INDIANA DEPARTMENT OF INSURANCE
November 29, 2004
Bulletin 127
PATIENT'S COMPENSATION FUND – SURCHARGE RATES FOR HOSPITALS AND PHYSICIANS

This bulletin is directed to all health care providers electing to be qualified under Indiana's Medical Malpractice Act (IC 34-18-1-1 *et seq*.) and to insurers that provide coverage to those health care providers.

Pursuant to IC 34-18-5-2, the Commissioner of the Department of Insurance in her capacity as administrator of the Patient's Compensation Fund hereby notifies physicians and hospitals of the following surcharge for qualification under the Medical Malpractice Act. The rates are effective for coverage beginning **February 1, 2005.**

PHYSICIANS

The percentage increase to the physician rates is the same for each specialty class. A complete list of physician specialty class codes is published at 760 IAC 1-60.

CLASS	ANNUAL RATE
0	$2,645
1	3,527
2	4,937
3	6,348
4	7,935
5	10,580
6	15,870
7	24,686
8	29,976

HOSPITALS

The surcharge for a hospital is calculated using the attached worksheet. The completed worksheet shall be submitted to the Department along with the surcharge payment.

INDIANA DEPARTMENT OF INSURANCE
Amy E. Strati, Acting Commissioner

HOSPITAL EXPOSURE WORKSHEET FOR SURCHARGE CALCULATION

Name of Hospital: ______________________________

License No: ______________________________

List all facilities and/or services operated under the hospital license (as identified on the Department of Health Application for License to Operate a Hospital):

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CATEGORY	EXPOSURE	MANUAL	TOTAL
Provide # of Beds			Category x Manual = Total
	Hospital (Acute care and Intensive Care)	682.00	
	Mental Health/Rehabilitation	341.00	
	Extended Care/Intermediate Care/Residential	34.00	
	Nursing Home/Critical Extended Care	341.00	
	Health Institution/Assisted Living/Other	136.00	
	Bassinets	682.00	
# of Visits (in 100s)			
	Emergency Room	68.20	
	Clinics/Others	34.10	
	Mental Health/Rehabilitation	17.05	
	Health Institution	13.64	
	Home Health Care	34.10	

Provide # of Surgeries/Births (in 100s)			
	Births	2,728.00	
	Outpatient Surgeries	68.20	
	Inpatient Surgeries	1,364.00	
Employed Physicians Sharing Limits	50% of Specialty Code		
		SUB-TOTAL	
	Lack of Risk Management Program	10% Penalty x sub-total	
	Hospital with > 500 beds	3% multiplier of subtotal	
		TOTAL DUE	

NATURAL RESOURCES COMMISSION
GEOCACHING ON DNR PROPERTIES
Information Bulletin #46

1. Purpose and Application

The purpose of this information bulletin is to provide guidance for the management of geocaching activities on a DNR property. A person who participates in geocaching is subject to 312 IAC 8. A "cache" is a "device" and requires a license from the department under 312 IAC 8-2-10(6)(B). The standards for a license are outlined by this information bulletin.

2. Definitions

(1) "Cache" means a container that is used in association with geocaching. A cache typically includes items such as a logbook, pen, pencil, map, or trinkets.
(2) "Department" refers to the department of natural resources.
(3) "DNR property" has the meaning set forth in 312 IAC 8-1-4(3).
(4) "Geocaching" means a game pursued by global positioning system (or "GPS") users. An individual or organization places a cache or caches and shares its or their location on the Internet. A participant in the game applies the GPS coordinates to locate a target cache or caches. When located, the participant records the find on a designated website such as www.geocaching.com. The game may provide that objects are traded at the cache.
(5) "Multi-cache" refers to containers that are located from information received in another cache.
(6) "Virtual cache" refers to the target for geocaching for which there is no container. The location itself is the cache. Objects are not traded at the site of a virtual cache.

3. License Applications

(a) A person must obtain an "official geocaching placement license" on a department form before placing a cache on or within a DNR property. A cache that is placed without first obtaining a license under this information bulletin may be removed by the department and disposed as provided in "Personal Property Found on DNR Properties" (Information Bulletin #23).

(b) The property manager is authorized to issue, condition, or deny a license application.

(c) A person who is aggrieved by a determination by the property manager may seek informal review from the division director. A determination by the division director is subject to administrative review under 312 IAC 3-1.

4. General Prohibitions, Limitations, and Requirements

The following prohibitions apply to the placement of any cache and to any geocaching activity:
(1) A person must not violate 312 IAC 8 or another state or a federal law.
(2) Properties administered in whole or in part by the following divisions of the department do not qualify for geocaching:
  (A) Division of nature preserves (including any property dedicated under IC 14-31-1).
  (B) Division of museums and historic sites.
  (C) Division of outdoor recreation.
(3) A person must not dig or otherwise disrupt the ground when placing a cache.
(4) A person is limited to a maximum of two (2) official geocaching placement licenses on a particular DNR property at any time.
(5) The maximum number of caches that can be approved on a DNR property at any time is the lesser of the following:
  (A) Twenty-five (25); or

(B) The number derived by dividing the total acreage of the DNR property by two hundred (200) acres. A DNR property containing fewer than two hundred (200) acres does not qualify for geocaching.

(6) A property manager is not required to approve any multi-cache but may approve not more than five (5) multi-caches under an official geocaching placement license.

(7) As soon as practicable after placing a cache, the person who holds an official geocaching placement license must record the exact location on the copy of the license maintained by the property manager.

(8) The person who holds an official geocaching placement license must inspect any cache at least once every six (6) months to help ensure compliance with this information bulletin. During the inspection, the person must remove from the cache any food, alcohol, firearms, drugs, items unsuitable for minors, or other items that may pose a danger to people or wildlife.

(9) An official geocaching placement license expires one (1) year after the date of issuance.

5. License Standards

The property manager shall exercise reasonable discretion in determining whether to issue, condition, or deny an application for an official geocaching placement license. In the exercise of discretion, the following factors and principles apply:

(1) A cache cannot be approved for placement in a sensitive archaeological, historical, or ecological area. Examples include historic buildings or structures, caves, or areas that contain rare, threatened, or endangered plant or animals.

(2) A scheduled resource management activity, such as a timber sale or a prescribed burn, shall be considered in evaluating a license application.

(3) A cache cannot be approved for placement in an area that could reasonably cause danger to a geocaching participant or to another person who visits the DNR property. Examples of inappropriate areas include cliffs, bluffs, trees, lakes, streams, and roads.

(4) For inclusion with the license application, the property manager may require a person issued an official geocaching placement license to provide a photograph of the cache, the site where the cache is placed, or both.

(5) Any other factor reasonably consistent with proper use and protection of the particular DNR property, including implementation of a master plan.

(6) A virtual cache is exempted from licensing under this information bulletin, but a person who administers or seeks a virtual cache must comply with 312 IAC 8.

6. License Suspension or Revocation and Site Reclamation

(1) The property manager may suspend or revoke an official geocaching placement license, if a term of the license or of this information bulletin is violated, or if the location of the cache is found to pose a hazard to safety or the environment. The property manager shall make a reasonable attempt to notify the license holder of the action, as well as to notify the designated website. The reasons for the property manager's action shall be recorded with the license. If the license holder elects to relocate the cache, a new license application is required.

(2) Upon the suspension, revocation, or termination of an official geocaching placement license, the license holder is responsible for removal of the cache, for site restoration, and for any associated expenses. A person who places a cache without a license has the same responsibilities as if issued a license.

(3) A person who is aggrieved by a suspension or revocation may seek administrative review under 312 IAC 3-1.

7. History

The Natural Resources Commission approved this information bulletin on November 16, 2004. The information bulletin was published in the Indiana Register and became effective on January 1, 2005.

NATURAL RESOURCES COMMISSION
Information Bulletin #47
January 1, 2005
Horses on DNR Properties

1. Purpose

Horseback riding is an appropriate recreational use on trails at designated DNR properties. Horseback trails are constructed and maintained according to agency standards and are located so they do not unacceptably alter natural resources or other recreational opportunities.

This information bulletin defines policies governing the recreational use of horses on DNR properties. The purpose is to help assure the application of fiscally and ecologically sound decision-making in property management. The information bulletin is supportive of 312 IAC 8.

2. Definitions

The definitions contained in 312 IAC 8-1-4 apply to this information bulletin. The term "horse" includes a horse, mule, pony, equine, llama, or other hoofed animal ridden or driven as a pack animal.

3. History

The recreational use of horses on DNR properties is as old as DNR property management. A majority of the trail system was established in the early 1930s when horses were the primary source of transportation in much of rural Indiana. Recreational trail riding grew from this early transportation system. For several decades, recreational horse use was limited to a small number of local residents, and there were few agency policies. This informal approach led to problems and inconsistencies.

In recent years, the number and variety of recreational horse users has increased substantially. Rules and formal policies have sought to provide all users with an enjoyable recreational experience while protecting natural resources. The natural resources commission approved a policy statement in 1994. The statement was amended during the commission's February 21, 1996 meeting with approval of the "Policy Guidelines for Recreational Horse Use".

The current information bulletin updates and supersedes the previous commission guidelines. The Natural Resources Commission approved it on November 16, 2004. The current information bulletin was published in the Indiana Register and became effective on January 1, 2005.

4. Policy Development

The following steps were used in developing this information bulletin:

- Determine the issues.
- Seek input from affected persons.
- Develop fiscally and ecologically sound ways to address the issues.
- Provide a framework for two-way communications and cooperation between DNR property managers and property users.
- Implement the policy.
- Periodically review and evaluate the policy.

A horse use opinion survey was conducted during the summer of 1993 to solicit information from a cross-section of interested persons. A wide spectrum of people was asked to participate in the survey. Included were horse users, non-horse users, resource professionals, property neighbors, and local and statewide interest groups.

The survey included 53 questions, and an opportunity was provided to offer general comments. Of 764 surveys distributed, 291 were completed and returned. Survey results were used to identify, consolidate, and prioritize issues. The survey also helped establish a communications framework between interested persons and the DNR. The framework has proven helpful to implementing a uniform policy.

5. Policy Statements

A. Horse-Drawn Vehicles

A horse-drawn vehicle may be operated on a public road or on a road or trail designated for this use. A horse-drawn vehicle used on a DNR property must meet safety standards for slow-moving vehicles on a state highway. Horses must be tagged as provided in 312 IAC 8-2-6. The operator must have prior approval from the DNR to livery or use for hire a horse-drawn vehicle on a DNR property. The DNR shall exclude horse-drawn vehicles from areas open to motorized vehicles if the presence of a horse would violate a public health or safety law.

B. Horse Campgrounds

The establishment and operation of a horse campground shall comply with 312 IAC 8, and with the "DNR Horse Trail and Horse Campground Standards Manual". Horse campgrounds are limited to persons camping with horses. Camping with horses is limited to areas designated as horse campgrounds.

A person keeping horses in a horse campground must collect and place horse manure at a designated collection site. Horses may be washed only at stations designated for this purpose. A person must not wash a horse at a drinking water fixture, waste dumping station, stream, pond, or lake.

C. Trail Density and Equine Carrying Capacity

To protect natural resources and recreational values, the density of horse trails on DNR properties is limited as follows:

High Density Trail Area: Except on a special concern area, within one mile of a horse campground or a day-use area, the maximum density is 4.5 miles of trail per square mile (640 acres) of state ownership.

Low Density Trail Area: Except on a special concern area, for an area outside a high density trail area, the maximum trail density is 2.5 miles of trail per square mile (640 acres) of state ownership.

Special Concern Area: A special concern area is an area designated by the property manager with approval by the division director. Examples of qualification for a special concern area include:

- A dedicated nature preserve.
- A designated old forest.
- Developed non-horse recreation.
- Location within 500 feet of a known cave entrance.
- A noncontiguous tract of less than 640 acres.
- Lack of legal access.
- The conduct of sensitive research activities.
- The presence of an extreme slope.
- Conditions subject to erosion.

Designation as a special concern area does not prohibit a trail, but a trail will require additional care and expense in construction and maintenance. Trail mileage shall be minimized.

Equine carrying capacity is the maximum number of horses allowed to use a DNR property at any time. The capacity is determined by multiplying the total miles of designated horse trails on a property by ten. See Appendix A for further information.

D. Animal Health Requirements

The owner of an animal brought onto a DNR property is solely responsible for each of the following:

- Providing proof of required vaccinations and applicable health statements under 345 IAC 6-1.1 and 345 IAC 7-5 before entrance.
- The humane treatment of any animal.
- The procurement and payment for any veterinary services.
- The payment of any expense for the removal of injured or dead animals.

E. Horseback Access to a DNR Property

Access to a DNR property by horseback is limited to a designated public entrance. A public entrance is a horse campground, day-use parking area, designated trailhead, and (for ride-on users only, no vehicle or trailer access) where a designated horse trail intersects a public road.

Access from an adjacent private property is allowed only if the following conditions are met:

1. The access is made a designated public trailhead for all horse users where the landowner either:
   a. accepts, in writing, liability for public access through the landowner's property; or
   b. grants a recreational access easement to the DNR.
2. The development of the access is not otherwise inconsistent with this information bulletin and is consistent with the property plan for horse trail management.

F. Multiple Use and Single Use Trails

A recreational trail on a DNR property shall be designated for hiker only, horse and hiker, or an otherwise identified special use. The designation shall be based on natural resource, recreation, and maintenance considerations. As provided in 312 IAC 8-2-6, a person shall not use a horse except on an area or trail designated for this purpose.

G. Annual Horse Tag

Between April 1 and November 30, a person with a horse driven, ridden, brought, or transported onto a DNR property for day use or overnight camping must possess an annual horse-use tag. The tag must be displayed on the tack of a horse or be possessed by the rider and made available for inspection upon request. The commission determines the cost of the annual horse-use tag. The tag is valid only on a DNR property where horse use is an approved activity. A horse-use tag does not authorize entrance if a facility is filled to capacity or is closed.

H. Special Event Ride

The DNR may authorize a special event ride where the following conditions are met:

1. The event is limited in size so as not to exceed the specified equine carrying capacity of the facility.
2. The property manager issues a written permit with appropriate conditions and a deposit fee.
3. The property manager pre-approves the use of any trail or facility.
4. The permit holder agrees to comply with the permit, this information bulletin, and 312 IAC 8.

I. Evaluation of Suitability of DNR Property for Horseback Trail Riding

The division that manages a DNR property is responsible for determining whether horseback trail riding is an approved activity on the property. The determination shall be based on the mission of the division and the environmental impact, with the benefit of public input.

A DNR property that would support less than ten miles of horse trails under the trail density standards is not suitable for horseback trail riding. A DNR property that would support at least ten but less than 20 miles of trails may be considered for day-use but is not suitable for a horse campground.

The DNR shall not add a new or expand an existing horse facility unless each of the following is satisfied:

1. The current horse use facilities on the property satisfy the "DNR Horse Trail and Horse Campground Standards Manual".
2. Adequate funding is available to assure proper operation and maintenance of the current and proposed new facilities.
3. The need is established for additional facilities.

J. Safety

The following standards apply to the promotion of public safety:

1. A person shall not ride at night on a horse trail section that is a public road.
2. Use of a public road for a horse trail shall be limited to where another trail routing is not feasible. The DNR shall minimize the use of a public road for a horse trail.
3. During a hunting season, a property manger may close a horse trail to riding or may close an area with a horse trail to hunting. The DNR shall conspicuously sign any such closure.
4. When not being ridden, a person must lead a horse by halter or reins or must confine a horse in an approved corral or trailer. Unless a property manager grants written permission, a person must not use a portable corral or an electric fence and must confine a horse to the hitching rail pad area of a campsite. An electric fence must have visible identification and must use

battery-powered or solar energizers and wide electric polytape wire.

5. A person must keep a horse at a flat walk within a horse campground or a day-use parking area.

6. The DNR may require a person with an unruly horse, which is causing a disturbance or safety hazard, to remove the horse from the DNR property. 312 IAC 8-2-6(b).

K. Volunteers and Donations

The DNR shall actively pursue programs with individuals or groups that wish to volunteer services or donate funds or materials to improve facilities on a DNR property. Volunteer services and donations shall be used only within a structured program approved by the division and consistent with this information bulletin and the approved uses of a property. Whenever practicable, a structured program shall be developed jointly by the property employees and the volunteers. The program shall focus on bringing an existing facility to current standards before considering expansion or the creation of a new trail or facility. For each program, the property manager will define in writing any special privileges or conditions that may be accorded to volunteers.

L. Concessionaires

A person must not engage in a concession or other business, except as approved by the DNR. 312 IAC 8-2-14(b). This restriction applies to the on-site rental of horses for use on a DNR property.

M. Education

When practicable, the DNR shall provide users with information on the impacts of recreational use, methods of minimizing negative impacts, trail ethics, and natural resource information.

N. Property Closures

A division director may temporarily close a DNR property to horse use. The department director may permanently close a DNR property to horse use. The closure would be based on resource protection, public input, and public safety.

With approval of the immediate supervisor, a property manger may temporarily or permanently close an individual trail, segment of a trail, or other facility on a DNR property. The closure may be for maintenance, inclement weather to prevent trail damage, because a trail cannot be brought to current standards, rotational to all recovery from damage, or to protect ecologically sensitive areas.

All closures shall be accompanied by efforts to minimize the negative impacts on the recreational opportunities of all users.

Appendix A

Overview of Trail Density and Equine Carrying Capacity

The decision to establish minimum trail density and maximum equine carrying capacity as part of the policy for "Horses on DNR Properties" was based on two factors. First, the long-term observations of many resource managers indicate that at certain times in certain locations, horse use caused ecologically unacceptable changes in the natural resources. Second, many recreational horse users believed that crowding and frequent contact among users caused a diminished recreational experience.

Trail density was established with a concentric, two-tiered design. High density areas are defined as encompassing an area of state-owned land, excluding special concern areas, within a one mile radius of a horse campground or designated horse day use parking area. The high density maximum of 4.5 miles of trail per 640 acres reflects a management decision to assign horse use a somewhat higher status in relation to other uses in these areas. A density in excess of 4.5 miles per 640 acres would not allow the necessary latitude for trail design and location to prevent unacceptable changes in natural resources. Low trail density areas are defined as those areas of state owned land, excluding special concern areas, that lie outside the high density areas. The low density maximum of 2.5 miles of trail per 640 acres reflects that horse use is only one of many uses on most properties. The low density maximum also indicates the dispersion factor as the trails move farther from high density areas.

These trail density figures coincide with the upper limits of trail density proposed by the United States Forest Service for the Hoosier National Forest. These trail density guidelines may need to be altered in the future if this level of use produces unacceptable changes, or if research data shows over time that additional use would not cause unacceptable impacts.

The Equine Carrying Capacity of a property is here derived from the miles of trail available for riding. The number of horses allowed per mile of trail is a function of two different factors. The first is the physical impact each horse has on the natural resources. These include soil, water, vegetation, and similar resources. The second is the frequency with which riders wish to encounter each other on the trail.

The physical impact of each horse on natural resources is dependent on many different factors. Included are weather, slope, soil type, trail condition, and similar factors. These are not yet well quantified; however, it has been observed that those trail systems that routinely have several riders per mile per day show substantial impacts.

Results from the trail riding respondents to the 1993 Horse Use Opinion Survey indicated they rode an average of about eight miles a day, and a majority preferred to encounter five or fewer other groups during the ride. The average group size was from two to six people. To accommodate this number of encounters would require somewhat less than one group per mile of trail. Ten horses per mile of trail would be the maximum to provide the desired recreational opportunity. As with trail density, the carrying capacities may need to be adjusted in the future after additional information is collected.

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #28
SALES TAX
JANUARY, 2005
(Replaces Information Bulletin #28 dated July, 2004)

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

SUBJECT: Sales & Leases of Motor Vehicles, Trailers and Watercraft

REFERENCES: IC 6-2.5-1-5, IC 6-2.5-1-6, IC 6-2.5-2-2, IC 2.5-3-6, IC 6-2.5-3-7, IC 6-2.5-4-10, IC 6-2.5-13-1

INTRODUCTION

The sale or lease of any motor vehicle, trailer or watercraft shall be subject to the sales/use tax unless such transaction is entitled to a statutory exemption as shown on Form ST-108E.

If the vehicle, trailer or watercraft is purchased or leased from a registered Indiana motor vehicle, trailer or watercraft dealer, the dealer must collect sales tax and provide to the purchaser a completed Form ST-108 showing that the tax has been paid. If the purchaser claims exemption and tax is not collected by the dealer, the statement at the bottom of Form ST-108E must be completed and signed by the purchaser. Title applications on sales by registered dealers without a Form ST-108, completed by the dealer, will not be accepted. Form ST-108 must be attached to the Department of Revenue copy of the title application by the license branch personnel. When a purchaser claims an exemption on Form ST-108E, the dealer must retain a completed exemption certificate in the dealer's records to document the exempt sale or lease. Form ST-105D may be used to document dealer-to-dealer exempt sales for resale.

Effective July 01, 2004 all motor vehicles, trailers and watercraft purchased or leased in Indiana are subject to Indiana sales tax. This includes sales or leases to be immediately registered, licensed or titled for use in another state.

I. AMOUNT SUBJECT TO TAX

A. REBATES VERSUS VARIOUS OTHER FORMS OF DISCOUNTS

The dealer's actual selling price, for which the dealer receives gross retail income, is the amount subject to sales tax. **A rebate is not an allowable deduction from the taxable selling price if the dealer receives payment for such rebate, as shown on the customer's purchase or lease agreement.** A manufacturer's rebate, as shown on the written purchase or lease agreement with a customer, is a form of payment. It is not a reduction in the dealer's selling price.

Regardless of terminology used, the amount subject to tax is based upon whether or not the selling price is reduced. Even though a dealer receives payment from the manufacturer for a rebate shown on the written purchase agreement, it does not reduce the selling price. The dealer's selling price is the amount subject to sales tax, not the amount actually paid by the customer.

Any adjustment to the list price shown on a customer's purchase agreement for which the dealer receives payment or credit from a third party is to be treated as a payment and is not a reduction of the taxable selling price. Such amounts are not deductible from the taxable selling price, regardless of the terminology shown on the purchase agreement.

Note: Customers often do not know if a dealer receives payment for any particular type of adjustment shown on their purchase agreement. Dealers do know if any adjustment shown is paid by a third party and must show these types of adjustments as payment applications, not reductions of the taxable selling price.

B. TRADE-IN ALLOWANCE

The deduction for a trade-in allowance applies only to "like-kind exchanges" where the vehicle, trailer or watercraft to be traded-in is **owned and titled** in the name of the customer. A like-kind exchange means a motor vehicle for another motor vehicle, a trailer for another trailer or a watercraft for another watercraft. A trade-in of a vehicle for a trailer or watercraft is not a "like-kind exchange," and is not deductible in the calculation of the amount of the taxable gross retail income received by the dealer. **Only motor vehicles traded for other motor vehicles, trailers traded for other trailers, or watercraft traded for other watercraft are deemed to be "like-kind exchanges" exempt from the sales tax.** A deduction is not available for other property, either personal or real, which is traded for a vehicle. All other type trade-in values are taxable and includable as part of the taxable retail income received by the dealer. Non-like-kind exchanges are another form of the taxable retail payment to the dealer which does not reduce the dealer's selling price.

Trade-In Value for Sales

Like-kind exchanges (trade-in value) applied toward the purchase price for the sale of a motor vehicle, trailer or watercraft are not reduced by any amounts represented by an encumbrance of any kind. The gross trade-in value is deductible from the taxable selling price for sales tax purposes.

Trade-In Value for Leases

Like-kind exchanges (trade-in value) applied as a capital cost reduction resulting from the trade-in equity of an owned vehicle are deductible from the taxable gross retail income for sales tax purposes. Equity is defined as the gross trade-in value less any encumbrance (lien) on the trade.

C. DOCUMENTATION FEES

Documentation fees for services performed **after the transfer** of the vehicle, trailer or watercraft are not considered part of the sales price and, therefore, are not subject to sales tax. Transfer of a vehicle, trailer or watercraft takes place when the purchaser takes possession and control of the property and assumes the risk of loss, even though title has not yet been transferred. The dealer must maintain adequate records to show which services pertain to the fees charged and that the services were performed after the transfer of the vehicle, trailer or watercraft to be exempted from sales tax. Documentation fees charged for services performed **prior to the customer taking physical possession** of the vehicle, trailer, or watercraft are subject to sales tax.

II. SALES - EXAMPLES OF TAXABLE SELLING PRICE {T=Taxable; E=Exempt}

A.	**(1) Sticker List Price**	**$12,000 T**
	(2) Dealer Discount	**$500 E**
	(3) Trade-In Value	**$4,000 E**
	(4) Taxable Selling Price	**$7,500**

The dealer discount (2) is a reduction in selling price and is an allowable deduction from the amount subject to tax. Item (3) is consideration received by the seller; however, per statute, it is deductible from the amount subject to sales tax. Taxable selling price is (1) minus (2) minus (3).

B.	**(1) Sticker List Price**	**$12,000 T**
	(2) Dealer Discount	**$500 E**
	(3) Trade-In Value	**$4,000 E**
	(4) Mfg Rebate Paid Direct to Customer	**$1,000**
	(5) Taxable Selling Price	**$7,500**

Items (2) and (3) reduce the amount subject to sales tax. Item (4) does not reduce the amount subject to sales tax. Note that in this example the rebate is paid to the customer, not the dealer. Compare this example to Example C below. These examples show that regardless who receives the rebate, it does not reduce the taxable selling price of the vehicle. Taxable selling price is (1) minus (2) minus (3).

C.	**(1) Sticker List Price**	**$12,000 T**
	(2) Dealer Discount	**$ 500 E**
	(3) Trade-In Value	**$ 4,000 E**
	(4) Mfg Rebate paid to Dealer	**$ 1,000**
	(5) Taxable Selling Price	**$ 7,500**

Item (2) is a reduction from the selling price per statute. Item (3) is consideration received by the seller; however, per statute, it is deductible from the amount subject to sales tax. The manufacturer rebate (4), paid to the seller by the manufacturer, is not an allowable deduction from the taxable selling price of the vehicle. Taxable selling price is (1) minus (2) minus (3)**.**

D.	**(1) Sticker List Price**	**$12,000 T**
	(2) Discount	**$ 500 E**
	(3) Trade-In Value	**$ 4,000 E**
	(4) Mfg Cost Reduction (not paid to dealer)	**$ 1,000 E**
	(5) Taxable Selling Price	**$ 6,500**

Items (2) (3) and (4) are all allowable as a reduction of the amount of gross retail income subject to sales tax. Items (2) and (4) are true selling price reductions since the seller does not receive any payment. Item (3) is consideration (payment) received by the seller; however, like-kind exchanges (trade-in) are allowable as a reduction of the selling price subject to tax per Indiana Code. Taxable selling price is (1) minus (2) minus (3) minus (4).

III. LEASES

The lease of any motor vehicle, trailer or watercraft shall be subject to the sales/use tax unless such transaction is entitled to a statutory exemption as shown on Form ST-108E.

All amounts received as consideration by a dealer or lessor are subject to sales tax with the exception of the value of an owned vehicle exchanged as a trade-in by the lessee. **All monies received at the origination of the lease that represent down payments, rebates, initial payments, first month's lease, etc., collected by a dealer or lessor are subject to the Indiana sales tax.** The deduction for a trade-in allowance applies only to vehicles, trailers or watercraft traded-in that are owned (titled) by the customer. There is no deduction available for other property, either personal or real, which is exchanged for a vehicle, trailer or watercraft. All other types of exchanges are taxable.

Customers (lessees) should understand that when a vehicle is leased there are two separate, but related, transactions. The dealer "sells" the vehicle to a leasing or finance company and at the same time originates a lease arrangement between the lessor (leasing/finance company) and the lessee (customer).

The term "capitalized cost" or "capital cost" is an accounting term used by the vehicle leasing industry to describe the actual selling price of the vehicle from the dealer to the leasing or finance company. The customer's (lessee's) monthly lease payment is materially affected by how much the leasing or finance company pays for the vehicle (capitalized cost). The dealer not only receives consideration (payment) from the customer, but many times receives payment from the manufacturer in the form of a rebate. The consideration received are examples of "capital cost reductions."

LESSEE PURCHASE AT END OF LEASE – If a lessee exercises a purchase option at the end of their lease, all monies paid by the lessee upon termination of the lease, including excess mileage fees, are subject to sales tax.

IV. TAXABLE LEASE AMOUNTS

A **manufacturer's rebate** based upon the lease of a vehicle is not considered deductible for sales tax purposes. For sales tax purposes, a rebate paid to the dealer is deemed to be "gross retail income" and thus is not deductible from the amount subject to Indiana sales tax. **Sales tax is based upon retail income received by the seller, not amounts paid by the lessee.** It does not matter if the lessee has the option of receiving the rebate in cash, or assigning the rebate to the dealer to be applied as a capital cost reduction on the lease of a vehicle. The character of the rebate remains taxable. In either situation the total selling price of the vehicle and amount of gross retail income received by the dealer are identical. Indiana Code 6-2.5-1-5 defines gross retail income for sales tax purposes to include the total gross receipts, of any kind or nature, received in a retail transaction by a retail merchant.

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

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

All types of discounts, regardless of the terminology used to describe the price adjustment, are either taxable or exempt based upon whether the selling dealer receives "gross retail income" for the sale or lease of a vehicle.

V. EXAMPLES OF TAXABLE LEASE AMOUNTS

A. New Vehicle Lease – Customer Trades in Vehicle Titled in Customer's Name {T=Taxable; E=Exempt}

1. Value of owned vehicle trade	**$15,000**
2. Customer's Loan Balance	**(10,000)**
3. Equity in owned vehicle	**$ 5,000 E**
4. Cash paid by customer	**$ 8,000 T**
5. Total Payment applied	**$13,000**
6. First month lease payment	**$ 400 T**
7. Amount Subject to Sales Tax at Lease Origination	**$ 8,400**

In the above example the dealer receives a total gross retail income of $13,400. Only $8,400 is subject to sales tax. The net equity of the owner trade-in (3) is used to reduce the capitalized cost (selling price) of the leased vehicle and is not subject to tax. Indiana statute exempts this "payment" towards the selling price if the vehicle being traded is "titled" to the customer initiating the lease. The cash payment (4) and the first month's lease payment (6) collected by the dealer are subject to the Indiana sales tax.

B. New Vehicle Lease – Customer Trades in Vehicle Titled in Customer's Name and has a Manufacturer's Rebate.

1. Value of owned vehicle trade	**$15,000**
2. Customer's Loan Balance	**(10,000)**
3. Equity in owned vehicle	**$ 5,000 E**
4. Cash paid by customer	**$ 1,500 T**
5. Manufacturer Rebate	**$ 2,000 T**
6. Total Payment applied	**$ 8,500**
7. First month lease payment	**$ 400 T**
8. Amount Subject to Sales Tax at Lease Origination	**$ 3,900**

In this example the dealer receives $8,900 (3+4+5+7) for the lease of this vehicle. The net equity of the owner trade-in (3) is exempt from sales tax provided the vehicle being traded is titled in the customer's name and is applied as a capital cost reduction. Items 4 + 5 + 7 are taxable.

C. New Vehicle Lease – Customer Trades in Vehicle NOT Owned/Titled in Name of Customer at End of Lease Term

1. Value of lessee vehicle	**$ 12,000**
2. Lessee's optional buy out	**(10,000)**
3. Allowance for lessee auto	**$ 2,000 T**
4. Cash paid by customer	**$ 3,000 T**
5. Manufacturer's Rebate	**$ 2,000 T**

6. Total Payment applied	**$ 7,000**
7. First month lease payment	**$ 400 T**
8. Amount Subject to Sales Tax at Lease Origination	**$ 7,400**

Dealer exercised option to purchase leased vehicle direct from leasing company. Trade-in was titled to leasing company, not the customer, thus is not an exempt trade per Indiana statute. In the above example, the dealer receives as retail income a total of $7,400. The entire amount of retail income is subject to the Indiana sales tax. (3+4+5+7)

D. New Vehicle Lease – Customer Receives Manufacturer's Rebate, Manufacturer's Price Reduction and a Dealer Price Discount.

1. Manufacturer's Rebate	**$ 3,500 T**
2. Manufacturer's Cost Reduction (not paid to dealer)	**$ 2,000 E**
3. Dealer Price Discount	**$ 2,000 E**
4. Cash paid by customer	**$ 3,000 T**
5. First month lease payment	**$ 400 T**
6. Amount Subject to Sales Tax at Lease Origination	**$ 6,900**

Items (2) and (3) are both exempt from sales tax since the dealer does not receive any "gross retail income." Items (1),(4) and (5) are subject to the Indiana sales tax. The amounts are not deductible from taxable gross retail income.

E. New Vehicle Lease – Entire Lease is Prepaid by Lessee at Origination

1. Manufacturer's Rebate	**$ 2,000 T**
2. Dealer Price Discount	**$ 1,000 E**
3. 3 Year Lease Prepaid by lessee	**$10,500 T**
4. Amount Subject to Sales Tax at Lease Origination	**$12,500**

The entire lease proceeds (1) and (3), paid at lease origination to the dealer, are subject to the Indiana sales tax regardless of residency of the customer. The fact that the lessee may later register/plate the vehicle in another state does not change the fact that Indiana sales tax is due on this transaction.

VI. LEASES FROM INDIANA DEALERS TO NONRESIDENTS

If a vehicle is leased from a registered Indiana motor vehicle, trailer or watercraft dealer, the dealer must collect the applicable sales tax and provide to the purchaser a completed Form ST-108 showing the amount of tax collected. If the purchaser claims exemption and tax is not collected by the dealer, the statement at the bottom of Form ST-108E must be completed and signed by the purchaser. When a purchaser claims an exemption on Form ST-108E, the dealer must retain a copy of the completed exemption certificate to document the exempted lease transaction. Exemption Form ST-105D may be used to document "dealer to dealer" sales for resale.

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

A dealer leasing to a **nonresident** must collect Indiana sales tax on all gross retail income items as defined by Indiana statute, including any advance lease payments tendered. Only the value of a vehicle trade-in applied as a capital cost reduction, titled in the name of the customer/lessee, is entitled to an exemption. All future periodic lease payments collected by the lessor **after transfer** of the vehicle, trailer or watercraft shall be subject to sales tax based upon the state where the property is located. Exemption from the sales tax will not be allowed except for the reasons listed on Form ST-108E.

Residency of the lessee (customer) does not determine the application of Indiana sales tax to a lease. **Indiana** sales tax is due on all "gross retail income" received by an Indiana dealer at the time of lease origination. The "stream" or "flow" of each lease payment determines if Indiana sales tax is due on a lease. All upfront monies paid at the time of a lease origination, regardless of the future location of the leased vehicle, are subject to **Indiana** sales tax. The lessor (leasing or finance company) will collect the appropriate sales tax on later periodic lease payments based upon where the vehicle is registered.

Example: A resident of another state initiates a new lease from an Indiana dealer. The nonresident lessee intends to register/plate the leased vehicle outside Indiana. The Indiana dealer is responsible for collection of the **Indiana** sales tax on all "gross retail income" received upon the origination of the lease. Once the vehicle is registered in another state, the lessor (leasing company or financial company) will collect that states' sales tax on each periodic monthly lease payment based upon the location where the vehicle is registered.

Borderline Nonresident Example #1

Illinois, Kentucky or Ohio Resident Initiating a Lease from an Indiana Dealer

Illinois, Kentucky and Ohio statutes require sales tax to be paid by the lessor (leasing or finance company) on the lessor's full purchase price of the vehicle at the lease inception. Indiana statute differs in that it requires sales tax to be collected based upon the stream of periodic lease payments. In this example a vehicle has a manufacturer's rebate used as a capitalized cost reduction and the customer makes the first monthly payment to the dealer at the time of lease inception. The dealer must collect Indiana's sales tax on the manufacturer's rebate amount and the first month's lease payment. In this example, the Indiana dealer is required by the lessor to apply for title in Illinois. Dealer computes Indiana sales tax on monies tendered upon lease origination and completes Form ST-108 disclosing amounts of Indiana sales tax collected.

Borderline Nonresident Example #2

Michigan Resident Initiates a lease from an Indiana Dealer

In this example both Michigan and Indiana collect sales tax on the stream of periodic lease payments. The vehicle has a manufacturer's rebate used as a capitalized cost reduction and the customer makes the first monthly payment to the dealer at the time of lease origination.

a) The Indiana dealer must collect Indiana's sales tax on the manufacturer's rebate amount received by the dealer and the first month's lease payment.

b) The lessor will collect sales tax on future periodic lease payments based upon the location of the leased vehicle, presumably Michigan in this example.

Additional information pertaining to sales tax concerning vehicles, trailers and watercraft is found on the Department's website at www.in.gov/dor. Click on: Businesses; click on: Frequently Asked Questions; click on: Auto Dealers.

Kenneth L. Miller
Commissioner

DEPARTMENT OF STATE REVENUE

04-980213.LOF

LETTER OF FINDINGS: 98-0213
Indiana Gross Retail Tax
For the Years 1993, 1994, 1995, and 1996

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

ISSUES

I. Purchase of Display Booths from Ohio Vendor – Use Tax.

Authority: IC 6-8.1-5-1; IC 6-8.1-5-1(b); 45 IAC 2.2-3-4.

Taxpayer argues that the audit review incorrectly assessed gross retail tax on the purchase of display booths which were purportedly shipped from an Ohio vendor to another location in Ohio.

II. Computer Software Updates – Use Tax.

Authority: IC 6-2.5-3-2(a); Sales Tax Information Bulletin #2 (May 2002); Sales Tax Information Bulletin #8 (May 2002); Sales Tax Information Bulletin #2 (August 1991); Sales Tax Information Bulletin #8 (February 1990).

Taxpayer maintains that the audit erred when the audit concluded that the purchase of computer software upgrades was subject to Indiana's gross retail tax.

III. Abatement of the Ten-Percent Negligence Penalty.

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

Taxpayer argues that the Department should exercise its authority to abate the ten-percent negligence penalty assessed at the time of the original 1997 audit.

STATEMENT OF FACTS

Taxpayer is in the banking business and has a number of banking locations within the state. In 1997, the Department of Revenue (Department) conducted an audit review of taxpayer's business records for the purpose of determining whether taxpayer had paid sales tax on taxable transactions or, in the alternative, had self-assessed use tax on those items for which sales tax had not been paid. Because of the sheer number of potential transactions, the parties agreed to use a sampling method to determine the amount of additional use tax owed. The audit determined that taxpayer owed additional use tax. Later in 1997, taxpayer submitted a protest concerning certain of the assessments. The file was assigned for a hearing in 2004. After being contacted, taxpayer's representative indicated that the only remaining issue was the ten-percent negligence penalty and that a determination of whether or not to abate the penalty should be based upon the information contained within the original audit report and the 1997 protest letter. Subsequently, taxpayer decided that it wanted two specific, substantive issues addressed within the Letter of Findings. Therefore, this Letter of Findings addresses both the two substantive issues and the penalty assessment.

DISCUSSION

I. Purchase of Display Booths from Ohio Vendor – Use Tax.

In reviewing taxpayer's invoices, the audit took note of a 1995 invoice for the purchase of display booths. The invoice stated that taxpayer had bought these booths from an Ohio vendor and had paid Ohio sales tax. This was evidenced by the fact that sales tax had been assessed at the Ohio rate of 5.75 percent. Because this was the audit of an Indiana taxpayer, the audit determined that taxpayer should have paid Indiana sales tax; accordingly, the audit assessed additional use tax.

Taxpayer argues that these particular display booths were shipped from the Ohio vendor to an Ohio location and that because the booths were never delivered into Indiana, that taxpayer had no initial obligation to pay sales tax to Indiana or to thereafter self-assess Indiana use tax. In support of that contention, taxpayer has supplied a copy of its purchase order with the Ohio vendor indicating that "each requested shipment will have a release issued showing quantities ship to location and invoicing address." According to taxpayer, this purchase order is sufficient to establish that the 1995 invoice was for the purchase of display booths shipped from the Ohio vendor to an Ohio location.

45 IAC 2.2-3-4 states as follows:

> Tangible personal property, purchased in Indiana, or *elsewhere* in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the *Indiana state gross retail tax* has been collected at the point of purchase. (*Emphasis added*).

What 45 IAC 2.2-3-4 means is that if an Indiana buyer purchases an item from an out-of-state seller and then arranges for delivery of that item into Indiana, the Indiana buyer must self-assess use tax unless it paid Indiana sales tax to the out-of-state seller. This explains why the audit imposed use tax on the 1995 purchase of the display booths; it was evident from the face of the 1995 invoice that – although taxpayer paid Ohio sales tax to the Ohio vendor – taxpayer did not pay Indiana sales tax.

In support of its argument that the booths were shipped to an Ohio location, taxpayer has provided a copy its purchase order with that vendor. However, that particular purchase order – although with the same Ohio vendor – is from 1997. Although the purchase order is also for display booths, the base sales amount is different from that indicated on the 1995 invoice. Therefore, the 1997 purchase order is not dispositive on the question of whether the display booths purchased in 1995 were shipped to an Ohio location. If taxpayer has provided the 1997 purchase order to establish evidence of the normal commercial practices between itself and the Ohio vendor, the purchase would seem to simply establish that taxpayer periodically contracted with the Ohio vendor to purchase display booths and to ship those booths to different locations. The purchase order does nothing to establish the 1995 transaction resulted in the delivery of *these* display booths to a location outside Indiana.

IC 6-8.1-5-1 states that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC 6-8.1-5-1(b). Taxpayer has not met its burden of demonstrating that the 1995 invoice was for the purchase of items shipped by the Ohio vendor to an Ohio location. The audit was correct in concluding that the 1995 purchase of display booths was subject to Indiana's use tax. Although taxpayer may have paid Ohio sales tax on this identical 1995 transaction, taxpayer's quarrel is with the state of Ohio and not with Indiana.

FINDING

Taxpayer's protest is respectfully denied.

II. Computer Software Updates – Use Tax.

In reviewing taxpayer's invoices, the audit found that taxpayer failed to pay sales tax on "software maintenance fees." Therefore, the audit assessed use tax on those purchase. Taxpayer states that the assessment of use tax is unwarranted because the purchase was for computer "updates."

IC 6-2.5-3-2(a) provides that "An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of the transaction or of the retail merchant making that transaction." The Department has determined that the purchase of computer updates constitutes a retail transaction in which the buyer acquires tangible personal property.

> Pre-written programs, not specifically designed for one purchaser, developed by the seller for sale or lease on the general market in the form of tangible personal property and sold or leased in the form of tangible personal property are subject to tax irrespective of the fact that the program may require some modification for a purchaser's particular computer. Pre-written or canned computer programs are taxable because the intellectual property contained in the canned program is no different than the intellectual property in a videotape or a textbook. Sales Tax Information Bulletin #8 (May 2002); *See also* Sales Tax Information Bulletin #8 (February 1990).

The particular updates of which taxpayer complains were obtained by virtue of a maintenance agreement. However, whether or not the updates were obtained pursuant to the terms of a maintenance agreement does not resolve the issue of whether the *updates* were subject to Indiana's gross retail tax. "Optional warranties and maintenance agreements that contain the right to have property supplied in the event it is needed are not subject to sales tax. Any parts or tangible personal property supplied pursuant to this type of agreement are subject to use tax." Sales Tax Information Bulletin #2 (May 2002); *See also* Sales Tax Information Bulletin #2 (August 1991).

Depending upon the nature of the agreement, maintenance contracts may or may not be subject to gross retail tax. Id. However, this is not the issue raised by taxpayer. It is taxpayer's contention that computer "updates" are not subject to the tax. Taxpayer errs because the updates were simply "canned" computer software which constitutes tangible personal property pursuant to IC 6-2.5-3-2(a). Taxpayer has not met its burden of demonstrating that the computer updates were not subject to the state's gross retail tax.

FINDING

Taxpayer's protest is respectfully denied.

III. Abatement of the Ten-Percent Negligence Penalty.

Following the 1997 audit, the Department assessed the ten-percent negligence on the ground that "numerous items where sales tax was not paid or use tax were accrued were missed." In its 1997 protest letter, taxpayer asked that the penalty be abated because of "reasonable cause" and the assurance that "[p]rocedural changes have since been implemented that require consistent adherence to tax law...."

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

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

Without excusing the taxpayer's initial failure to produce the required documents at the time of the 1997 audit review or the failure to appropriately self-assess use taxes on all of its 1993 through 1996 transactions, the Department concludes that taxpayer's failure to exercise "ordinary business care" does not necessitate imposition of the negligence penalty. The penalty should be abated in its entirety.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04990379.LOF

LETTER OF FINDINGS NUMBER: 99-0379
Sales and Use Tax
For Tax Years 1996 through 1998

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

ISSUE

I. Sales and Use Tax—Liability for taxes

Authority: IC 6-8.1-5-1

Taxpayer protests that it is not liable for sales and use taxes.

STATEMENT OF FACTS

Taxpayer was an out of state business which operated as a construction contractor in Indiana during the tax period. The Indiana Department of Revenue ("Department") conducted an audit and as a result issued proposed assessments for sales tax and use tax. Taxpayer protested a portion of these assessments on the grounds that either another taxpayer was liable, or that it paid sales tax to another state. Further facts will be supplied as necessary.

I. Sales and Use Tax—Liability for taxes

DISCUSSION

Taxpayer operated a construction contracting business in Indiana during the tax period at issue. The Department conducted an audit and issued proposed assessments for sales tax and use tax. Taxpayer made a broad protest of the assessments on the grounds that it paid sales tax to other states or other taxpayers should be liable for the taxes. Despite repeated attempts by the Department to get a detailed protest and supporting documentation, none was forthcoming. When an administrative hearing was scheduled, the hearing officer was informed that taxpayer no longer wanted a hearing, that taxpayer was going out of business and that a fire had destroyed most of taxpayer's records.

The relevant statute is IC 6-8.1-5-1(b), which states in relevant part:

> The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

In this case, taxpayer has not made anything more than a general protest, and has not provided any documentation supporting its position. Such documentation could have been provided at any time during the audit or when the protest was initiated. That the documentation may have been destroyed before the administrative hearing is not persuasive. Taxpayer has not met its burden of proving the proposed assessments wrong, as provided in IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02-20000487.LOF

LETTER OF FINDINGS NUMBER: 00-0487
Gross Income Tax and Penalty
For the Years 1995-1996

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

ISSUES

I. Gross Income Tax - Out-of-state sales

Authority: 45 IAC 1-1-119; *Indiana Dept. of State Revenue v. Bendix Aviation Corp.*, 143 N.E.2d 91, 237 Ind. 98 (Ind. 1957**)**

Taxpayer protests the Department's assessment of gross income tax with respect to government sales that were received by the government outside Indiana.

II. Penalty - Request for waiver

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

Taxpayer protests the Department's imposition of the 10% negligence penalty, requesting a waiver for reasonable cause.

STATEMENT OF FACTS

Taxpayer, a corporation engaged in the sale of military items, produced items for sale to the federal government. The items were produced in Indiana, with the federal government inspecting and accepting the items in Indiana; however, the items were shipped outside Indiana, and Taxpayer assumed the risk of loss until the items had reached their ultimate destination. Taxpayer was assessed gross income tax and penalty with respect to these sales. Taxpayer has protested the assessment, claiming that the sale occurred in interstate commerce.

I. Gross Income Tax - Out-of-state sales

DISCUSSION

Taxpayer argues that the Department seeks to impose gross income tax on government sales that were shipped ultimately to out-of-state locations. In particular, a normal contract would work in the following manner: Taxpayer would produce goods in Indiana for sale to the federal government. The sales were inspected and accepted in Indiana; however, Taxpayer assumed risk of loss until the goods were actually received by the government at out-of-state locations.

Taxpayer maintains that the fact that Taxpayer assumed risk of loss for any goods until the government actually took physical possession of those goods exempted those goods from gross income tax based on 45 IAC 1-1-119 (repealed December 30, 1998), which provides that a sale from an Indiana seller and shipped to an out-of-state buyer is exempt from gross income tax unless the sale in question is completed in Indiana. Taxpayer cites to federal shipping guidelines that provide risk of loss or damage remains with Taxpayer until they are received at the government destination. However, formal title of the goods by terms of the same guidelines passes when the goods are inspected and accepted by the federal government.

On point is the case of *Indiana Dept. of State Revenue v. Bendix Aviation Corp.*, 143 N.E.2d 91, 237 Ind. 98 (Ind. 1957). In that case, a defense contractor sold products manufactured at an Indiana plant to the federal government. The goods were to be shipped via carrier designated by the federal government. The federal government accepted the goods at the South Bend location, even though the goods were to be ultimately shipped to out-of-state locations. The court held that the transactions in question occurred entirely in Indiana. *Id.* at 96, 239 Ind. at 109. Accordingly, the transactions were subject to gross income tax. *Id.* at 99, 239 Ind. at 114.

Here, Taxpayer has acknowledged that the goods were inspected and accepted in Indiana. While the risk of loss remained with Taxpayer, formal transfer of title of the items in question occurred in Indiana, just as the goods in *Bendix Aviation* were accepted by the government in Indiana. Accordingly, the transactions by Taxpayer were completed in Indiana and are subject to Indiana gross income tax.

FINDING

Taxpayer's protest is denied.

II. Penalty - Request for waiver

DISCUSSION

Taxpayer protests the imposition of the 10% negligence penalty on the entire assessment. Taxpayer argues that it had reasonable cause for failing to pay the appropriate amount of tax due.

Indiana Code Section 6-8.1-10-2.1(d) states that if a Taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. In addition, the relevant Department regulation, 45 IAC 15-11-2, defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable Taxpayer. Negligence results from a Taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the Taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, Taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed...." In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayer has provided sufficient information to conclude that the Taxpayer acted with reasonable care, rather than negligently, and accordingly the penalty should be waived.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04-20020086.LOF

LETTER OF FINDINGS NUMBER: 02-0086
SALES/USE TAX
For Years 1998 and 1999

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

ISSUES

I. Sales/Use Tax—Maintenance Agreements

Authority: Sales Tax Information Bulletin #2 (August 1991); 45 IAC 2.2-4-2; IC 6-8.1-5-1

Taxpayer protests the imposition of gross retail tax on transactions performed under maintenance agreements that taxpayer has with third parties.

II. Sales/Use Tax—Software Maintenance Agreements

Authority: Sales Tax Information Bulletin #2 (August 1991)

Taxpayer protests the imposition of gross retail tax on services and software upgrades performed under software maintenance agreements that taxpayer has with third parties.

III. Sales/Use Tax—Sale of Telecommunication Services to Public Utilities

Authority: Sales Tax Information Bulletin #51T (January 2003); IC 6-2.5-4-6(b)

Taxpayer protests the imposition of gross retail tax on satellite feeds sold to taxpayer as a provider of telecommunication services.

IV. Sales/Use Tax—Rental Agreements Exceeding 30 Days

Authority: IC 6-2.5-4-4; 45 IAC 2.2-4-8(b)

Taxpayer protests the imposition of gross retail tax on storage unit rental costs for property rented for a period exceeding 30 days.

V. Sales/Use Tax—Proof of Sales Tax Paid

Authority: none

Taxpayer protests the imposition of gross retail tax on items for which an invoice demonstrates that sales tax has previously been paid.

VI. Sales/Use Tax—Use Tax Accrued

Authority: none

Taxpayer protests the imposition of gross retail tax on transactions for which use tax has already been accrued.

VII. Sales/Use Tax—Bulk Mailing

Authority: none

Taxpayer protests the imposition of gross retail tax on bulk mailing transactions.

STATEMENT OF FACTS

Throughout the year, taxpayer purchased tangible personal property and services, along with maintenance agreements that accompanied some of the tangible personal property. Some of these purchases were picked up on audit as being subject to gross retail tax for various reasons.

DISCUSSION

I. Sales/Use Tax—Maintenance Agreements

Taxpayer protests the assessment of use tax on items that taxpayer has labeled maintenance agreements. Taxpayer has provided the Department with invoices and copies of canceled checks that indicate payment for the service. While the canceled checks provide little assistance in determining the nature of the transaction in question, the invoices state that the payment is for a maintenance agreement. However, these invoices fail to clearly demonstrate whether or not taxpayer is paying for services or tangible personal property used in fulfilling the contract.

Maintenance agreements that also contain provisions for periodic services where tangible personal property will be supplied as a part of the unitary price fall within the ambit of 45 IAC 2.2-4-2. Sales Tax Information Bulletin #2 (August 1991).

45 IAC 2.2-4-2 reads:

(a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

(1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;

(2) The tangible personal property purchased is used or consumed as a necessary incident to the service;

(3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and

(4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

It is therefore essential to the disposition of the matter that the service agreements be available for inspection to determine their nature. Because taxpayer has not complied with repeated requests to produce these agreements, it is therefore impossible to determine their nature and therefore determine if tangible personal property was contemplated to be transferred during the servicing of the various items for which maintenance agreements were entered.

The notice of proposed assessment is *prima facie* evidence that the Department's claim for unpaid tax is valid, and the burden of proof that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC 6-8.1-5-1.

Taxpayer has not produced sufficient evidence to rebut the Department's assessment.

FINDINGS

The taxpayer is respectfully denied.

II. Sales/Use Tax—Software Maintenance Agreements

DISCUSSION

Similar to the maintenance agreements above, taxpayer has entered into a software maintenance agreement with a third party. However, unlike the above maintenance agreements, taxpayer has submitted the software maintenance agreement for inspection by the Department.

The agreement calls for the third party to "furnish and license Customer (taxpayer) with upgraded versions of the software licensed to (taxpayer) under the … (c)ontract. Such upgrades shall be delivered at such time as they are generally made available by (c)ompany (third party) to its (c)ustomers."

Sales Tax Information Bulletin #2 states:

Optional extended warranties and maintenance agreements are offered as a separate added amount to the purchase price of property being sold and a fixed sum is charged for the furnishing of tangible personal property throughout the term of the warranty or the agreement. Optional warranties and maintenance agreements are not subject to sales or use tax. Optional warranties and maintenance agreements are not subject to tax because the purchase of the warranty or maintenance agreement is the purchase of an intangible right to have property supplied and there is no certainty that property will be supplied. However, if the agreement includes a charge for property to be periodically supplied the agreement would be subject to tax.

At first blush, it seems that the agreement calls for the third party to regularly supply taxpayer with upgrades, taking it out of the realm of the optional extended warranty exemption. However, because the contract makes no guarantees that upgrades will ever be produced by the third party, taxpayer has merely purchased an intangible right to have property supplied should the third party decide to upgrade its software.

FINDINGS

The taxpayer is sustained.

III. Sales/Use Tax—Sale of Telecommunication Services to Public Utilities

DISCUSSION

Taxpayer has been assessed gross retail tax on its purchase of satellite transmissions from a third party and has protested this assessment. Taxpayer claims that, according to Sales Tax Information Bulletin #51T (January 2003), "the sale of telecommunication services to public utilities or any provider of telecommunication services are (sic) not subject to sales or use tax." Taxpayer is a broadcaster and not a provider of telecommunication services and the exemption discussed in Tax Information Bulletin #51T does not apply. Additionally, taxpayer is the recipient of the telecommunication services contemplated in IC 6-2.5-4-6(b):

(b) A person is a retail merchant making a retail transaction when the person:

(1) furnishes or sells an intrastate telecommunication service; and

(2) receives gross retail income from billings or statements rendered to customers.

The transmissions at issue appear to be interstate in nature and are therefore not subject to tax.

FINDINGS

The taxpayer is sustained.

IV. Sales/Use Tax—Rental Agreements Exceeding 30 Days

DISCUSSION

Taxpayer was assessed sales tax based on the leasing of accommodations (45 IAC 2.2-4-8(b)) for a transaction in which taxpayer rented a storage unit at a self-storage facility from a third party. There is no indication that human beings ever occupied the storage unit, and the term "storage unit" implies that the space is not being utilized, nor is it fit for being utilized, as space intended for occupancy by human beings. The storage unit rental is the rental of real property, thus it is not considered tangible personal property per IC 6-2.5-4-4 and therefore falls outside of the regulation.

Therefore, inasmuch as the storage space is real property and not an accommodation, the Department has no legal basis for assessing tax on its rental.

FINDINGS

The taxpayer is sustained.

V. Sales/Use Tax—Proof of Sales Tax Paid

DISCUSSION

Taxpayer has produced invoices that show sales tax was previously paid on two transactions for which the audit generated an assessment against taxpayer. These invoices are sufficient evidence that taxpayer has already paid the sales tax due.

FINDINGS

The taxpayer is sustained.

VI. Sales/Use Tax—Use Tax Accrued

DISCUSSION

Taxpayer has produced invoices that show use tax was previously accrued on one transaction for which the audit generated an assessment against taxpayer. These invoices are sufficient evidence that taxpayer has already accrued the use tax due.

FINDINGS

The taxpayer is sustained.

VII. Sales/Use Tax—Bulk Mailing

Taxpayer purchased a bulk mailing project in a transaction that was assessed sales tax in its entirety. Taxpayer has submitted the invoice for the purchase, which contains hand-written breakouts of the postage, freight charges, and other services. Taxpayer claims that, in accordance with a Revenue Ruling, when an invoice breaks out non-taxable services from taxable retails sales, the individual components of the transaction should be considered separately. In other words, the retail sale should be taxed and the services should not. It should be noted that Revenue Rulings are only binding with respect to the taxpayer to which they are issued.

Taxpayer takes a very open view of the Revenue Ruling. This ruling was specifically designed to deal with service charges related to the banquet and catering industry. Even if the Department were to adopt such a liberal view and apply it to a bulk mailing project, taxpayer has not met its burden of production in this case.

The invoices provided to the Department are hand-written and were added to original source documents after the audit was completed. Absent further evidence that the transaction is as taxpayer submits that it is, the Department cannot find in taxpayer's favor.

FINDINGS

The taxpayer is respectfully denied.

DEPARTMENT OF STATE REVENUE

0120020125.LOF

LETTER OF FINDINGS NUMBER: 02-0125
Adjusted Gross Income Tax
For the Tax Period 1995-2000

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. Adjusted Gross Tax-Imposition

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

The taxpayer protests the assessment of adjusted gross income tax.

STATEMENT OF FACTS

The taxpayer is an individual who works as a contractor in the business of roofing homes and local businesses. He also does some home remodeling projects. The taxpayer did not file Indiana adjusted gross income tax returns for the years 1995-2000. Pursuant to an audit, the department assessed adjusted gross income tax, interest, and penalty for the tax period 1995-2000. The taxpayer protested the assessment of tax. A hearing was held and this Letter of Findings results.

1. Adjusted Gross Income Tax-Imposition

DISCUSSION

Indiana imposes the adjusted gross income tax on Indiana residents. IC 6-3-2-1. All department assessments are prima facie evidence that the taxes are owed by the taxpayer who has the burden of proving that the assessment is incorrect. IC 6-8-1-5-1(b).

Taxpayers are required to maintain adequate original documentation and records for the department to determine the correct amount of tax due. IC 6-8.1-5-4(a). The taxpayer did not produce any documentation or records for the use of the department's auditor in preparation of the audit. Due to the lack of records, the auditor had to use the best information available to make a reasonable estimate of the adjusted gross income tax due to the state.

Although the taxpayer was given adequate opportunity, he did not present any documentation or records to demonstrate that the audit assessment was incorrect. The taxpayer did not sustain his burden of proof.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20020241.LOF

LETTER OF FINDINGS NUMBER: 02-0241
Gross Retail & Use Tax-Production Exemption
For Years 1998, 1999, 2000

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

ISSUES

I. Gross Retail and Use Taxes—Production exemption

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-4; IC § 6-2.5-3-6; IC § 6-2.5-3-7; IC § 6-2.5-4-2(c); IC §§ 6-2.5-5-5-3, -5-1; IC § 6-2.5-5-5.1; IC § 6-2.5-5-9; 45 IAC 15-5-3(8); 45 IAC 2.2-2-1; 45 IAC 2.2-3-4; 45 IAC 2.2-5-8; *Harlan Sprague Dawley, Inc. v. Indiana Department of State Revenue*, 605 N.E.2d 1110 (Ind. Tax 1992)

Taxpayer protests the assessment of use tax on various materials, equipment, and utilities used in finishing customers' tangible personal property where no gross retail tax was paid at the point of purchase. Taxpayer claims the materials are exempt from tax because they are part of the production process.

STATEMENT OF FACTS

Taxpayer's business started out as furniture manufacturing; now, however, taxpayer "finishes" products manufactured by customers who send tangible personal property to taxpayer for the addition of paint, finishes, coatings, etc. Taxpayer then returns the items to its customers following packaging and labeling instructions required by each customer. Taxpayer also manufactures some tangible personal property based on specifications supplied by customers. The audit determined exempt percentages for items taxpayer produced, but did not exempt from tax items used solely in finishing customers' tangible personal property. Additional facts will be added as necessary.

I. Gross Retail and Use Tax—Production exemption

DISCUSSION

Taxpayer protests the assessment of use tax on various items taxpayer uses to apply paint, varnishes, coatings, etc. to tangible personal property manufactured by customers who send it to taxpayer for finishing. Taxpayer then returns the tangible personal property to the customers who have provided specific packaging and labeling instructions taxpayer must follow in returning the finished products to its customers. The audit determined that taxpayer was entitled to exempt finishing materials used on tangible personal property manufactured according to customer supplied specifications, approximately 25% to 30% of taxpayer's business.

The audit also determined that the required packaging and labeling for taxpayer's outside customers was non-exempt, finding that the labels were used for in-house inventory tracking. The audit also determined the packaging was non-exempt. The audit characterized 70% to 75% of taxpayer's business as being an industrial processor who returns customers' tangible personal property to them after processing.

Taxpayer argues that it is entitled to the full production exemption, claiming that the finishing of customers' tangible personal property by using the air hoist to position tangible personal property on the conveyor belt to transport it to the various rooms where paint, etc., is applied, constitutes direct use in the direct production of a customer's product. The audit had determined the air hoist was used to transport work-in-progress 50% of the time. Therefore, 50% of it was exempt and 50% of it was taxable. Taxpayer also argues that the packaging and shipping materials, including labels, are required components of the products shipped to their customers and are therefore an essential and required part of the production process. Taxpayer also argues that all of its utility usage is exempt, not just the percentages the audit had determined based on data taxpayer provided and on an agreed-upon methodology for determining usage.

Pursuant to IC § 6-8.1-5-1(b) and 45 IAC 15-5-3(8), a "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made." Pursuant to IC § 6-2.5-2-1, a "person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state." *See also*, 45 IAC 2.2-2-1. Pursuant to IC §§ 6-2.5-3-1 through 6-2.5-3-7, an "excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana is the property was acquired in a retail transaction." An exemption is provided in IC § 6-2.5-3-4 if "the property was acquired in a retail transaction and the state gross retail tax" was paid at the time of purchase. Taxpayers are personally liable for the tax. (IC § 6-2.5-3-6). IC § 6-2.5-3-7 provides that a "person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana;" therefore, the presumption of taxability exists until rebutted. *See also*, 45 IAC 2.2-3-4.

The specific statute at issue, IC § 6-2.5-5-5.1, provides in pertinent part:

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

The specific regulation at issue, 45 IAC 2.2-5-8, provides in pertinent part:

(a) In general, all purchases of tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property are taxable. The exemption provided in this regulation extends only to manufacturing machinery, tools, and equipment directly used by the purchaser in direct production. It does not apply to material consumed in production or to materials incorporated into tangible personal property produced.

(b) The state gross retail tax does not apply to sales of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property.

(c) The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

(d) Pre-production and post-production activities. "Direct use in the production process" begins at the point of the first operation or activity constituting part of the integrated production process and ends at the point that the production has altered the item to its completed form, including packaging, if required.

The general rule, outlined in great detail in the regulation, is that purchases are either subject to the state's gross retail tax or the state's use tax unless the specific exemption applies. The parameters of the so-called "production exemption" are narrow: to be exempt, the tangible personal property must be directly used in the direct production of other tangible personal property. The regulation defines direct use and direct production as requiring "an immediate effect on the article being produced;" i.e., the production-exempt tangible personal property must be an essential and integral part of an integrated process."

With respect to the air hoist system, taxpayer argued that using it to place truck wheels on the overhead paint conveyor was the first step in production. In reality, the air hoist system is used in pre-production; the system makes no changes to the wheels before they are placed on the paint conveyor. Plus, the air hoist system is equipment, not a consumable supply. Therefore, that part of the audit denying the production exemption for the air hoist system when it is being used for pre-production is correct.

Audit relied on the definition of an industrial processor set forth in IC § 6-2.5-4-2(c) to conclude that taxpayer was not in the business of manufacturing. With respect to this part of the statute, the tax court has stated "[n]othing in the context of this statute demonstrates its exemption provisions are to have a different meaning than those in the industrial exemptions, and the court therefore gives the utility exemption provisions the same meaning as their counterparts in the industrial exemptions." *Harlan Sprague Dawley v. Indiana Department of State Revenue,* 605 N.E.2d 1222, 1230 (Ind. Tax 1992), citation omitted. "Processing" is one of the activities that generally entitles a taxpayer to other exemptions. IC §§ 6-2.5-5-3,-5-1. In this case, the utilities used in the operations related to taxpayer's paint and other applications are the type of processing which would entitle taxpayer to the other statutory industrial exemptions. Accordingly, it would be entitled to the exemption for its utilities in light of *Harlan Sprague Dawley*.

With respect to taxpayer's electrical usage, there are no exemptions for maintaining a controlled environment outside the production process. Taxpayer's major argument here concerned the auditor's methodology in assessing tax on electrical consumption. When given the opportunity to supply a different one, taxpayer did not provide one. Taxpayer supplied all data in connection with electrical usage. The paint shakers at issue were listed by taxpayer as being in the maintenance department. Therefore, that part of the audit denying the production exemption for electrical usage for heat and air conditioning outside the production process and for the paint shakers is correct.

However, with respect to all electric meters examined in the audit, the auditor prorated dollar totals and ended up with percentages of exempt and non-exempt usages. Based on *Harlan Sprague*, taxpayer should be allowed all applicable exemptions on all meters, both gas and electric. Audit should revisit this issue.

With respect to the air make-up system, taxpayer argued that the gas usage, recorded by three gas meters, should be 100% exempt because the system is used to comply with environmental quality standards. However, the gas used is not for preventing the expulsion of contaminants into outside air or water. Taxpayer cites Occupational Safety and Health Act requirements which benefit employees, not the environment. The Department's consistent policy has been to use the Environmental Protection Act's strictures and exempt equipment, etc., that help control outside environmental quality. Therefore, that part of the audit denying the production exemption for the air make-up system is correct.

Taxpayer claimed that the labels affixed to the packaging used to return customers' tangible personal property to them were not used for inventory tracking purposes, but because customers had definite requirements for the packaging and labeling of the packaging once their tangible personal property was ready to be returned to them. Customers' packaging and labeling requirements are not exempt from taxation merely because taxpayer must follow them in order to return customers' property to them. Taxpayer may be liable for damage, but taxpayer has no ownership interest in the property, nor is the property packaged for resale. Therefore, packaging and labeling materials are not exempt from the state's gross retail and use taxes. *See*, IC § 6-2.5-5-9.

FINDING

Taxpayer's protest concerning the assessment of use tax on items taxpayer alleged fell within the production exemption to the state's gross retail and use taxes is denied. That part of taxpayer's protest regarding gas and electric exemptions is sustained subject to review by audit.

DEPARTMENT OF STATE REVENUE

0420020398.LOF

LETTER OF FINDINGS NUMBER: 02-0398
Sales and Use Tax
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.

ISSUES

1. Sales and Use Tax - Imposition of Use Tax on Tangible Personal Property

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

The taxpayer protests the assessment of use tax on certain items of tangible personal property.

2. Sales and Use Tax - Imposition of Use Tax on Delivery Charge

Authority: IC 6-2.5-3-2 (a), IC 6-2.5-4-1(b), IC 6-2.5-4-1(e)(2), 45 IAC 2.2-4-3(b)(3), 45 IAC 2.2-4-3(a).

The taxpayer protests the imposition of tax on a delivery charge.

3. Sales and Use Tax - Imposition of Use Tax on Painting and Wallpapering Supplies

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

The taxpayer protests the imposition of use tax on painting and wallpapering supplies.

4. Sales and Use Tax - Imposition of Use Tax on Truck

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

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

STATEMENT OF FACTS

The taxpayer is a sole proprietor who does business as a lump-sum contractor. The taxpayer's business installs wallpaper and other wall coverings in hotels and/or motels around the United States. After an audit for the tax period 1999-2000, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional use tax, interest, and penalty. The taxpayer agreed with some of the assessed items and protested the remainder of the assessment. A hearing was held and this Letter of Findings results.

1. Sales and Use Tax - Imposition of Use Tax on Tangible Personal Property

DISCUSSION

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

Indiana imposes an excise tax, the use tax, on tangible personal property purchased in a retail transaction and stored, used, or consumed in Indiana. IC 6-2.5-3-2 (a). Payment of sales tax at the time of purchase exempts the use of tangible personal property from the use tax. IC 6-2.5-2(c)(1).

The taxpayer protests the imposition of use tax on its use of seeds. The taxpayer submitted an invoice indicating that sales tax had been paid on the purchase of the seeds. Therefore, the use of the seeds is exempt from the use tax.

The taxpayer also protests the imposition of Indiana use tax on a fan. The taxpayer's crew working in Texas purchased the fan in Texas, used the fan in Texas, and paid the Texas sales tax in Texas. Since the fan was not used by the taxpayer in Indiana, it is not subject to the Indiana use tax.

The taxpayer also protests the imposition of Indiana use tax on fifty five (55) Moen rough in kits with a tub, shower, and valve. These kits were purchased by taxpayer's crew working in Chicago, Illinois from a distributor located in Grove Village, Illinois (a suburb of Chicago). They were installed in a motel in Arlington Heights, Illinois (a suburb of Chicago). Illinois sales tax was paid on the kits at the time of purchase. Since the kits were not used in Indiana, they are not subject to the Indiana use tax.

The taxpayer also protests the imposition of Indiana use tax on fabric books listed as reference 0190456. The taxpayer agrees the use of the fabric books was subject to use tax, however, the item is listed twice in the audit. Each transaction can only be subjected to the sales or use tax once. The duplication of the item in the audit was an inadvertent error.

FINDING

The taxpayer's protest to the imposition of use tax on seeds, a fan, rough in kits, and the duplicate fabric book is sustained.

2. Sales and Use Tax - Imposition of Use Tax on Delivery Charge

DISCUSSION

The taxpayer purchased hardwood mulch and paid for delivery of the mulch to its facility. The audit imposed use tax on the delivery charge. The taxpayer protested this assessment.

Retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. A retail transaction is defined generally as the acquiring and subsequent selling of tangible personal property. IC 6-2.5-4-1(b). Except for certain enumerated services, sales of services are generally not retail transactions and are not subject to sales tax. Delivery prior to the transfer of title to the purchaser is, however, one of the enumerated services that is specifically subjected to sales tax. IC 6-2.5-4-1(e)(2). If sales tax is not collected at the time of the original payment, the delivery charge is subject to the complimentary use tax. IC 6-2.5-3-2 (a).

The taxpayer maintains that separately stated delivery charges where no F.O.B. has been established are non taxable. The taxpayer bases this conclusion upon 45 IAC 2.2-4-3(b)(3) which states, "[d]elivery charge[s] separately stated where no F.O. B. has been established [are] non taxable." The taxpayer's reliance on F.O.B. designations in this case is misplaced. The Regulation's reference to F.O.B. designations are applicable only when public transportation companies deliver the product.

There are two prerequisites for separately stated delivery charges to be subject to sales or usetax. The Regulations state these prerequisites as "[s]eparately stated delivery charges are considered part of selling at retail and subject to sales and use tax if the delivery is made by or on behalf of the seller of property not owned by the buyer." 45 IAC 2.2-4-3(a). In this instance, the first prerequisite for assessing sales tax is met because the retail merchant delivered the mulch.

Whether or not sales or use tax applies to these delivery charges, then, depends upon when title to the goods transferred to the buyer. The Indiana law concerning the passing of title of goods to the buyer states that, "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods..." IC 26-1-2-401(2). The taxpayer offered no evidence indicating that title to the goods passed from the retail merchant to the taxpayer at any point prior to delivery of the goods. The taxpayer's fact situation, then, meets the requirements of 45 IAC 2.2-4-3(a) with the delivery service taking place prior to the transfer of title to the buyer. The delivery charges are subject to Indiana sales and use tax.

FINDING

The taxpayer's protest is denied.

3. Sales and Use Tax - Imposition of Use Tax on Painting and Wallpapering Supplies

DISCUSSION

The taxpayer's protest items 3, 6, and 9 concern the assessment of use tax on painting and wallcovering supplies pursuant to IC 6-2.5-3-2(a). The supplies were purchased from two major national paint suppliers. Even though the invoices all have the taxpayer's Indiana address as the "ship-to" address, the taxpayer contends that the items were never shipped to Indiana. The taxpayer argues that each of these items was purchased and used in another state where the taxpayer had crews working on hotels and motels.

The taxpayer supplied a letter from one of the vendors stating that in the absence of a job account, the "ship-to" address will be the shop account of sold-to information. The letter also indicated that the invoice indicates the store location where the items were sold. Each of the protested invoices originates in a store outside of Indiana. Each invoice indicates that sales tax was paid to the state where the store was located. The taxpayer indicated that supplies were consistently purchased in stores near the out-of-state work locations where they were used. Since the subject supplies were not used in Indiana, the Indiana use tax does not apply.

FINDING

The taxpayer's protest is sustained.

4. Sales and Use Tax - Imposition of Use Tax on Truck

DISCUSSION

The taxpayer loaned money to another party to purchase a triaxle dumptruck. After the purchaser defaulted on its repayment of the loan, the taxpayer foreclosed on the lien. The taxpayer took possession of the truck and titled the truck in its name. The Bureau of Motor Vehicles did not collect sales tax from the taxpayer when it retitled the truck. After the repossession, the taxpayers used the truck for business purposes. They added the truck to their depreciation schedule. The taxpayer protests the assessment of use tax on their use of the truck pursuant to IC 6-2.5-3-2(b) as follows:

The use tax is also imposed on the storage, use, or consumption of a vehicle, an aircraft, or a watercraft, if the vehicle, aircraft, or watercraft:

(1) is acquired in a transaction that is an isolated or occasional sale; and
(2) is required to be titled, licensed, or registered by this state for use in Indiana.

The taxpayer acquired the truck in an isolated sale. The taxpayer needed to title the truck to drive it on the Indiana highways in the course of its business. The taxpayer did not pay sales tax when it titled the truck. Therefore, there is no exemption from the use tax because sales tax was paid on the sale transaction. IC 6-2.5-2(c)(1). The taxpayer did not establish that its use of the truck qualified for any other exemption. The taxpayer meets the requirements of the statute, thus subjecting the use of the truck to the Indiana use tax.

The taxpayer argues that it does not owe use tax at this time because the Bureau of Motor Vehicles failed to collect sales tax at the time the truck was titled to the taxpayer. The taxpayer errs in this conclusion. The department is charged with the primary responsibility for collecting use taxes. IC 6-8.1-3-1. If the Bureau of Motor Vehicles mistakenly fails to collect the use tax at the time of issuing a title, the department has the obligation to collect the use tax at a later time. The assessment of use tax pursuant to the audit is an appropriate method for the department to collect the use tax due to the state.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420030031.LOF

LETTER OF FINDINGS NUMBER: 03-0031
Sales Tax
For the Calendar Years 1998, 1999, 2000, & 2001

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a Department sales and use tax audit conducted for the years the calendar years 1998, 1999, 2000, & 2001.

The taxpayer is a company located in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the negligence penalty should be abated as the error was unintentional, and, the taxpayer initiated the audit.

The Department points out that there is no provision in the Indiana tax regulations that waives penalty when a taxpayer initiates the audit. Also, the error in the audit was 24% which the Department considers material.

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

0420030089.LOF

LETTER OF FINDINGS NUMBER: 03-0089

Sales Tax
For the Calendar Years 1999, 2000, & 2001

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a Department prepaid sales tax audit conducted for the years the calendar years 1999, 2000, & 2001.

The taxpayer is a company located in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the negligence penalty should be abated as the error was unintentional, and, the taxpayer had no control over the remittance of prepaid sales tax as the fuel in question was sold to retail locations other than the taxpayer's locations.

The Department disagrees. As the taxpayer is the distributor of the fuel to other retail locations other than the taxpayer's own locations, the taxpayer has control of the collection and the remittance of the prepaid sales tax on the sale of the bulk fuel.

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 the tax due date. 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

04-20030142.LOF
04-20030143.LOF
01-20040046.LOF

LETTER OF FINDINGS NUMBER: 03-0142; 03-0143; 04-0046
Gross Retail & Use Tax
Income Tax
For 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.

ISSUES

I. Gross Retail Tax—Automobile Sales

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; 45 IAC 15-5-3(8); 45 IAC 2.2-2-1

Taxpayers protest the assessment of the state's gross retail tax on automobiles they allege their dealership did not sell.

II. Gross Income Tax—Automobile Sales

Authority: IC § 6-2.1-1-2; IC § 6-2.1-2-2; 45 IAC 1.1-2-1

Taxpayers protest the assessment of the state's gross income tax on automobiles they allege their dealership did not sell.

III. Penalty—Request for Waiver

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

Taxpayers protest the imposition of the 10% negligence penalty and request a waiver.

STATEMENT OF FACTS

Taxpayers, husband and wife, own a registered Indiana motor vehicle dealership. When taxpayers sold a car, the selling price upon which sales tax was charged was the sale price after deducting a trade-in. In the normal course of doing business, taxpayers completed the required ST-108's showing that the tax had been collected. The audit compared taxpayers' sales records to sales reported to the Department and determined that taxpayers had underreported sales each year during the audit period. The income audit, based on the same set of facts and records, also determined that taxpayers had underreported their gross income for the audit period. At the hearing, taxpayers withdrew the hobby racing/use tax issue, docket number 04-20030142. Additional facts will be supplied as required.

I. Gross Retail Tax—Automobile Sales

DISCUSSION

Taxpayers protest the assessment of the state's gross retail tax on automobile sales taxpayers allege did not occur. Taxpayers kept envelopes/files folders for all vehicles sold, stating that if there were no envelopes/file folders for a particular month and year, then no automobiles were sold. Since there were no envelopes/file folders for 1999 and 2000, taxpayers allege they did not sell any automobiles in those years. However, because taxpayers failed to maintain complete records, the auditor examined the Dealer's Short Report for taxpayers' dealership, obtained from the Bureau of Motor Vehicles. The Dealer Short Report represents information gathered from ST 108's that all dealerships must send to the Bureau to show that tax has been paid on car sales. It was the information on the Dealer's Short Report that the auditor used to determine taxpayers' additional tax liabilities. The auditor did not examine any ST 108's. Taxpayers, at the time of the audit, had no evidence that the picked up sales were fraudulent. Taxpayers stated some of the vehicles were not sold by their dealership. At the hearing, taxpayers provided four microfiche copies of ST-108's for four vehicles taxpayers claim they did not sell. Taxpayers pointed out that on the ST-108's, addresses are incorrect or not there at all, there are incomplete dealership numbers, incorrect zip codes, and there are no FID numbers. The taxpayers also claim the signatures are forged.

Pursuant to IC § 6-8.1-5-1(b) and 45 IAC 15-5-3(8), a "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made." Pursuant to IC § 6-2.5-2-1, a "person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state." *See also*, 45 IAC 2.2-2-1.

At this time, taxpayers state that they cannot obtain all the ST-108's the audit relied on to assess the additional sales tax because the cost of obtaining copies of the microfiche from the Bureau of Motor Vehicles is prohibitive. The ST-108's are not in the file. Taxpayers have the burden of showing that an audit assessment is incorrect. Without more evidence that the audit assessment is incorrect, taxpayers have not sustained their burden of proof.

FINDING

Taxpayers' protest concerning the assessment of the state's gross retail tax on vehicles taxpayers claim they did not sell is denied.

II. Gross Income Tax—Automobile Sales

DISCUSSION

The same facts from the gross retail tax issue apply to the gross income tax issue. The same arguments and evidentiary issues also apply. The applicable statutes and regulations regarding the state's gross income tax, IC § 6-2.1-1-2, IC § 6-2.1-2-2, and 45 IAC 1.1-2-1, impose the gross income tax on "all the gross receipts a taxpayer receives" from business activities within the state of Indiana. *See*, IC § 6-2.1-2-2(a)(1). Taxpayers would owe gross income tax on receipts from automobile sales, provided that such gross income can be plausibly identified. This is the same issue and analysis as appeared under the discussion of the state's gross retail tax, *supra*. Without more evidence to show that the audit assessment is incorrect, taxpayers have not sustained their burden of proof.

FINDING

Taxpayers' protest concerning the assessment of the state's gross income tax on vehicles taxpayers claim they did not sell is denied.

III. Penalty—Request for waiver

DISCUSSION

Taxpayers protest the imposition of the 10% negligence penalty on the entire assessment. Taxpayer argues that it had reasonable cause for failing to pay the appropriate amount of tax due. Taxpayers essentially cite the fraudulent ST-108's as the basis for not paying the taxes owed.

Indiana Code Section 6-8.1-10-2.1(d) states that if a taxpayer subject to the negligence penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit taxes held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty. Indiana Administrative Code, Title 45, Rule 15, section 11-2 defines negligence as the failure to use reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence results from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by Indiana's tax statutes and administrative regulations.

In order for the Department to waive the negligence penalty, taxpayer must prove that its failure to pay the full amount of tax due was due to reasonable cause. Taxpayer may establish reasonable cause by "demonstrat[ing] that it exercised ordinary business care and prudence in carrying or failing to carry out a duty giving rise to the penalty imposed...." In determining whether reasonable cause existed, the Department may consider the nature of the tax involved, previous judicial precedents, previous department instructions, and previous audits.

Taxpayers have not set forth a basis whereby the Department could conclude taxpayers exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer in maintaining proper records. Therefore, given the totality of all the circumstances, waiver of the penalty on the entire assessment is inappropriate in this particular instance.

FINDING

Taxpayers' protest concerning the proposed assessment of the 10% negligence penalty is denied.

DEPARTMENT OF STATE REVENUE

02-20030154.LOF

LETTER OF FINDINGS: 03-0154
Indiana Corporate Income Tax
For the Year 1995

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

ISSUE

I. Income from Services Provided to Indiana Customers – Adjusted Gross Income Tax.

Authority: IC 6-8.1-5-1; 45 IAC 3.1-1-55

Taxpayer protests the imposition of adjusted gross income tax with respect to its subscriptions received from Indiana customers.

STATEMENT OF FACTS

Taxpayer is an out-of-state business which provides financial market data to customers. Taxpayer collects its data in California, and in turn the data is provided via cable boxes and other means to customers throughout the country, including Indiana.

The Department's audit of taxpayer's years from 1994 to 1995 and from 1998 to 2000 determined that the income received from Indiana subscriptions constituted "Indiana sales [to be] included in the sales factor." As a result, the audit concluded that Taxpayer owed additional Indiana adjusted gross income tax for 1995. Taxpayer disagreed with that conclusion and submitted a protest.

Taxpayer was notified of the hearing via letter; however, at the designated time of the hearing, no representative of Taxpayer appeared or called the hearing officer. This Letter of Findings results, based on the information included in the file.

DISCUSSION

I. Income from Services Provided to Indiana Customers – Adjusted Gross Income Tax.

Taxpayer argues that income received from Indiana customers is not subject to the state's adjusted gross income tax. Taxpayer bases this argument on the ground that activities related to the performance of services provided to Indiana customers is conducted in California. Specifically, taxpayer cites to 45 IAC 3.1-1-55 which states:

> Gross receipts from transactions other than sales of tangible personal property shall be included in the numerator of the sales factor if the income producing activity which gave rise to the receipts is performed wholly within this state. Except as provided below if the income producing activity is performed within and without this state such receipts are attributable to this state if the greater proportion of the income producing activity is performed here, based on costs of performance.

Taxpayer concludes that the cost of performance of the market data should be apportioned to California under the "cost of performance rules."

Under the rule cited by taxpayer, the issue is the location of the taxpayer's "income producing activity." 45 IAC 3.1-1-55 states that the term, "income producing activity" means "the act or acts directly engaged in by the taxpayer for the ultimate purpose of obtaining gains or profits." The rule states that a taxpayer's "[i]ncome producing activity is deemed performed at the situs of real, tangible and intangible personal property or the place where personal services are rendered." Id.

Taxpayer's income is derived from two sources: cable boxes located in Indiana, which are not at issue, and subscriptions to its market data. Taxpayer argues that its data collection, customer service, and engineering functions are performed entirely in California, and thus the income from the subscription fees should be sourced there as opposed to Indiana. However, the income producing activity-subscription fees- only occurs when the data is received in this and other states. Further, even assuming that the cost of performance standard advanced by Taxpayer is appropriate, Taxpayer has not provided sufficient information with respect to such costs and accordingly has not met its burden of proof, as required under Ind. Code § 6-8.1-5-1.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420040054.LOF

LETTER OF FINDINGS NUMBER: 04-0054

Sales and Withholding Tax
Responsible Officer
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

1. Sales and Withholding Tax - Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-8.1-5-1(b), IC 6-3-4-8(f), 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 taxpayer was an employee of a corporation that did not properly remit sales taxes and withholding taxes to the state during the tax period 2000-2002. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed the unpaid sales taxes, withholding 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 and Withholding Tax - Responsible Officer Liability

DISCUSSION

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

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

An individual who:

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

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

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

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

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 submitted substantial documentation indicating that he was not a person with the authority to make financial decisions for the corporation or determine which creditors would be paid. The taxpayer was not responsible for the remittance of trust taxes to Indiana.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

28-20040091.LOF

LETTER OF FINDINGS NUMBER: 04-0091
Controlled Substance Excise Tax
For the Tax Period 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. Controlled Substance Excise Tax - Imposition

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

The taxpayer protests the imposition of controlled substance excise tax.

STATEMENT OF FACTS

The taxpayer's residence was searched on December 14, 2001. The officers found a variety of controlled substances, drug paraphernalia, and indoor grow equipment. The taxpayer pled guilty to Operating a Vehicle with Controlled Substance in Blood. On January 6, 2004, the County Prosecutor requested in writing that controlled substance excise tax be imposed against the taxpayer.

The Indiana Department of Revenue, hereinafter referred to as the "department," issued a Record of Jeopardy Finding, Jeopardy Assessment Notice and Demand on January 15, 2004 in a base tax amount of $21,317.20. The taxpayer filed a protest to the assessment and a telephone hearing was held. This Letter of Findings results.

I. Controlled Substance Excise Tax - Imposition

DISCUSSION

All notices of assessment issued by the department are presumed to be correct. The taxpayer bears the burden of proving that the assessment of tax is incorrect. IC 6-8.1-5-1(b).

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of controlled substances in the State of Indiana. Methamphetamine, amphetamine, and marijuana are defined as controlled substances subject to the excise tax. IC 6-7-3-1. The amphetamine, methamphetamine, and marijuana assessed were actually tested and weighed by an employee of the department. Since the remainder of the controlled substances seized from the taxpayer's house were destroyed pursuant to court order, no additional controlled substance excise tax was assessed.

The taxpayer contends that the controlled substances were illegally seized because the police officer was later fired for cause. The taxpayer did provide overwhelming evidence that the police officer was fired for cause. The evidence provided, however, does not suggest that the police officer acted in an inappropriate or illegal fashion in this particular arrest and seizure of evidence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220000456.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 00-0456
Income Tax
For Tax Years 1995-97

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. Income Tax—Partnership Distributions

Authority: IC 6-2.1-2-2(a)(2); IC 6-3-2-2(a)(2); IC 6-3-8-1; IC 6-3-8-2; 45 IAC 1-1-159.1; 45 IAC 3.1-1-153

Taxpayer protests the imposition of Gross, Adjusted Gross, and Supplemental Net Income taxes on partnership distributions.

STATEMENT OF FACTS

Taxpayer is a non-resident minority partner in a limited partnership. The partnership owns several pieces of real property in Indiana shopping malls. The Indiana Department of Revenue ("Department") issued proposed income tax assessments on partnership distributions and taxpayer protested the assessments. The Department issued a Letter of Findings ("LOF") denying the protest and taxpayer requested a rehearing. Due to new factual information, the Department granted a rehearing. Further facts will be provided as necessary.

I. Income Tax—Partnership Distributions

DISCUSSION

Taxpayer protested the Department's proposed assessments and a Letter of Findings was issued denying that protest. Taxpayer requested a rehearing for the protest. The Department granted the request for rehearing in order to clear up some confusion regarding the facts in the protest. In its original protest letter, taxpayer stated that it held passive investment interests in four Real Estate Investment Trusts (REITs), and it believed that those interests should be treated as intangibles. Taxpayer believed that such intangibles were not subject to income tax since taxpayer was a non-resident with no contact with Indiana other than ownership of the REIT interests. The LOF denied the protest on the grounds that ownership of real property, via the REITs, constituted sufficient contact to subject taxpayer to Indiana income tax.

As part of its request for rehearing, taxpayer established that it was not a member of any REIT, but rather was a minority partner in four limited partnerships which each had a REIT as the general partner. In the initial protest, taxpayer stated that its partnership interests in REITs should be treated as intangibles. Because the statutes do not specifically explain whether or not REIT interests are intangibles, the bulk of the LOF was dedicated to determining if REIT interests were intangibles or not, and whether or not taxpayer had a business situs in Indiana. Since it has now been established that taxpayer had ordinary partnership interests instead of REIT interests, this analysis is unnecessary. The partnerships were renting real property in Indiana. This gave rise to income from activity within Indiana, which is taxable gross income under IC 6-2.1-2-2(a)(2). 45 IAC 1-1-159.1 specifically explains that a corporate partner's distributive share of income from the partnership is taxable as gross income. IC 6-3-2-2(a)(2) and 45 IAC 3.1-1-153(b) and (c) explain that such income is taxable as adjusted gross income. IC 6-3-8-1 and IC 6-3-8-2(b) explain that the supplemental net income tax is imposed on the net income of all corporations except those subject to the financial institutions tax. Since taxpayer is a corporation, but is not subject to the financial institutions tax, it is subject to the supplemental net income tax.

In the rehearing, taxpayer referred to an Alabama Department of Revenue Final Order in support of its protest. As was explained to taxpayer during the rehearing, the Department is not controlled by other states' laws or departmental decisions. Taxpayer also referred to an Indiana Supreme Court case which dealt with partnership issues unrelated to taxation. Again, the initial LOF was focused on determining if taxpayer had a business situs in Indiana, and as part of the analysis referred to a partnership statute. As previously explained, since it is now established that taxpayer is receiving ordinary partnership income from Indiana business activities, such a reference to a partnership statute is unnecessary. The Indiana tax statutes and regulations are clear on the subject of partnership distributions. In this case, since it has now been established that taxpayer received ordinary partnership income from business activities in Indiana, the assessments for gross income tax, adjusted gross income tax and supplemental income tax are correct.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220010041.SLOF

SUPPLEMENTAL LETTER OF FINDINGS: 01-0041
Indiana Corporate Income Tax
For the Tax Years 1993 through 1996

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

ISSUES

I. Calculation and Reporting Errors.

Authority: IC 6-8.1-5-1(b); 45 IAC 3.1-1-45.

Taxpayer argues that the original audit report contained certain computational and reporting errors which were not resolved within the original Letter of Findings.

II. Gross Income Tax Calculation.

Authority: IC 6-2.1-2-2(a)(1); IC 6-2.1-2-2(a)(2); IC 6-2.1-2-2(b); IC 6-2.1-2-3; IC 6-2.1-2-4; IC 6-2.1-2-5; IC 6-2.1-2-5(9); IC 6-8.1-5-1(b).

Taxpayer takes exception to the audit's determination as to the amount of its gross income subject to the high rate.

III. Apportionment Sales Factor – Adjusted Gross Income Tax.

Authority: 45 IAC 3.1-1-50(5); 45 IAC 3.1-1-55(e); Sherwin-Williams Co. v. Indiana Dept. of State Revenue, 673 N.E.2d 849 (Ind. Tax Ct. 1996); AT&T v Director, Division of Taxation, 476 A.2d 800 (N.J. Super. A.D. 1984).

Taxpayer restates that – for purposes of calculating the sales denominator – the audit erred in excluding income received from the sale of short term securities.

IV. Ten-Percent Negligence Penalty.

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

Taxpayer maintains that it is entitled to an abatement of the ten-percent negligence penalty assessed at the time of the original audit review.

STATEMENT OF FACTS

Taxpayer is in the business of manufacturing, distributing, and selling various paints and paint coatings. Taxpayer sells these products to professional, industrial, commercial, and retail customers. During the relevant period, taxpayer operated a manufacturing plant within the state. In 2001, the Department of Revenue (Department) completed an audit review of taxpayer's business records and tax returns. This audit review concluded that taxpayer owed additional Indiana corporate income taxes. Taxpayer disagreed with the audit's methodology, conclusions, and consequent assessments and submitted a protest to that effect. In 2003, an administrative hearing was conducted during which taxpayer explained the basis for its protest. As a result, the Department issued a Letter of Findings denying in part and sustaining in part the taxpayer's protest. Nonetheless, taxpayer disagreed with those portions of the Letter of Findings denying taxpayer's initial protest. Therefore, taxpayer requested the opportunity to provide additional information at an administrative rehearing. That request was granted; an additional hearing was conducted, and this Supplemental Letter of Findings results.

DISCUSSION

I. Calculation and Reporting Errors.

Taxpayer reasserts three arguments pertaining to factual and reporting "errors" purportedly contained within the original audit report and which remained unresolved following publication of the original Letter of Findings. Specifically, taxpayer maintains that the audit report erred in the following manner:

A. Real Property Rent Expense. Taxpayer believes that – for purposes of determining the numerator of the property factor pursuant to 45 IAC 3.1-1-43 – the audit report overstated the amount of rent it paid for its Indiana paint manufacturing facility. The Letter of Findings found that taxpayer did not refute the audit report's conclusion as to the amount of rent. Taxpayer has now provided a copy of the lease agreement along with an amendment to that agreement representing the amount of monthly rent paid.

B. Personal Property Rent Expense. Taxpayer states that the audit erroneously listed the amount of personal property rent expense for 1993 by erroneously duplicating the amount listed for 1994. According to taxpayer, the audit overstated the amount of 1993 personal property rent expense by approximately $1,000.

C. Average Inventory and Personal Property. The audit calculated the average amount of inventory and personal property located at taxpayer's Indiana manufacturing facility. Taxpayer states that audit's arithmetic was flawed; in effect, taxpayer states that the audit made a computational mistake because the audit "forgot to divide by two."

In regards to the "Real property rent expense," taxpayer has provided a complete copy of the lease agreement for the Indiana paint manufacturing facility. The document indicates that taxpayer is required to make $5,600 in monthly rent payments. As taxpayer asserts, this amount alone is substantially less than the monthly rent expense reported in the original audit report. However, taxpayer is incorrect in suggesting that the $5,600 monthly rental amount is the beginning and end of the calculation. 45 IAC 3.1-1-45 states in relevant part as follows:

"Annual rent" is the actual consideration for use of the property and includes payment of a fixed sum of money or percentage of sales profits or receipts, as well as interest, taxes, insurance, repairs and any other items required as payment under the lease which are meant as additional rent or in lieu of rent.

The parties' lease agreement includes the requirement that taxpayer reimburse to the property owner, "[A]ll general real estate taxes and assessments for betterments or improvements which may be levied by any lawful authority against the premises." In addition, the agreement stipulates that taxpayer is to maintain liability and property insurance for the leased facility.

For purposes of computing the property factor, the rented property "is valued at eight times its annual net rental rate." 45 IAC 3.1-1-45. However, the $5,600 rate cited by taxpayer is only one portion of the formula. The value of rented property includes not only the base rate, but it includes the amount of taxes and any repairs or improvements made to the rented property. Id. To determine the value of the manufacturing facility, 45 IAC 3.1-1-45 requires that the base rent be multiplied by eight ($44,800). To that amount is added the costs of insurance, improvements, repairs, and any other expenses which taxpayer incurs under the terms of the agreement; all of these individual items are multiplied by eight.

Taxpayer's original protest as to the amount of "Real Property Rent Expense" was denied because taxpayer failed to provide a complete copy of the lease agreement between itself and the manufacturing facility's lessor. Taxpayer has corrected that oversight and supplied the agreement which clearly states that the monthly rate for the property is $5,600 per month. However, the Department is unable to conclude that that audit incorrectly calculated the amount of rent for the Indiana manufacturing facility. The amount stated in the original audit report is not unreasonable, and taxpayer has not provided sufficient evidence, as to the additional associated costs of the property, to specifically refute that amount. The factual and legal conclusions contained within the original audit report are presumed correct. IC 6-8.1-5-1(b). "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Id. As to the property value of the rented Indiana manufacturing facility, taxpayer has failed to meet its burden of demonstrating that the original assessment was incorrect.

The audit division has reviewed taxpayer's remaining points of contention – the "Personal Property Rent Expense" and the "Average Inventory and Personal Property" – and has concluded that taxpayer's alternative computations are correct.

FINDING

Taxpayer's protest as to the "Real Property Rent Expense" is respectfully denied. Taxpayer's protest as to the "Personal Property Rent Expense" and the "Average Inventory and Personal Property" is sustained.

II. Gross Income Tax Calculation.

According to taxpayer, it "takes exception with the inclusion of certain receipts in the determination of the gross income tax based on high and low rate receipts." Taxpayer maintains that apportionment of its gross income as to high and low rate receipts was made "arbitrarily" and that taxpayer now "requests support for the numbers included in the high rate calculation."

Taxpayer has reframed the gross income tax issue from that posed in the initial protest and addressed within the original Letter of Findings. Originally, taxpayer maintained that the money received by its retail distributors for the delivery and installation of floor coverings was not subject to gross income tax at the high rate because taxpayer was acting in an agency capacity when it accepted this money. Taxpayer's original argument was that it was acting as an agent for the independent service providers who actually delivered and installed the floor coverings. The Department found no evidence of an agency relationship between taxpayer and the independent service providers. As stated in the original Letter of Findings, "The audit correctly determined that income obtained from the provision of [installation and delivery] services was subject to the gross income tax at the high rate pursuant to IC 6-2.1-2-3 and IC 6-2.1-2-5(9)." Taxpayer does not now challenge and the Department finds no reason to retreat from that original conclusion. However, taxpayer now maintains that the apportionment of its gross income between the "high" and the "low" rate was arbitrary and unsubstantiated.

IC 6-2.1-2-2(a)(1) imposes a gross income tax on "the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana...." For a non-resident, the tax is imposed on, "the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or domiciliary of Indiana." IC 6-2.1-2-2(a)(2) "The gross income tax is imposed at two rates, a "high rate" of 1.2 percent and a "low rate" of.3 percent. IC 6-2.1-2-3 "The rate of tax is determined by the type of transaction from which the taxable gross income is received." IC 6-2.1-2-2(b). The receipts from wholesale sales and from selling at retail are taxed at the low rate. IC 6-2.1-2-4. Receipts from service activities and other business activities are taxed at the high rate. IC 6-2.1-2-5.

According to the audit report, "This audit identified receipts for labor, services, and rent income from sample invoices and requested detail for each year by account." From this description, it appears that the audit calculated the apportionment of "high" and "low" rate income based on the sample invoices available at the time of the audit review. Taxpayer finds that this sampling method was deficient and that "no information was given to support the numbers."

The Department finds itself at something of a loss as to how address taxpayer's most recent protest concerning this gross income tax issue. If the audit had determined that taxpayer received $500 in service income – taxable at the high rate – but taxpayer provided information purporting to establish that it had actually received only $300 in service income, the issue would be amenable to either a legal or factual resolution. Taxpayer offers no such argument; it simply expresses a global dissatisfaction with the high/low rate apportionment. As stated in Part I of this Supplemental Letter of Findings, "The factual and legal conclusions contained within the audit report are presumed correct." *See* IC 6-8.1-5-1(b). From the narrative included within the audit report, it would seem clear that the audit did not review and tabulate each and every one of taxpayer's invoices. Instead, it appears that the high/low rate apportionment was based upon a review and extrapolation of a set of "sample invoices." The Department is unable to agree with taxpayer that this particular accounting methodology was "arbitrary." Given the substantial size of taxpayer's business, it finds that the methodology was entirely reasonable. While taxpayer may be disaffected by the results, there is nothing upon which to base a conclusion that the audit based its conclusion as to high/low rate apportionment upon a whimsical or capricious methodology.

FINDING

Taxpayer's protest is respectfully denied.

III. Apportionment Sales Factor – Adjusted Gross Income Tax.

In reviewing the taxpayer's adjusted gross income tax returns, the audit excluded from the sales denominator "the principal returned in short term securities." In other words, the audit determined that "sales" income did not include the amount of principal realized when the taxpayer sold a short term security. Taxpayer continues to disagree and restates its original argument addressed within the original Letter of Findings. According to taxpayer, the audit erred when it excluded the "principal" income from the sales factor. As originally stated by taxpayer, receipts "generated by intangible personal property that produced business income should have been included in the numerator and the denominator of sales factor." The essence of taxpayer's argument is that gross receipts equals the amount received on the sale of investment securities including the interest earned and the principal.

In support of its premise, taxpayer points to 45 IAC 3.1-1-55(e) which states that "Gross receipts from intangible personal property shall, if classified as business income, be attributed to this state based upon the ratio which the total property and payroll factors in this state bears to the total of the property and payroll factors everywhere...."

The Indiana Tax Court has addressed the specific issue raised by taxpayer and held, "'Gross Receipts' for the purpose of the sales factor includes *only* the interest income and not the rolled over capital or return of principal realized from the sale of investment securities." Sherwin-Williams Co. v. Indiana Dept. of State Revenue, 673 N.E.2d 849, 853 (Ind. Tax Ct. 1996) (*Emphasis added*). The Court found that "[P]rincipal included in the proceeds of sale or redemption of short term-investments is not includible in the receipts factor." Id. at 852. In arriving at that conclusion, the Tax Court cited to AT&T v Director, Division of Taxation, 476 A.2d 800, 802 (N.J. Super. A.D. 1984) which – in addressing the same issued raised by taxpayer – stated that "To include such receipts in the factor would be comparable to measuring business activity by the amount of money that a taxpayer repeatedly deposited and withdrew from its own bank account" and that to hold "otherwise produces an absurd interpretation of [the relevant statute]." Id. Taxpayer cannot logically contend that if it invested $100 in a security, sold the security, bought a second security with the same $100 and then repeated that process that six times during the same tax year, that it realized $600 in sales. Similarly, taxpayer cannot maintain that the $600 "sales" amount can be used as a means by which fairly and accurately determine the taxpayer's Indiana income. The $600 figure is a bookkeeping fiction and represents neither real-world income nor sales.

The audit was correct when it excluded from both the sales numerator and the sales denominator "principal returned in short term securities transaction" because to do otherwise would not lead to an equitable apportionment of taxpayer's income. Taxpayer may not include the return of principal realized each time it sells investment securities because including both the principal and interest in each rollover amount would distort the sales factor by giving extra weight to its out-of-state sales. As stated in 45 IAC 3.1-1-50(5), "In some cases, certain gross receipts should be disregarded in determining the sales factor to effectuate an equitable apportionment."

Taxpayer's reliance on the general language contained in 45 IAC 3.1-1-55(e) notwithstanding, both the Indiana Tax Court and the Department have addressed this specific issue previously and – in each case – has rejected taxpayer's argument.

FINDING

Taxpayer's protest is respectfully denied.

IV. Ten-Percent Negligence Penalty.

Taxpayer argues that it is entitled to an abatement of the ten-percent negligence penalty because it "acted with reasonable cause and without the willful intent to underpay Indiana taxes."

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

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

The Department is unable to agree with taxpayer's contention that its preparation of the original tax returns represented a reasonable interpretation of the tax law and that in preparing those returns it "exercised ordinary business care." The taxpayer's erroneous decision to include principal from the sale of short term investment resulted in more than 60 percent of its additional tax liability. Taxpayer and the Department may continue to disagree on the question of whether gross proceeds generated by these investments should be included in the sales factor, but this *identical* issue has been twice protested, twice denied, and unsuccessfully litigated in the Tax Court. The Department does not doubt taxpayer's good faith interpretation of the tax law, but it is unable to agree that taxpayer's decision to include gross investment receipts in yet a audit third cycle is indicative of the "reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." 45 IAC 15-22-2-(b).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2004-02ST
November 3, 2004

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

ISSUE

Sales and Use Tax- Sale of Gasoline from a Metered Pump

Authority: IC 6-2.5-7-2, IC 6-2.5-7-3.

The taxpayer requests the department to rule on whether or not its proposed operating procedures comply with Indiana law.

STATEMENT OF FACTS

The taxpayer is a limited partnership. It has entered into agreements with retailers in Indiana to enable its customers access to retailers' sites. This access would allow said customers to use its cards. The taxpayer would take possession of the fuel purchased at the nozzle and would reimburse the retailer the following per gallon:

- Average oil price information service ("OPIS") daily price
- Posted freight allowance
- Commission
- Federal government excise tax/gallon
-
  1. Diesel .244
  2. Kerosene .244
  3. Gasoline .184
  4. Gasohol .132
- Indiana State Excise Tax/gallon
  1. Diesel .160
  2. Kerosene .160
  3. Gasoline .180
  4. Gasohol .180
- Indiana state oil inspection fee
  1. Gasoline .008
  2. Gasohol .008

- No prepaid sales tax or sales tax is reimbursed because this is an interstate transaction.

The taxpayer would bill the customers a weekly price based on OPIS weekly average plus a margin including all taxes unless exempt. The taxpayer would remit sales tax to Indiana based on what the customer was billed; the final retail price.

The taxpayer would pay Indiana the final sales tax due on the above described sales after taking credit for any legitimate sales tax-exempt sales made to agriculture customers, state and local governments, the federal government, non-profit organizations, parochial and public schools, and public transportation customers.

The taxpayer would continue to make reimbursements to the "retailer" as mentioned above with the understanding that they will have reported the related transactions as "sales for resale"; a non-sales taxable transaction. The taxpayer would pay the full sales tax to the state of Indiana.

DISCUSSION

IC 6-2.5-7-2 provides as follows:

Except as provided in section 2.5 of this chapter, a retail merchant who uses a metered pump to dispense gasoline or special fuel shall display on the pump the total price per unit of the gasoline or special fuel. Subject to the provisions of section 2.5 of this chapter; a retail merchant may not advertise the gasoline or special fuel at a price that is different than the price that he is required to display on the metered pump.

IC 6-2.5-7-3 provides as follows:

(a) With respect to the sale of gasoline which is dispensed from a metered pump, a retail merchant shall collect, for each unit of gasoline sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent ($.001), of:

(i) the price per unit before the addition of state and federal taxes; multiplied by

(ii) six percent (6%). The retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under IC 6-2.5-5.

(b) With respect to the sale of special fuel or kerosene which is dispensed from a metered pump, unless the purchaser provides an exemption certificate in accordance with IC 6-2.5-8-8, a retail merchant shall collect, for each unit of special fuel or kerosene sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent ($.001), of:

(i) the price per unit before the addition of state and federal taxes; multiplied by

(ii) six percent (6%).

Unless the exemption certificate is provided, the retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under IC 6-2.5-5.

The law clearly requires that the metered pump display the total price of the gasoline or special fuel. All sales tax collected and remitted from a particular metered pump must correspond to the amount stated as the sales price on the pump. The taxpayer's proposed method of operation would require that its customers take delivery of gasoline and other fuels from the same metered pumps that the retail merchants use to make other sales. The taxpayer's customers could pay a different amount for the gasoline or special fuel than other persons receiving fuel from the metered pump. Therefore, the taxpayer's proposed method of operation does not comply with Indiana's sales tax law.

The law also requires the retail merchant to collect and remit the sales tax unless an exemption certificate is provided. The taxpayer's proposed method of operations would have the taxpayer collecting and remitting the sales tax instead of the retail merchant. This also contradicts the clear requirements of the law.

RULING

The Department rules that the taxpayer's proposed method of operations does not comply with the Indiana law.

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.