer's store. The purchased jewelry was later mailed to the purchasers' out-of-state addresses. The sales were actually completed in Indiana. Subsequent delivery to an out-of-state location does not put the sale into interstate commerce. Therefore sales tax was properly imposed.

The taxpayer provided substantial evidence that rubies and a ring were returned by the purchasers to the taxpayer's store. After the return of the items, the taxpayer refunded the total price including Indiana sales tax to the purchasers. Since there were no sales, there was no sales tax due to the state. The taxpayer sustained its burden of proof that these transactions should be removed from the audit.

FINDING

The taxpayer's protest is sustained as to the two transactions where the purchased items were returned. The taxpayer's protest as to the two transactions where the purchased items were subsequently mailed out of state are denied.

DEPARTMENT OF STATE REVENUE

0420030295.LOF

LETTER OF FINDINGS NUMBER: 03-0295
Sales and Withholding Tax
Responsible Officer
For the Tax Period 1999-2000

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

ISSUE

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), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995).

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 taxes, 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 1999-2000. The taxpayer protested the assessment of tax. A hearing was held and this Letter of Findings results.

1. Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

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

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

An individual who:

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

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

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

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

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995) any officer, employee, or other person who has the authority to see that they are paid has the statutory duty to remit sales and withholding taxes to the state.

The taxpayer agrees that he was the person with the authority to see that the taxes were remitted to the state prior to May 9, 2000. On that date, the corporation's default on its primary loan caused the primary lender to require the execution of a document known as the "Surrender Agreement." This agreement gave the lender control over all of the corporation's collateral which included inventory, accounts receivable, most equipment, and junior security interests in all other assets. Concurrently, the lender took control over the corporation's business premises and operations. The lender became the party with the duty to remit trust taxes to the state.

FINDING

The taxpayer's protest is denied as to taxes due prior to May 9, 2000 and sustained as to taxes due after May 9, 2000.

DEPARTMENT OF STATE REVENUE

02-20030403.LOF

LETTER OF FINDINGS NUMBER: 03-0403
Adjusted Gross Income 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. Adjusted Gross Income Tax - Unitary filing

Authority: Ind. Code § 6-3-2-2; *Allied-Signal Corp. v. Director, Division of Taxation,* 504 U.S. 768, 781 (1992).

Taxpayer protests the disallowance of its unitary income tax return between itself and various subsidiaries of its parent company.

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 penalties for failing to make estimated quarterly payments.

STATEMENT OF FACTS

Taxpayer is a business engaged in the production of high pressure laminates. Prior to 1999, Taxpayer had filed on a unitary basis with several other companies under a different corporate umbrella. In 1999, Taxpayer was purchased by another corporation. In order to purchase the Taxpayer, its parent corporation had to pay a sum of money to the Taxpayer's prior owner, most of which was financed via debt. This debt was secured by the assets of several companies in the new corporation's group, including Taxpayer.

In early 2000, Taxpayer wrote to the Department, requesting permission to file a combined (unitary) tax return for fiscal year 1999 with itself and other subsidiaries that otherwise did not have Indiana nexus. Such request was made within statutory time limits. The Department sent out a standard letter with respect to that filing. Taxpayer subsequently filed a unitary tax return with various subsidiaries for taxable years 1999 and 2000. Upon audit review, however, Taxpayer's unitary returns were rejected and the Taxpayer was required to be treated as a separate company, based primarily on the lack of flow of goods between Taxpayer and subsidiaries and a lack of distortion of income. Taxpayer filed a timely protest of the assessment.

I. Adjusted Gross Income Tax - Unitary filing

DISCUSSION

Taxpayer protests the imposition of additional adjusted gross income tax with respect to its attempted unitary filing for the taxable years in question, as opposed to the separate company basis proposed by audit. First, Taxpayer argues that the Department granted its permission to file on a unitary basis via its letter, and that such permission should not be withdrawn absent some material

element of the request for permission being incorrect or misleading. In general, a taxpayer may be permitted to file on a unitary basis if it requests permission to do so within thirty (30) days of the end of the taxpayer's taxable year, and the Department permits such filing. Ind. Code § 6-3-2-2(q).

First, Taxpayer argues that the Department, in its reply to Taxpayer's letter requesting permission to file a unitary return, granted its permission in the letter. As a result, Taxpayer argues, such permission should not be rescinded absent a material misrepresentation of a taxpayer's circumstances. After review of the Department's letter regarding permission for unitary filing, the language of the Department's letter grants such permission subject to audit review, which is exactly what transpired in this case.

Second, taxpayer argues that the elements for unitary filing are satisfied. Taxpayer notes its operations meet the criteria for unitary filing-namely, functional integration, centralization of management and economies of scale. *See generally Allied-Signal Corp. v. Director, Division of Taxation,* 504 U.S. 768, 781 (1992) *(citing F.W. Woolworth Co. v. Taxation and Revenue Dep't. of New Mexico,* 458 U.S. 354, 364 (1982)). Further, Taxpayer argues that a distortion of income occurred in its operations under Ind. Code § 6-3-2-2(l), which could only be remedied by unitary filing.

Taxpayer has noted the three elements of unitary filing. Taxpayer and the subsidiaries have the same management, satisfying the common management element. With respect to functional integration, Taxpayer has integrated the subsidiaries into one large, functional whole, with substantial flow of value, even without necessarily a flow of goods. Finally, with respect to economies of scale, Taxpayer has noted several aspects of its operations where the Taxpayer and subsidiaries have realized savings from operating as an entity rather than as separate parts. In short, Taxpayer has a well-integrated operation, the type necessary for unitary filing.

With respect to distortion of income, Taxpayer notes several types of distortion that are present within the company. For one thing, Taxpayer notes that many of its clerical services are provided by affiliates, and that Taxpayer is only charged for these services at cost-a fraction of the arms-length price for these services.

In addition, Taxpayer has noted that another member of the unitary group with which it seeks to file has incurred a substantial amount of debt in the acquisition of Taxpayer, and later for additional expenses. Taxpayer's assets are part of the security for both sets of debt. However, Taxpayer's books do not reflect the payment of interest with respect to the debt.

Further, Taxpayer notes that it does not have its own separate sales force, but rather uses the sales force of another member of its claimed unitary group. Taxpayer argues that the fees it is charged are less than the arms-length value of the services provided. Finally, Taxpayer argues that its trademarks are used interchangeably by the businesses without charge.

With respect to Taxpayer's overall operations, it is difficult to quantify what the effects of Taxpayer's transactions leading to the claimed distortion were. In this file, insufficient information exists with respect to whether Taxpayer's intragroup transactions significantly affected Taxpayer's profitability. Finally, with respect to the interest paid for the debt to acquire Taxpayer, Taxpayer's argument that this creates distortion of income with respect to Taxpayer's Indiana operations is difficult to reconcile. Basically, Taxpayer's argument effectively tries to offset its income by the costs of acquiring … itself. In effect, by permitting unitary filing, Taxpayer transforms the profit of Taxpayer's overall enterprise-which an appropriate filing status, unitary or separate, seeks to accomplish- into a substantially different profit. Rather than being a pre-existing distortion that unitary filing seeks to reduce, the allowance of the interest expense on the unitary return creates a distortion of Taxpayer's income. Thus the unitary filing of Taxpayer and its affiliates is disallowed.

FINDING

Taxpayer's protest is denied.

II. Tax Administration - Penalty

DISCUSSION

Taxpayer also protests the imposition of penalty with respect to its quarterly payments. In particular, Taxpayer argues that, since the penalties were imposed on the basis of failing to remit quarterly income taxes, and were only assessed as a result of the prior assessment, then it is tantamount to the penalty for negligence not otherwise assessed by the Department.

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

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

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

(1) the nature of the tax involved;

(2) judicial precedents set by Indiana courts;

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

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.
45 IAC 15-11-2.

With respect to the penalty, Taxpayer has presented a case that it acted with reasonable care expected of taxpayers generally, and thus the penalty should be waived.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04-20040021.LOF

LETTER OF FINDINGS NUMBER: 04-0021
Responsible Officer
Periods 2000 through 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. Sales and Withholding Tax: Responsible Officer Liability

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

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

STATEMENT OF FACTS

Taxpayer was employed by a company ("Company"). On Company's filing of Articles of Incorporation and all subsequent filings with the Indiana Secretary of State's office, Taxpayer was listed as Company's President, and the address for Company was listed as being in care of Taxpayer.

Taxpayer's protest was set for hearing at a designated time by the Department via letter. Neither Taxpayer nor any representative of Taxpayer contacted the hearing officer assigned to the protest. At the time designated for the hearing, Taxpayer neither appeared at the Department's offices nor called the hearing officer responsible for conducting the hearing. Accordingly, this letter is based on information in the Department's file and publicly available information from the Indiana Secretary of State's office.

I. Sales and Withholding Tax: Responsible Officer Liability

DISCUSSION

The proposed sales tax and withholding tax liability was issued under authority of Ind. Code § 6-2.5-9-3 that provides as follows:

An individual who:
(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
(2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department;
holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

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

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

Taxpayer argues that he was only an employee of Company, and neither an owner nor officer of Company, at the time of the proposed assessments. However, all filings with the Secretary of State required of Company indicated that Taxpayer was the president of Company. Any filings that may have indicated otherwise are not part of that file. Taxpayer has provided no other substantiation of his arguments.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420040092.LOF

LETTER OF FINDINGS NUMBER: 04-0092
Sales and Withholding Tax
Responsible Officer
For the Tax Period 1999-9/30/2000

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

ISSUE

1. Sales and Use Tax - Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-8.1-5-1(b), Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995).

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

STATEMENT OF FACTS

The taxpayer was the President of a corporation that did not properly remit sales taxes to the state during the tax period 1999-September 30, 2000. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed the unpaid sales taxes, interest, and penalty against the taxpayer as a responsible officer of that corporation. The taxpayer protested the assessment of tax. A hearing was held and this Letter of Findings results.

1. Sales and Use Tax - Responsible Officer Liability

DISCUSSION

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

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

An individual who:

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

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

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

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995) any officer, employee, or other person who has the authority to see that they are paid has the statutory duty to remit sales and withholding taxes to the state. As the President of the corporation, the taxpayer had the responsibility to oversee the corporation. The taxpayer failed to insure that the corporation fulfilled its financial responsibilities by remitting trust taxes to the Indiana Department of Revenue. Therefore, the taxpayer had the statutory duty to remit the sales taxes and is personally liable for the payment of those taxes.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

42-20040103.LOF

LETTER OF FINDINGS NUMBER: 04-0103
IFTA
For The Tax Period 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.

ISSUES

I. International Fuel Tax Agreement - Imposition

Authority: IC 6-8.1-3-14, IC 6-6-4.1-4(a), IC 6-6-4.1-4.5, IC 6-8.1-5-1 (b), IC 6-8.1-5-4(a).

The taxpayer protests the imposition of IFTA taxes.

II. 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 corporation engaged in trucking with one truck and a driver. After an audit, Indiana Department of Revenue, hereinafter referred to as the "department," assessed International Fuel Tax Agreement (IFTA) taxes, penalty, and interest against the taxpayer. The taxpayer protested this assessment. A hearing was held. This Letter of Findings results.

I. International Fuel Tax Agreement - Imposition

DISCUSSION

IFTA is an agreement between various United States jurisdictions and Canada allowing for the equitable apportionment of previously collected motor fuel taxes. The agreement's goal is to simplify the tax, licensing, and reporting requirements of interstate motor carriers such as the taxpayer. The agreement itself is not a statute, but was implemented in Indiana pursuant to the authority granted under IC 6-8.1-3-14.

The taxpayer protests the department's imposition of taxes pursuant to IFTA.

The taxpayer was a trucking concern that operated in Indiana. As such, it operated on Indiana highways and consumed motor fuel. Therefore, the taxpayer was subject to IFTA taxes.

All tax assessments are presumed to be accurate. The taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b). Taxpayers have the duty to maintain books and records of their affairs and present those to the department for review upon the department's request. IC 6-8.1-5-4(a).

The taxpayer was unable to produce any documentation demonstrating that it had paid the proper amount of tax on the motor fuel it used in its operations. Due to the lack of documentation, the department assessed tax based on the best information available, mileage records on the taxpayer's IRP applications. The taxpayer claimed that it was not responsible for keeping such documentation since the taxpayer operated under a lease arrangement with a Pennsylvania corporation. That corporation, according to the taxpayer, was responsible for all filings and payment of IFTA taxes. The taxpayer was unable to produce the lease or any other documentation relating to a relationship between itself and the Pennsylvania corporation. The taxpayer failed to sustain its burden of proving that the department incorrectly imposed IFTA taxes in this situation.

FINDING

The taxpayer's protest is denied.

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.

Through its lack of reasonable care and failure to follow the instructions of the department, the taxpayer did not pay taxes it owed to the state. This constitutes negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

4120040104.LOF

LETTER OF FINDINGS NUMBER: 04-0104
IRP
For The Tax Period 2000-2002

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

ISSUE

I. International Registration Plan - Imposition

Authority: IC 6-8.1-4-2, IC 9-28-4-6, IC 6-8.1-5-1(b), IC 6-8.1-5-4(a), IRP Agreement Article IV 400(a), IRP Agreement Article II 210.

The taxpayer protests the imposition of International Registration Plans fees.

STATEMENT OF FACTS

The taxpayer is a corporation engaged in trucking with one truck and a driver. After an audit, Indiana Department of Revenue, hereinafter referred to as the "department," assessed International Registration Plan fees against the taxpayer. The taxpayer protested this assessment. A hearing was held. This Letter of Findings results.

I. International Registration Plan - Imposition

DISCUSSION

The International Registration Plan, hereinafter referred to as the "IRP," is an agreement between various United States jurisdictions and Canada allowing for the proportional registration of commercial vehicles and providing for the recognition of such registrations in the participating jurisdictions. The agreement's goal is to promote the fullest possible use of the highway system by authorizing apportioned registration of fleets of vehicles. The agreement itself is not a statute, but was implemented in Indiana pursuant to the authority granted under IC 6-8.1-4-2 and IC 9-28-4-6.

The taxpayer was a trucking concern incorporated under the laws of Indiana. The taxpayer's truck was based in Indiana. The taxpayer had an Indiana phone number. The president of the corporation and the only driver was a resident of Indiana. The taxpayer's operational records were kept in Indiana. The taxpayer drove its truck in Indiana.

The taxpayer protests the department's imposition of Indiana excise fees pursuant to IRP and disallowance of the mileage statements submitted to Oklahoma. The taxpayer contends that it paid all necessary IRP fees to Oklahoma through arrangements made by a licensing service. Further, the taxpayer contends that Indiana received its appropriate share of the excise fees from Oklahoma.

All assessments by the department are presumed to be accurate. The taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b). Taxpayers have the duty to maintain books and records of their affairs and present those to the department for review upon the department's request. IC 6-8.1-5-4(a).

IRP Agreement Article IV 400(a) requires that IRP registrants file for IRP status in its base jurisdiction as defined at IRP Agreement Article II 210 as follows:

> "Base Jurisdiction" means, for purposes of fleet registration, the jurisdiction where the registrant has an established place of business, where distance is accrued by the fleet and where operational records of such fleet are maintained or can be made available in accordance with the provisions of Section 1602.

This taxpayer's established place of business was Indiana and its operational records were kept at that place of business. Further, the truck was operated in Indiana. Therefore, the taxpayer's base jurisdiction was Indiana. The taxpayer should have filed for IRP status in Indiana and remitted the IRP fees to Indiana.

The taxpayer also protests the department's disallowance of the mileage filed with Oklahoma as to where the truck operated and how much fee apportionment should be sent to each state. The taxpayer argued that the filing service filled in the numbers and the truck never went to several of the states listed such as California and Connecticut. Since the taxpayer agreed that the mileage amounts listed were estimates, the department had no choice but to disallow those mileage statements. The taxpayer could not produce any records to establish the actual miles the taxpayer's truck traveled through the various states during the audit period. Indiana properly apportioned all the miles and related IRP fees to Indiana because there were no records establishing which other states should receive proportional shares of the plate fee.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20040119.LOF

LETTER OF FINDINGS NUMBER: 04-0119
Sales and Use Tax
For Tax Year 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 specific issues.

ISSUES

I. Sales and Use Tax - Publications

Authority: Ind. Code § 6-2.5-3-2, Ind. Code § 6-2.5-5-17, 45 IAC 2.2-5-26, *Emmis Publishing Corporation v. Indiana Department of Revenue*, 612 N.E.2d 614 (Ind. Tax 1993)

Taxpayer protests the assessment of use tax on its publication.

STATEMENT OF FACTS

Taxpayer is a beneficial society organized under § 501(c) (2) of the Internal Revenue Code. Members of this society elect a board of directors to manage the distribution of benefits to each of the members. Each month Taxpayer purchases a publication and distributes it to each of its members. After a routine audit, the Indiana Department of Revenue assessed additional use tax on Taxpayer's use of this publication. Taxpayer protested this assessment. Further facts will be provided as necessary.

I. Sales and Use Tax - Publication

DISCUSSION

Ind. Code § 6-2.5-3-2 imposes the gross retail tax on "the storage, use, or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction." Taxpayer purchases a publication and distributes it to its members. This use is generally subject to the gross retail tax. Taxpayer contends, however, that the publication is a newspaper and therefore qualifies for exemption from the gross retail tax pursuant to Ind. Code § 6-2.5-5-17. The auditor for the Indiana Department of Revenue classified the publication as a magazine. Therefore, it would not qualify for the newspaper exemption to the gross retail tax. The issue to be determined is whether the publication is a newspaper qualifying for exemption or a magazine subject to tax.

The Indiana Administrative Code provides clarification of the newspaper exemption at 45 IAC 2.2-5-26 as follows:

(a) General Rule. In general, sales of all publications irrespective of format are taxable. The exemption provided by this rule is limited to sales of newspapers.

(b) Application of the general rule. For purposes of [sales] tax, the term "newspaper' means only those publications which are:

(1) commonly understood to be newspapers;

(2) published for the dissemination of news of importance and of current interest to the general public, general news of the day, and information of current events;

(3) circulated among the general public;

(4) published at stated short intervals;

(5) entered or are qualified to be admitted and entered as second class mail matter at a post office in the county where published; and

(6) printed for resale and are sold.

(c) Publications which are primarily devoted to matters of specialized interest such as business, political, religious, or sporting matters may qualify for exemption if they also satisfy the criteria listed in subsection 26 of this rule [subsection (b)].

(d) Magazines, periodicals, journals, bulletins, advertising supplements, handbills, circulars, or the like are not newspapers until distributed as a part of a publication which is a newspaper within the meaning of this rule [45 IAC 2.2].

(1) Magazines are not construed to be newspapers. The retail sales of all magazines and periodicals are subject to sales tax. The sale of magazines by subscription is subject to sales tax without regard to the price of a single copy, and sales tax without regard to the price of a single copy, and sales tax must be collected by the seller from the person who subscribes to the magazine on the full subscription price.

(2) For purposes of [sales] tax, the tern 'newspaper' shall include advertising inserts. Advertising inserts shall mean only those publications which are:

(A)(I) produced for a person by a private printer and delivered to the newspaper publishers, or

(ii) produced and printed by a newspaper publisher, or

(iii) produced and printed by a person and delivered to the newspaper publisher, and

(B) inserted by the newspaper publisher into the newspapers and distributed along with the newspapers.

Any distribution not meeting the above test does not qualify for the newspaper insert exemption. Examples of items distributed along with a newspaper that do not qualify for the exemption include: gum, shampoo, and detergent samples.

(e) Publications issued monthly, bimonthly or at longer or irregular intervals are generally not considered to be newspapers.

(f) Racing forms and tip sheets are not newspapers.

(g) A preponderance of advertising, lack of authorization to carry legal advertising, or lack of a masthead setting forth the publisher, editor, circulation, and place of publication are characteristics of publications other than newspapers.

The Tax Court of Indiana ruled that the requirement set forth in (b)(2) was unconstitutional in *Emmis Publishing Corporation v. Indiana Department of Revenue*, 612 N.E.2d 614 (Ind. Tax Court, 1993). However, any publication must fulfill the remaining five requirements of subsection b to be considered a newspaper.

The first requirement of subsection (b) is that the publication must be commonly understood to be a newspaper. The fact that there is a dispute over whether this publication is a newspaper or a magazine indicates that it is at least questionable whether the publication would be considered a newspaper. Further the publication is very similar to publications commonly perceived of as magazines which are sent to members of beneficial societies.

Finally, one item of note with respect to the issue of whether the publication at issue is a magazine or newspaper: many other beneficial societies distribute the same publication, with about four pages devoted to the local beneficial society. A routine internet search revealed that at least four similarly situated societies referred to the publication as a magazine, and only two referred to it

as a newspaper- and one of those later referred to the publication as a magazine in the same paragraph. This leads to one inference: even the beneficial societies that distribute this publication cannot decide if it is a newspaper, and actually lean in the direction that the publication is not a newspaper. Taxpayer's publication does not meet the test of being commonly understood as a newspaper since there appears to be a great deal of room for discussion about the subject.

Next, to be considered a newspaper, the publication must be circulated among the general public. This publication is automatically mailed each month to all the members of Taxpayer's beneficial society. This is the primary means of circulation. Members of the general public, if they knew of the offer and were interested, could subscribe to the publication. This is not effectively publicized, however, and there is no evidence that very many people actually pay the subscription rate to obtain the publication. The publication does not circulate among the general public.

Publications that are newspapers are published at short intervals. Most newspapers are published daily or weekly. Further in the regulation at (e), the regulation clearly states that "publications issued monthly.... are not generally considered to be newspapers." This publication is issued monthly. That is too long an interval for it to be considered a newspaper. Rather, monthly publications are generally considered magazines and not entitled to the newspaper exemption from the gross retail tax.

This publication does qualify to be mailed second class.

The final requirement is that the newspaper be "printed for resale and are sold". As discussed earlier, this publication is offered for sale by subscription to persons who are not members of Taxpayer's beneficial society.

Taxpayer's publication does not meet all of the regulatory requirements to be considered a newspaper exempt from the gross retail tax.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420040168P.LOF

LETTER OF FINDINGS NUMBER: 04-0168P
Sales 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 superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late payment of a monthly sales tax return for December 2003.

The taxpayer is a company residing in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be waived as the error is the result of a sick employee. The taxpayer had an employee get sick. The employee was unable to work which caused a personnel shortage. The taxpayer covered the personnel shortage by personally working the extra hours. The extra hours overburdened the taxpayer which resulted in the taxpayer misinterpreting the due date.

The Department allows for waiver of penalty in the event of an incapacitating illness. In the instant case, the taxpayer could have handled this situation by hiring another employee, and thereby, relieve the work overload which caused the misinterpretation of the due date.

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

The Department finds the taxpayer was 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

0320040169P.LOF

LETTER OF FINDINGS NUMBER: 04-0169P
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 superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

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

The taxpayer is a company residing in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be waived as the error is the result of a sick employee. The taxpayer had an employee get sick. The employee was unable to work which caused a personnel shortage. The taxpayer covered the personnel shortage by personally working the extra hours. The extra hours overburdened the taxpayer which resulted in the taxpayer misinterpreting the due date.

The Department allows for waiver of penalty in the event of an incapacitating illness. In the instant case, the taxpayer could have handled this situation by hiring another employee, and thereby, relieve the work overload which caused the misinterpretation of the due date.

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

The Department finds the taxpayer was 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

0220040231P.LOF

LETTER OF FINDINGS NUMBER: 04-0231P
Income Tax
For the Calendar Years 1994 through 2002

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty and underpayment of estimated tax penalty.

STATEMENT OF FACTS

The late penalty and underpayment penalty were assessed on the filing of delinquent income tax returns for the calendar years 1994 through 2002.

The taxpayer is a company located out-of-state.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be waived as the taxpayer was not aware of the filing requirements. All Indiana sales were reported to California and the taxes were paid to California in regard to those liabilities. After being audited by the California Franchise Tax Board, the taxpayer realized it had a requirement to file separate income tax returns in Indiana. The taxpayer filed all delinquent tax returns for the tax years 1994 through 2002 in the year 2003.

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

0320040239P.LOF

LETTER OF FINDINGS NUMBER: 04-0239P
Withholding Tax
For the months August and 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 superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

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

The taxpayer is a company located in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be waived as the taxpayer was not aware of the filing frequency, and, the error was unintentional. Furthermore, the taxpayer states the taxpayer has a good compliance record.

The Department will waive penalty when the error is unusual and the taxpayer has an exemplary compliance history.

With regard to the payment history, the taxpayer has an earlier error which the taxpayer paid. In light of this error, the Department does not feel the taxpayer has established a good compliance record which would be a factor in waiving penalty.

With regard to the nature of the error, the Department does not feel misinterpreting the filing frequency is an unusual error. Thus, the Department does not feel the nature of the error is a factor in waiving 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

0420040114P.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 04-0114P
Sales Tax
For the Months of December 2002, January 2003, June 2003, and August 2003

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

ISSUE

I. Tax Administration – Penalty
Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2

The taxpayer protests the late penalty.

II. Tax Administration - Interest
Authority: IC 6-8.1-10-1

The taxpayer protests the interest assessment.

STATEMENT OF FACTS

The late penalty and interest were assessed on the late filing of sales tax returns for the months of December 2002, January 2003, June 2003, and August 2003.

The taxpayer is a company located out-of-state.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer continues to request the penalty be waived. The error is the taxpayer not changing the filing frequency from "monthly" to "early filer".

The Department reviewed the filing frequency letter that went out and noticed the letter was incorrect. The letter should have stated the filing frequency changed from "monthly" to "early filer". However, the letter stated the filing frequency changed from "early filer" to "monthly". As the Department did not correctly notify the taxpayer of the filing frequency change, the Department did not conform to the requirements of law. Therefore, the protest is sustained.

FINDING

The taxpayer's penalty protest is sustained.

II. Tax Administration – Interest

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

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2004-01IT
August 26, 2004

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

Adjusted Gross Income Tax, Et Al. – Community Revitalization Enhancement District Tax Credit
Authority: IC 6-3.1-19-3

The taxpayer requests the Department to rule whether or not investor members will be entitled to a pro rata percentage of the

available and qualified credit within a given year based upon each member's pro rata ownership in the taxpayer at the time the taxpayer makes qualified investment expenditures.

STATEMENT OF FACTS

The taxpayer, an LLC, plans to construct a building in a part of a district that has been designated as a Community Revitalization Enhancement District (CReED) under IC 6-3.1-19. The taxpayer has obtained approval for a tax credit authorized under the CReED statute. To help finance the project, the taxpayer will soon begin securing investors for the project. The investors, which may include business entities such as corporations or individuals, will become members of the taxpayer. Once the investor group becomes fixed, investors will share income, profits and cash flow with all other members of the taxpayer at a ratio of 99 percent for investors and 1 percent for the developer. After 2006, depreciation will be split into the ratio of positive capital accounts until capital accounts are equal to zero, and all other items will be shared at a ratio of 1 percent for the investors and 99 percent for the developer. The taxpayer will be taxed as a partnership for federal income tax purposes.

DISCUSSION

IC 6-3.1-19-3(a) provides:

> Subject to section 5 of this chapter, a taxpayer is entitled to a credit against the taxpayer's state and local tax liability for a taxable year if the taxpayer makes a qualified investment in that year.

IC 6-3.1-19-3(e) provides, in relevant part:

> If a pass through entity is entitled to a credit under this chapter but does not have state and local liability against which the tax credit may be applied, a shareholder, partner, or member of the pass through entity is entitled to a tax credit equal to:
>
> 1. the tax credit determined for the pass through entity for the taxable year; multiplied by
> 2. the percentage of the pass through entity's distributive income to which the shareholder, partner, or member is entitled.

It is clear from the above statute, a taxpayer is entitled to a tax credit if the taxpayer makes a qualified investment. Further, if the taxpayer is a pass through entity and has no state and local tax liability against which the tax credit may be applied, each owner of the taxpayer is entitled to a pro rata portion of the tax credit.

In the instant case then, to the extent the taxpayer makes a qualified investment in a given tax year and does not have state and local tax liability against which the tax credit may be applied, an investor member would be entitled in such year to a tax credit equal to the tax credit determined for the taxpayer for such year multiplied by the percentage of the taxpayer's distributive income to which the investor member is entitled. If an investor member's ownership percentage in the taxpayer is equal to the percentage of the distributive income of the taxpayer to which the investor member is entitled in a taxable year that the taxpayer makes a qualified investment, the tax credit available to the investor member would equal the tax credit determined for the taxpayer for that taxable year multiplied by the investor member's ownership percentage in the taxpayer for that taxable year.

RULING

The Department rules that investor members will be entitled to a percentage of the available and qualified CReED credit determined for the taxpayer for a taxable year based upon the percentage of the taxpayer's distributive income to which the investor member is entitled in such taxable year.

CAVEAT

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

Indiana Department of State Revenue