INDIANA DEPARTMENT OF INSURANCE
August 4, 2005
Bulletin 133

Pre-existing Condition Exclusion Waivers Individual and Non-employer Association or Discretionary Group Policies

This Bulletin is directed to all insurers that write individual health insurance policies or non-employer sponsored association or discretionary group health insurance policies. Beginning July 1, 2005, House Enrolled Act 1075 (P.L. 211-2005) allows insurers to issue individual policies with a waiver of coverage for a specified condition and complications directly related thereto. Department of Insurance Bulletins 96 and 121 are withdrawn.

When issuing waivers, the insurer must comply with several conditions. A waiver may not exceed ten (10) years. The insurer shall provide the applicant written notice explaining the waiver of coverage before issuance of the policy. The insurer must obtain the applicant's initials on the notice, offer of coverage and policy documents as proof that the applicant was provided the required notice and accepts the waiver of coverage. The offer of coverage and the policy must include the waiver in a separate section stating in bold print that the applicant is receiving coverage with an exception for the waived condition. Only two (2) waivers per individual are permitted. The waiver period must run concurrently with any preexisting condition limitation or exclusionary period. The insurer must review the underwriting basis for the waiver upon request, one (1) time each year and remove the waiver if the insurer determines that evidence of insurability is satisfactory. The insurer must disclose to the applicant that he/she may decline the offer of coverage and apply for a policy with the Indiana Comprehensive Health Insurance Association (ICHIA). The individual's insurance card must include a telephone number for verification of whether a given procedure is excluded under the waiver of coverage.

A policy may not include a waiver for a mental health condition or a developmental disability, including pervasive developmental disorder as defined at IC 27-8-14.2. An insurer may not deny coverage, based on the waiver, for any condition or complication that is not specified in the written notice of the waiver, the offer of coverage and the issued policy. Once a waiver is lifted or expires, the insurer shall not consider the previously waived condition in renewal and underwriting determinations and must renew the policy in accordance with Indiana and federal laws.

Reporting Requirements

In order to assist the Department in preparing for its statutory reporting obligations, the Department is directing insurers to notify the Department in writing of an intent to use waivers prior to issuing any waivers. Also, insurers are reminded that waiver forms must be filed and approved by the Department under IC 27-8-5-1.

Each insurer that chooses to issue policies with waivers is required to report the following information on a form prescribed by the Department.

(1) The number of policies and certificates that the insurer issued with a waiver.
(2) A list of specified conditions that the insurer waived.
(3) The number of waivers issued for each specified condition.
(4) The number of waivers issued categorized by the period of time for which coverage of a specified condition was waived.
(5) The number of applicants who were denied insurance coverage by the insurer because of a specified condition.

The form for these reports will be posted on the Department's website, www.in.gov/idoi. Reports will be due on September 1, 2006 and September 1, 2007. Insurers participating in the demonstration project under P.L. 211-2003 should file the report due August 1, 2005 for the reporting period of July 1, 2004, through June 30, 2005. Thereafter the reporting requirements of P.L. 211-2003 will be considered void as the 2005 legislation requires duplicative reports in 2006 and 2007 for all insurers issuing waivers.

INDIANA DEPARTMENT OF INSURANCE
James Atterholt, Commissioner

DEPARTMENT OF STATE REVENUE
COMMISSIONER'S DIRECTIVE #30
(Replaces Information Bulletin #1FB dated December 2002)
July 2005

DISCLAIMER: Commissioner's Directives are intended to provide non-technical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules and court decisions. Any information that is 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: Local Food and Beverage Taxes

REFERENCE: IC 6-9-12; IC 6-9-20; IC 6-9-21; IC 6-9-23; IC 6-9-24; IC 6-9-25; IC 6-9-26; IC 6-9-27; IC 6-9-33; IC 6-9-35; IC 6-9-36; and IC 6-9-38

INTRODUCTION

This directive is directed to retail merchants responsible for collecting the various county and municipal food and beverage taxes. The purpose of this directive is to assist retail merchants in the proper application of the food and beverage tax. In counties or municipalities that adopt a food and beverage tax, the rate is one percent (1%) of the gross retail income received from taxable food and beverage transactions. In some instances where **both a county and municipality within the county** have adopted the food and beverage tax, the total tax rate for a taxable transaction inside the municipality is two percent (2%).

I. LOCATION OF TRANSACTION

The food and beverage tax applies only to transactions that take place in a county or municipality that adopts the tax. A retail merchant that caters in counties that have not adopted the tax will not collect the tax on transactions in those counties.

II. TRANSACTIONS SUBJECT TO TAX

The food and beverage tax applies to any transaction in which food or beverage is furnished, prepared, or served by a retail merchant for consumption at a location or on equipment provided by the retail merchant in a county or municipality that adopts the tax.

For purposes of the food and beverage tax, consumption at a location or on equipment provided by the retail merchant includes food or beverage which is served by a retail merchant off the retail merchant's premises. This includes food sold and served by a retail merchant that is performing catering activities.

The transaction is taxable if the food is sold in a heated state or heated by the retail merchant. This includes food sold at a deli counter in a grocery store that is cooked or heated on the premises of the retail merchant.

Food or beverages sold by a retail merchant where the seller provides eating utensils including plates, knives, forks, spoons, glasses, cups, napkins, or straws results in a taxable transaction.

Food sold by a retail merchant where two or more food ingredients are mixed or combined by the retail merchant for sale as a single item results in a taxable transaction. This does not include food that is only cut, repackaged, or pasteurized by the seller and eggs, fish, meat, and poultry requiring cooking by the consumer.

III. EXEMPT TRANSACTIONS

The food and beverage tax does not apply to the sales of food and beverages if the transaction is exempt from the sales tax.

IV. COLLECTION AND REMITTANCE OF THE TAX

The food and beverage tax is imposed, paid and collected in the same manner as the sales tax. The filing of the return and the remittance of the tax collected is due thirty days after the end of the month in which the transaction occurs. The return for the food and beverage tax is a separate return from the sales and use tax return. A retailer that is required to collect and remit the tax may file a consolidated food and beverage tax return if the retailer operates multiple locations in the same county. A separate return is required to be filed by the retailer if the retailer has locations in different adopting counties.

The retailer is required to file a separate return if the retail establishment is located in a municipality inside a county where both units of government have adopted a food and beverage tax.

With the exception of Johnson County all tax returns and remittances for the food and beverage tax are required to be filed with the Indiana Department of Revenue. Johnson County has passed an ordinance to have the tax remitted to the county treasurer.

V. UNITS IMPOSING THE FOOD AND BEVERAGE TAX

Unit of Government	**Rate**	**Effective Date**
Marion County	2%	July 1981 July 2005 (Rate Increase)
Vanderburgh County	1%	August 1985
Delaware County	1%	August 1986
Allen County	1%	July 1986
Nashville (Brown County)	1%	July 1987
Henry County	1%	October 1987
Madison County	1%	February 1989
Mooresville (Morgan County)	1%	August 1990
Shipshewana (LaGrange County)	1%	July 1990
Plainfield (Hendricks County)	2%	August 1995
Brownsburg (Hendricks County)	2%	August 1995
Avon (Hendricks County)	2%	July 2005
Martinsville (Morgan County)	1%	July 2005
Boone County	1%	August 2005
Johnson County	1%	August 2005 Collected by county treasurer
Hamilton County	1%	August 2005

Carmel (Hamilton County)	2%	August 2005
Noblesville (Hamilton County)	2%	August 2005
Hancock County	1%	August 2005
Hendricks County	1%	August 2005
Shelby County	1%	August 2005

Authorized but not adopted as of July 12, 2005
Fishers
Greenfield
Lebanon
Westfield
Zionsville
Lake County
Porter County
Wayne County
Cities and Towns within Wayne County

John Eckart
Commissioner

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
KOKOMO FIRE DRAGONS
3112 OXFORD STREET
KOKOMO, IN 46074
DOCKET NO. 29-2003-0432

PROPOSED ORDER

1) The Criminal Investigation Division of the Indiana Department of Revenue conducted an investigation of the Petitioner on July 8, 2003.
2) Petitioner was assessed three thousand five hundred dollars ($3,500) in civil penalties and its license to conduct charity gaming was suspended for three (3) years.
3) Petitioner appealed the Department's proposed actions on October 29, 2003.
4) A power of attorney form (POA-1) was signed on November 10, 2003 by Petitioner's Secretary/Treasurer Judy Wade giving Chris L. Kemp, CPA the authority to receive confidential information and the full power to perform on behalf of the Petitioner all acts incidental to such representation.
5) A hearing in this matter was set for August 12, 2004 and again on June 21, 2005.
6) Petitioner's Directors held a meeting on May 26, 2005 regarding the organization's dissolution.
7) Petitioner's articles of dissolution were dated May 26, 2005.
8) The Petitioner's CPA, Chris L. Kemp, withdrew Petitioner's appeal on June 6, 2005.

PROPOSED DEPARTMENTAL ORDER

Following due consideration of the entire record, the Administrative Law Judge orders the following:
Petitioner's appeal is dismissed.
1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue (100 North Senate Avenue, Room N248, Indianapolis, Indiana 46204-2253), a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).
2) Judicial review of a final order may be sought under IC 4-21.5-5.

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

Dated: ________________

Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

IN REGARDS TO THE MATTER OF:
ANDERSON HOOP SHOOTERS, INC.
425 SYLVAN DRIVE
ANDERSON, IN 46012
DOCKET NO. 29-2004-0339

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED DEPARTMENTAL ORDER

An administrative hearing was held on Monday, January 31, 2005, and Tuesday, February 1, 2005 in the office of the Indiana Department of State Revenue, 100 N. Senate Avenue, Room N248, Indianapolis, Indiana 46204 before Bruce R. Kolb, Administrative Law Judge acting on behalf of and under the authority of the Commissioner of the Indiana Department of State Revenue.

Petitioner, Anderson Hoop Shooter, Inc., was represented by Marilyn A. Moores and Arend J. Abel of Cohen & Mallad, LLP, One Indiana Square, Suite 1400, Indianapolis, Indiana 46204. Attorney Doug Klitzke appeared on behalf of the Indiana Department of State Revenue.

A hearing was conducted pursuant to IC 4-21.5 et seq., evidence was submitted, and testimony given. The Department maintains a record of the proceedings. The transcript of the hearing was received by the Administrative Law Judge on February 24, 2005. A Supplemental Brief from the Department was received on March 18, 2005. A Supplemental Brief on behalf of the Petitioner was received on April 2, 2005. Being duly advised and having considered the entire record, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law, and Proposed Departmental Order.

REASON FOR HEARING

An investigation was conducted by the Criminal Investigation Division of the Indiana Department of Revenue and was completed on June 15, 2004. The Department issued a letter to Petitioner dated September 3, 2004, which imposed Eight Thousand Five Hundred Dollars ($8,500) in civil penalties, and suspended the Petitioner from any and all gaming activities for a period of three (3) years. Petitioner's civil penalties were paid in full on September 17, 2004. The Petitioner protested the Department's decision in a timely manner.

FINDINGS OF FACTS

1) The Criminal Investigation Division of the Indiana Department of Revenue (hereinafter referred to as Department) conducted an investigation of Anderson Hoop Shooters, Inc. in 2002. (Record at 113).

2) Anderson Hoop Shooters, Inc. was founded by Dr. Philip Foley (hereinafter referred to as Dr. Foley) in 1987. (Record at 10).

3) Anderson Hoop Shooters, Inc. (hereinafter referred to as Petitioner) runs Slam Dunk Bingo. (Record at 31).

4) Before Slam Dunk Bingo, the Petitioner ran Warrior Bingo. (Record at 10).

5) Slam Dunk Bingo was located at 121 Federal Drive, Chesterfield, Indiana 46017. (Department's Exhibit #1).

6) Tom Arnbo and Sally Arnbo were the signatories on the Slam Dunk Bingo charity gaming account. (Record at 13).

7) Dr. Foley and David Clark were the signatories on Petitioner's checking account. (Record at 14).

8) Tom Arnbo, Sally Arnbo, and Dr. Foley were listed as operators for Anderson during the periods at issue. (Department's Exhibits #2, 3, and 4).

9) An operator is responsible for conducting an allowable event for a qualified organization under this article in accordance with Indiana law. (See IC 4-32-6-17).

10) The Department's letter to Petitioner, dated September 3, 2004, states in part, "For several years (September 1, 1997 to November 1, 2003) Anderson Hoop Shooters indicated that the location of its principal office was 1017 W. 19th Street, Anderson, IN. This is also the address of the Wilson Boys & Girls Club. Pursuant to a subpoena, Bruce Rhodes, Chief Professional Officer for Wilson Boys & Girls Club, indicated that the Anderson Hoop Shooters has never, during the period indicated above, utilized any portion of the facility located at 1017 W. 19th Street, Anderson, IN. Furthermore, Mr. Rhodes indicated that Anderson Hoop Shooters, Inc. has not had a lease agreement with the Wilson Boys & Girls Club during the period indicated…For over six (6) years Anderson Hoop Shooters told the Department that their principal office was located at 1017 W. 19th Street, Anderson, IN; however, Wilson Boys & Girls Club indicates that Anderson Hoop Shooters never utilized any portion of the facility located at 1017 W. 19th Street…**The Department imposes a civil penalty for the first violation of one thousand dollars ($1,000)**."

11) Petitioner's address of its principal office listed on its CG-2Rs (Annual Bingo Renewal Application) for the year 2001 is 1017 W. 19th Street, Anderson, Indiana 46011. (Department's Exhibit #2).

12) Petitioner's address of its principal office listed on its CG-2Rs (Annual Bingo Renewal Application) for the year 2002 is 1017 W. 19th Street, Anderson, Indiana 46011. (Department's Exhibit #3).

13) Petitioner's address of its principal office listed on its CG-2R (Annual Bingo Renewal Application) for the year 2003, dated

November 3, 2003, is 425 Sylvan Drive, Anderson, Indiana 46012. (Department's Exhibit #4).
14) Petitioner's CG-2R (Annual Bingo Renewal Application) for the year 2003, dated November 3, 2003 was stamped received by the Indiana Department of Revenue Compliance Division, Charity Gaming Section on November 6, 2003. (Department's Exhibit #4).
15) According to Petitioner's letter dated November 1, 2003 (signed by Dr. Foley) the Department as well as the Indiana Secretary of State was notified that Petitioner's principal office address was changed to 425 Sylvan Drive, Anderson, Indiana 46012. (Petitioner's Exhibit N).
16) Petitioner's letter dated November 1, 2003 (Petitioner's Exhibit N) was stamped received by the Indiana Department of Revenue Compliance Division, Charity Gaming Section on November 6, 2003. (Petitioner's Exhibit N).
17) Dr. Foley stated at hearing that Petitioner's records were kept on the third floor of the building occupied by the Wilson Boys & Girls Club. This address was 1017 W. 19th Street address in Anderson, Indiana. (Record at 12-13).
18) Dr. Foley also testified, "We [Anderson Hoop Shooters] had a room upstairs which was part of the Warrior program where I had file cabinets, I had uniforms, and basketballs…" (Record at 45).
19) Dr. Foley testified that the Petitioner's records were moved out of the 1017 W. 19th Street address in Anderson, Indiana three or four years ago. (Record at 16).
20) When Dr. Foley was asked whether the reports turned into the Department were ever corrected to reflect the address change he replied, "No. Tom and Sally told me to just leave it that way because it might cause us some change in our license." (Record at 13).
21) The Department's investigator testified, "I asked Mr. Rhodes regarding the Anderson Hoop Shooters, I asked him if they were housed, had any offices or conducted any business out of 1017 West 19th Street in Anderson. Mr. Rhodes told me that Anderson Hoop Shooters, to his knowledge, never occupied space or maintained records during his tenure." (Record at 103).
22) Mr. Rhodes had been Chief Professional Officer for the Wilson Boys & Girls Club since February 15, 2000. (Department's Exhibit #10).
23) The Indiana Department of Revenue's *Charity Gaming Information Publication 2* has no legal authority or precedential value.
24) Petitioner had offices at the 1017 W. 19th Street address in Anderson, Indiana and ceased using them prior to February 15, 2000.
25) The conflicting evidence provided at hearing does not pinpoint the exact time when the Petitioner officially moved its principal offices out of the 1017 W. 19th Street address; however, the fact remains that Department did not receive notice of this address change until November 6, 2003.
26) The Department's letter to Petitioner, dated September 3, 2004, states in part, "For the period ending August 31, 2002 and August 31, 2003 Anderson Hoop Shooters indicated on its Schedule CG-Dist, Charitable Distribution Listing, that it donated $26,239 and $11,587 respectively to the Wilson Boys & Girls Club. In response to a subpoena, Bruce Rhodes, Chief Professional Officer for Wilson Boys & Girls Club, indicated that the Wilson Boys & Girls Club had no record of any moneys being donated to it by the Anderson Hoop Shooters…In this case, Anderson Hoop Shooters indicated that in excess of $37,000 was donated to the Wilson Boys & Girls Club over a two (2) year period. Wilson Boys & Girls Club, Chief Professional Officer, denied that the organization ever received any moneys from the Anderson Hoop Shooters. Anderson Hoop Shooters has failed to file accurate reports with the Department and has failed to accurately account for all the net proceeds from allowable charity gaming events. Anderson Hoop Shooters has committed deceit and misrepresentation in the filing of the reports required by charity gaming statutes…**The Department imposes a civil penalty for the second violation of two-thousand five hundred dollars ($2,500)**."
27) Petitioner's CG-Dist (Charitable Contribution Distribution Listing) contained entries for the period ending August 31, 2002 showing twenty-six thousand two hundred thirty-nine dollars ($26,239) was donated to the Wilson Boys and Girls Club. (Department's Exhibit #8).
28) Petitioner's CG-Dist (Charitable Contribution Distribution Listing) contained entries for the period ending August 31, 2003 showing eleven thousand five hundred eighty-seven dollars ($11,587) was donated to the Wilson Boys and Girls Club. (Department's Exhibit #11).
29) At hearing Dr. Foley stated under oath, "I have a statement recently by Bruce Rhodes, just this week, showing that the Boys and Girls club did receive money and that the Slam Dunk Bingo did provide money and funds for the Wilson Girls and Boys Club."(Record at 22).
30) Dr. Foley produced a written statement, by Mr. Rhodes dated January 28, 2005, which states, "This letter is in reference to the financial support of the Wilson Boys & Girls Club by Doctor Phillip Foley and Hoopshooter's Bingo. During the past few years Dr. Foley and the Hoopshooter's Bingo have provided funding for AAU Basketball Teams and their activities. Also, they have donated funds support Boys & Girls Club programming and activities. These funds were provided the funds to support the activities of this organization, impacting the lives of many youth through-out or community and Madison County."

(Petitioner's Exhibit L).
31) Dr. Foley provided all financial information contained in Exhibits C, D, E, and F. (Record at 36-39).
32) The evidence presented at hearing tends to support the Petitioner's contention that the donations at issue, sent to Wilson Boys & Girls Club, were in fact received.
33) The Department's letter to Petitioner, dated September 3, 2004, states in part, "The investigation by the Department revealed that Anderson Hoop Shooters failed to keep accurate records of the allowable events it conducted, and to make accurate and timely reports of all financial aspects of the allowable events as required by IC 4-32-9-17. The Department reconstructed that gaming records pertaining to the sale of pull tabs. The investigation determined that Anderson Hoop Shooters understated its gross receipts derived from the sale of pull tabs by $3,592,499. This understatement of gross receipts derived from the sale of pull tabs resulted in the organization's charity gaming license fees being underreported by $11,500 for the periods ended August 31, 2001, August 31, 2002 and August 31, 2003…**The Department imposes a civil penalty of five thousand dollars ($5,000)**."
34) The Department's reconstruction was based upon Petitioner's financials filed with the Department, and the information provided by the organizations (suppliers) that sold pull tabs to the Petitioner. (Record at 107).
35) However, the Department did not thoroughly review the nightly game summaries provided by the Petitioner pursuant to a Departmental Subpoena. (Record at 117).
36) Petitioner's witness noted seven (7) instances of duplication in the Department's reconstruction which according to the witness was the result of gaming supplies being returned for a credit. (Record at 267-271) (See Petitioner's Exhibit X).
37) Neither Petitioner's original filings with the Department, nor the information provided by the suppliers, that sold pull tabs to the Petitioner, reflect a credit for supplies returned.
38) Petitioner's CG-8s (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the periods September 1, 2000 to August 31, 2001 and September 1, 2001 to August 31, 2002 list its principal office address as 1017 W. 19th Street, Anderson, Indiana 46011. (Department's Exhibits #6 and 8).
39) Petitioner's CG-8 (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the period September 1, 2002 to August 31, 2003 lists its principal office address as 425 Sylvan Drive, Anderson, Indiana 46012. (Department's Exhibit #11).
40) Petitioner's CG-8s (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the periods September 1, 2000 to August 31, 2001 and September 1, 2001 to August 31, 2002 lists as its address where the charity gaming financial records are maintained as 1017 W. 19th Street, Anderson, Indiana 46011. (Department's Exhibits #6 and 8).
41) Petitioner's CG-8 (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the period September 1, 2002 to August 31, 2003 lists as its address where the charity gaming financial records are maintained as 425 Sylvan Drive, Anderson, Indiana 46012. (Department's Exhibit #11).
42) Petitioner's CG-8 (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the period September 1, 2000 to August 31, 2001 lists Tom Arnbo as the name of the person maintaining these financial records. It also states that his address is P.O. Box 215, Chesterfield, Indiana 46017. (Department's Exhibit #6).
43) Petitioner's CG-8 (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the period September 1, 2001 to August 31, 2002 lists Tom Arnbo as the name of the person maintaining these financial records. It also states that his address is 5083 Stonespring Way, Anderson, Indiana 46012. (Department's Exhibits #8).
44) Petitioner's CG-8 (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the period September 1, 2002 to August 31, 2003 lists Philip D. Foley as the name of the person maintaining these financial records. It also states that his address is 425 Sylvan Drive, Anderson, Indiana 46012. (Department's Exhibit #11).
45) The Department alleges that Anderson failed to report $3,592,499 in gross revenue from the sale of pull tabs for the periods ending August 31st of 2001, 2002, and 2003. (Record at 147).
46) Dr. Foley signed Anderson's CG-2Rs (Annual Bingo Renewal Application) for the years 2001, 2002, and 2003. (Department's Exhibits #2, 3, and 4).
47) Dr. Foley signed Anderson's CG-8s (Indiana Annual Bingo and/or Pull Tab License Financial Report) for the accounting periods September 1, 2000 to August 31, 2001; September 1, 2001 to August 31, 2002; and September 1, 2002 to August 31, 2003. (Department's Exhibits #6, 8, and 11).
48) Tom Arnbo's signature only appears on Anderson's CG-DIST, (Indiana Department of Revenue Charitable Contribution Distribution Listing) as the preparer of the schedule, for the period September 1, 2002 to August 31, 2003. (Department's Exhibit #11).
49) Sally Arnbo's signature appears on Anderson's CG-INV (Charity Gaming Ending Inventory Statement) for the period September 1, 2001 to August 31, 2002. (Department's Exhibits #8).
50) Sally Arnbo's signature appears on Anderson's CG-INV (Charity Gaming Ending Inventory Statement) for the period September 1, 2002 to August 31, 2003. (Department's Exhibits #11).
51) During cross examination Petitioner's witness Sally Arnbo was asked,

"Q And the bingo applications and the reapplications that we had introduced into evidence earlier, did you fill those applications out?
A Pretty much, yes. In total, yes, pretty much, but not total.
Q What part didn't you fill out?
A Well, I didn't fill the distribution, the part that Dr. Foley gave to Tom. Other than that, I pretty much filled the rest of it out." (Record at 278).

52) Petitioner's building was prone to water damage especially where the charity gaming supplies were kept as evidenced by Petitioner's Exhibits BB through KK.
53) Sally Arnbo, Petitioner's witness, when asked, "how bad would you say the water problem was before the landlord made the repairs?" stated, "The water problem was terrible and we complained to him many, many times about it, showed it to him, you know, and said, you know, you've got water, you know, there were times when literally we could see it running and we put garbage cans up when it was dripping out of the ceiling, so it was bad. It was bad. Sometimes worse than other times." (Record at 241).
54) Petitioner's operators allowed water damaged charity gaming supplies to be discarded by workers and other individuals without keeping any records as to which games or how much was destroyed. (Record at 239-240).
55) Petitioner's witness Sally Arnbo testified under oath that as many as two thousand (2,000) boxes of pull tabs were discarded in the trash. (Record at 239).
56) Petitioner's witness Sally Arnbo testified under oath that no inventory of discarded pull tabs was ever undertaken. (Record at 301).
57) Petitioner's witness Sally Arnbo testified under oath that no one was held accountable for discarding of pull tabs in the trash. (Record at 302).
58) Petitioner's witness Sally Arnbo testified under oath that there was no financial oversight and no one questioned the discarding of pull tabs. (Record at 302).
59) Petitioner's witness Sally Arnbo testified under oath that insurance to cover the loss of pull tabs was cost prohibitive. (Record at 303).
60) Petitioner's witness Sally Arnbo testified under oath that moving to another location to avoid water damage was never an option. (Record at 303).
61) Petitioner's witness Sally Arnbo testified under oath that the discarded boxes of pull tabs were not accounted for in Anderson's annual renewals or financial statements. (Record at 239-240).
62) Lack of proper record keeping and reporting regarding lost, stolen, or destroyed games was the impetus behind the Department's initial investigation of Anderson.
63) The Department during its reconstruction of Petitioner's records did not know that Petitioner's operators gave away pull tabs as prizes. (Record at 138).
64) Sally Arnbo did not reconstruct Petitioner's pull tab records (Petitioner's Exhibits X, Y, and Z) until November of 2004. (Record at 301).
65) A serious reconstruction and reconciliation by Sally Arnbo of Petitioner's charity gaming financial records did not occur until nearly two (2) years after the Department's initial investigation began.
66) The Department's letter to Petitioner, dated September 3, 2004, states in part, "Indiana § 4-32-12-1 provides that the Department may suspend the license of a qualified organization for failing to accurately account for the sale of pull tabs and for misrepresenting the location of the organization's principal office and claiming donations to Wilson Boys & Girls Club which were never made. **The Department hereby suspends Anderson Hoop Shooters, Inc. from any and all gaming activities for a period of three (3) years effective with the receipt of this decision.**"
67) Petitioner's counsel argues that the proposed three-year suspension is statutorily unauthorized. In support of its position, counsel states in its brief, "Charity Gaming licenses are only valid for one year. Ind. Code § 4-32-9-5(f). Given that the license expires after one year, it is obvious that the statute cannot authorize a 'suspension' that lasts more than one year. At most, a license could be 'suspended' for the remainder of its term, and even that, properly viewed, is a ***termination*** rather than a suspension." (Petitioner's Brief at 16).
68) Petitioner also contends that § 4-32-9-5(i) only authorizes the Department to deny a license if, "after a public hearing the commissioner determines that the applicant: (1) has violated a local ordinance; or (2) has engaged in fraud, deceit, or misrepresentation." (Petitioner's Brief at 16).

STATEMENT OF LAW

1) The Department's hearings are governed by IC 4-21.5 exclusively. (See IC 4-32-8-5. *As added by P.L.188-2003, SEC.3.).*
2) IC 4-21.5-2-26(a) states, "The administrative law judge may admit hearsay evidence. If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exemption to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence."

3) IC 4-21.5-3-25(b) provides in pertinent part, "The administrative law judge shall regulate the course of the proceedings in …an informal manner without recourse to the technical, common law rules of evidence applicable to civil actions in the courts…"
4) IC 4-32-1-2 states, "The purpose of this article is to permit a licensed qualified organization: (1) to conduct bingo events, charity game nights, door prize drawings, and raffles; and (2) to sell pull tabs, punchboards, and tip boards; as a fund raising activity for lawful purposes of the organization."
5) IC 4-32-7-1 states, "The department shall supervise and administer allowable events conducted in Indiana under this article."
6) IC 4-32-9-5 states (a) The commissioner may issue a bingo license to a qualified organization if:

(1) the provisions of this section are satisfied; and
(2) the qualified organization:
(A) submits an application; and
(B) pays a fee set by the department under IC 4-32-11.

(b) Each officer of a qualified organization that signs an application for a bingo license under this section must live in the county where the proposed bingo events will be held.

(c) The commissioner or the commissioner's designee may hold a public hearing to obtain input on the proposed issuance of an annual bingo license to an applicant that has never held an annual bingo license under this article.

(d) The first time that a qualified organization applies for an annual bingo license, the commissioner shall publish notice that the application has been filed. The notification shall be in accordance with IC 5-14-1.5-5 and shall contain the following:

(1) The name of the qualified organization and the fact that it has applied for an annual bingo license.
(2) The location where the bingo events will be held.
(3) The names of the operator and officers of the qualified organization.
(4) A statement that any person can protest the proposed issuance of the annual bingo license.
(5) A statement that the department shall hold a public hearing if ten (10) written and signed protest letters are received by the department.
(6) The address of the department where correspondence concerning the application may be sent.

(e) If the department receives at least ten (10) protest letters, the department shall hold a public hearing in accordance with IC 5-14-1.5. The public hearing will be held within one (1) of the six (6) geographic regions designated by the department. The department shall issue a license or deny the application not later than sixty (60) days after the date of the public hearing.

(f) A license issued under this section:

(1) may authorize the qualified organization to conduct bingo events on more than one (1) occasion during a period of one (1) year;
(2) must state the locations of the permitted bingo events;
(3) must state the expiration date of the license; and
(4) may be reissued annually upon the submission of an application for reissuance on the form established by the department and upon the licensee's payment of a fee set by the department.

(g) Notwithstanding subsection (f)(4), the commissioner shall hold a public hearing for the reissuance of an annual bingo license if:

(1) an applicant has been cited for a violation of law or a rule of the department; or
(2) the department finds, based upon investigation of at least three (3) written and signed complaints alleging a violation of law or a rule of the department in connection with the bingo license, that one (1) or more of the alleged violations:
(A) has occurred;
(B) is a type of violation that would allow the department to cite the applicant for a violation of a provision of this article or of a rule of the department; and
(C) has not been corrected after notice has been given by the department.

(h) If the department is required to hold a public hearing on an application for a reissuance of an annual bingo license it shall comply with the same procedures required under this section for notice and for conducting the hearing.

(i) The commissioner may deny a license if after a public hearing the commissioner determines that the applicant:

(1) has violated a local ordinance; or
(2) has engaged in fraud, deceit, or misrepresentation.

7) IC 4-32-9-17 states, "A qualified organization shall maintain accurate records of all financial aspects of an allowable event under this article. A qualified organization shall make accurate reports of all financial aspects of an allowable event to the department within the time established by the department…."
8) IC 4-32-9-21 states, "Except where a qualified organization or its affiliate is having a convention or other annual meeting of its membership, a qualified organization may only conduct an allowable event in the county where the principal office of the qualified organization is located. The principal office of a qualified organization shall be determined as follows:

(1) Except as provided in subdivision (3) or subdivision (4), if a qualified organization is a corporation, the principal office shall be determined by the street address of the corporation's registered office on file with the secretary of state.
(2) If a qualified organization is not a corporation, the principal office shall be determined by the street address of the organization on file with the Internal Revenue Service, the department, or county property tax assessment board of appeals for tax exempt purposes.
(3) If a qualified organization is affiliated with a parent organization that:
(A) is organized in Indiana; and
(B) has been in existence for at least five (5) years;
the principal office shall be determined by the principal place of business of the qualified organization.
(4) If a qualified organization is affiliated with a parent organization that:
(A) is a nationally recognized charitable organization;
(B) serves a majority of counties in Indiana; and
(C) has been in existence for at least twenty-five (25) years; the principal office shall be deemed to be present in every county served by the organization."

9) IC 4-32-12-1 provides, "(a) The department may suspend or revoke the license of or levy a civil penalty against a qualified organization or an individual under this article for any of the following:
(1) Violation of a provision of this article or of a rule of the department.
(2) Failure to accurately account for:
(A) bingo cards;
(B) bingo boards;
(C) bingo sheets;
(D) bingo pads;
(E) pull tabs;
(F) punchboards; or
(G) tip boards.
(3) Failure to accurately account for sales proceeds from an event or activity licensed or permitted under this article.
(4) Commission of a fraud, deceit, or misrepresentation.
(5) Conduct prejudicial to public confidence in the department.
(b) If a violation is of a continuing nature, the department may impose a civil penalty upon a licensee or an individual for each day the violation continues.

10) IC 4-32-12-2 states, "The department may impose upon a qualified organization or an individual the following civil penalties:
(1) Not more than one thousand dollars ($1,000) for the first violation.
(2) Not more than two thousand five hundred dollars ($2,500) for the second violation.
(3) Not more than five thousand dollars ($5,000) for each additional violation."

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

12) IC 4-32-13-3 states, "The department shall conduct investigations necessary to ensure the security and integrity of the operation of games of chance under this article."

CONCLUSIONS OF LAW

1) Gambling in the State of Indiana is still illegal except for a few well defined exceptions.
2) The Indiana Legislature has made specific exceptions for charitable organization to participate in gambling.
3) The purpose of Indiana's charity gaming statutes is to permit a licensed qualified charitable organization to conduct gambling as a fund raising activity for lawful purposes of the organization.
4) To this end, the Indiana Department of State Revenue is responsible for conducting investigations necessary to ensure the security and integrity of the operation of games of chance under Article 32.
5) Petitioner had its principal offices located at the 1017 W. 19th Street address in Anderson, Indiana, and ceased using them prior to February 15, 2000.
6) The conflicting evidence provided at hearing does not pinpoint the exact date or year the Petitioner officially moved its

principal offices out of the 1017 W. 19th Street address; however, the fact remains that Department did not receive notice of this address change until November 6, 2003.

7) The failure to correct Petitioner's principal office address on the CG-2Rs (Annual Bingo Renewal Application) based upon the belief that any correction "might cause us some change in our license" constitutes a misrepresentation of the facts.

8) The evidence presented at hearing tends to support the Petitioner's contention that the donations at issue, sent to Wilson Boys & Girls Club, were in fact received.

9) Pursuant to IC 4-32-9-17 a qualified organization shall maintain accurate records and reports of all financial aspects of an allowable event under Article 32.

10) The burden rests with the Petitioner to show that its financial filings sent to the Department accurately reflect its fund raising activities. In this case they did not. The burden cannot be shifted to the Department by arguing that its attempt at reconstruction is flawed.

11) The lack of proper financial record keeping and the failure to accurately report lost, stolen, destroyed, or giveaway games in its filings with the Department, resulted in as much as $3,592,499 of underreported pull tabs for the periods ending August 31st of 2001, 2002, and 2003.

12) IC 4-32-12-1(a) provides in pertinent part, "The Department may suspend or revoke the license or levy a civil penalty against a qualified organization…"

13) "IC 4-32-12-3 states, In addition to the penalties described in section 2 of this chapter, the department may do all or any of the following: (1) Suspend or revoke the license (2) **Lengthen a period of suspension of the license**…"(Emphasis added).

14) IC 4-32-9-5(f), cited by Petitioner's counsel, provides for the re-issuance of a charity game license.

15) Pursuant to IC 4-32-9-5(g) The Commissioner of the Department shall hold a public hearing for the re-issuance of a license if the provisions of subsection (1) or (2) are met. Under IC 4-32-9-5(h) the hearing on the re-issuance of a license must comply with the same procedures as required by section nine. The Commissioner under IC 4-32-9-5(i) may deny a license if after a public hearing he determines that the applicant has violated a local ordinance or has engaged in fraud, deceit, or misrepresentation. Therefore, the provisions of IC 4-32-9-5 cited by Petitioner would only apply to the re-issuance of its license after the qualified organization's suspension has ended.

16) The Department, pursuant to IC 4-32-12-1 and IC 4-32-12-3, may suspend a qualified organization from any and all gaming activities for a period greater than one (1) year.

PROPOSED DEPARTMENTAL ORDER

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

Petitioner's appeal is denied in part and sustained in part. The failure to correct Petitioner's principal office address on the CG-2Rs constitutes a misrepresentation of the facts. The donations at issue, sent to Wilson Boys & Girls Club, were in fact received. The lack of proper financial record keeping and the failure to accurately report lost, stolen, destroyed, or giveaway games in its filings with the Department, resulted in as much as $3,592,499 of underreported pull tabs for the periods ending August 31st of 2001, 2002, and 2003. The Department, pursuant to IC 4-32-12-1 and IC 4-32-12-3, may suspend a qualified organization from any and all gaming activities for a period greater than one (1) year.

1) Administrative review of this proposed decision may be obtained by filing, with the Commissioner of the Indiana Department of State Revenue (100 North Senate Avenue, Room N248, Indianapolis, Indiana 46204-2253), a written document identifying the basis for each objection within fifteen (15) days after service of this proposed decision. IC 4-21.5-3-29(d).

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

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

Dated: ____________________

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Bruce R. Kolb / Administrative Law Judge

DEPARTMENT OF STATE REVENUE

04990537.LOF

LETTER OF FINDINGS NUMBER: 99-0537
Sales and Use and Withholding Taxes
For the Tax Period 1992-1996

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

1. Withholding Tax-Imposition

Authority: IC 6-3-2-1, IC 6-3-4-8(a), IC 6-8.1-5-1(b), IC 6-8.1-5-4.

The taxpayer protests the assessment of withholding tax.

2. Sales and Use Tax- Imposition

Authority: IC 6-2.5-2-1, IC 6-2.5-3-2 (a).

The taxpayer protests the imposition of sales and use tax**.**

STATEMENT OF FACTS

The taxpayer is a corporation that over the years has operated a variety of printing shops and a theater. After an audit, the Indiana Department of Revenue (department) issued an assessment for additional sales and use tax, interest, and penalty. The department has also issued assessments for withholding tax, interest and penalty. The taxpayer protested these assessments. A hearing was held and this Letter of Findings results.

1. Withholding Tax-Imposition

DISCUSSION

Indiana imposes a tax on the adjusted gross income of all residents. IC 6-3-2-1. Indiana employers are required to withhold Indiana adjusted gross income tax from employees and remit it to the state. IC 6-3-4-8(a). The department assessed withholding tax against the taxpayer. The taxpayer protested the assessment contending that its payroll service properly paid all taxes as they were due.

All tax assessments are presumed to be accurate. The taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b). Taxpayers are also required to keep documentation for presentation to the department as stated in the following provisions of IC 6-8.1-5-4:

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

The taxpayer was offered every opportunity to offer proof that all withholding taxes had been properly remitted to the department. The taxpayer failed to do so. The taxpayer did not sustain its burden of proving that the withholding taxes were imposed improperly.

FINDING

The taxpayer's protest is denied.

2. Sales and Use Tax- Imposition

DISCUSSION

Indiana imposes an excise tax, the sales tax, on the retail sales of tangible personal property. IC 6-2.5-2-1. Indiana imposes a complementary 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).

An audit indicated that the taxpayer did not collect and remit sales tax on the sales of refreshments at the theater. The audit also indicated that the taxpayer did not pay use tax on its use of several items such as office supplies and costumes. The department assessed tax on these amounts pursuant to the audit. The taxpayer paid a portion of the assessment and protested the remainder.

The taxpayer also submitted returns without payments after the audit period. The department assessed additional sales tax, interest and penalty for these amounts. The taxpayer protested these assessments.

The taxpayer submitted several checks to prove that he had properly paid all of his tax liabilities. Upon review, it was determined that each of those payments had already been credited to the taxpayer's liabilities.

The taxpayer did not offer any other documentation to sustain its burden of proving that the sales and use tax assessments were made in error.

FINDING

The taxpayer's protest to the assessment of sales and use tax is denied.

DEPARTMENT OF STATE REVENUE

01-20020504.LOF

LETTER OF FINDINGS NUMBER: 02-0504

Adjusted Gross Income Tax

For the Tax Period 1998-2000

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

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

ISSUES

1. Adjusted Gross Income Tax – Unreported Gross Income

Authority: IC 6-8.1-5-1 (b), IC 6-3-2-1, IC 6-3-1-3.5, 26 USCA 62(a),

The taxpayer protests the assessment of adjusted gross income tax on unreported gross income.

2. Adjusted Gross Income Tax-Subcontractor Expense

Authority: IC 6-3-1-3.5, 26 USCA 62(a), 26 USCA 162(a)(1).

The taxpayer protests the disallowance of certain subcontractor expenses.

STATEMENT OF FACTS

The taxpayer is a sole proprietor who installs wallpaper and other wall coverings in hotels and/or motels around the United States. After an investigation for the tax period 1998-2000, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional adjusted gross income 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. Adjusted Gross Income Tax-Unreported Gross Income

DISCUSSION

Indiana Department of Revenue assessments are presumed to be correct. The taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

An adjusted gross income tax is imposed upon all Indiana residents. IC 6-3-2-1. The Indiana adjusted gross income is determined by starting with the taxpayer's federal adjusted gross income and making certain modifications. IC 6-3-1-3.5. A taxpayer's federal adjusted gross income is determined by taking the federal gross income and making certain adjustments. 26 USCA 62(a).

The taxpayer reported his gross income for federal purposes on Schedule C of his federal tax returns. For each of the years of the tax period, the taxpayer's gross income as reported on Schedule C was less than the deposits into taxpayer's bank accounts. The excess of deposits over the income reported by the taxpayer was considered unreported gross income in the investigation. The department adjusted the taxpayer's federal gross income to reflect the unreported gross income. After adjusting the taxpayer's federal gross income, the department recalculated the amount of Indiana adjusted gross income tax due. The recalculated amounts were higher than the Indiana adjusted gross income taxes paid by the taxpayer. The department assessed the difference, interest and penalty against the taxpayer.

The taxpayer conceded that he owed Indiana adjusted gross income tax on unreported income of $3,297.38 in 1998, $4,312.77 in 1999 and $5,927.36 in 2000.

The taxpayer contends that the amounts he didn't concede are not subject to the Indiana adjusted gross income tax because they were personal loans to the business, deposits from a line of credit and repayments of loans. In support of these contentions, the taxpayer submitted extensive financial records. The taxpayer's records indicate that the taxpayer commingled his personal and business accounts.

The taxpayer contended that he transferred funds ($170,000 in 1999 and $530,000 in 2000) from his personal brokerage accounts to the checking account. He argued that these transfers were not income subject to the Indiana adjusted gross income tax. Rather, these transfers were personal loans to the corporation. Review of the taxpayer's brokerage accounts and checking accounts indicate that these deposits in the checking accounts actually originated in the taxpayer's personal brokerage accounts. The taxpayer's financial records support the contention that the 1999 deposit of $170,000 and 2000 deposit of $530,000 were actually personal loans from the taxpayer to the business. These amounts are not subject to the Indiana adjusted gross income tax. The taxpayer's protest to the assessment of tax on these amounts is sustained.

The taxpayer also contended that a 2000 deposit into the checking account represented a loan from a line of credit. The taxpayer presented documentation that the line of credit existed and that the $530,000 deposit was a loan from the line of credit. This deposit does not represent business income subject to the Indiana adjusted gross income tax. The taxpayer's protest to the assessment of tax on this amount is sustained.

The taxpayer contended that the remainder of the deposits subjected to Indiana adjusted gross income tax represented repayments of loans from various parties. The taxpayer did not present any loan documentation, interest payment schedules or any other documentation substantiating that the deposited amounts were actually loan repayments subject to the tax. The taxpayer did not sustain his burden of proving that the amounts were not subject to the Indiana adjusted gross income tax.

FINDING

The taxpayer's protest to the assessment of Indiana adjusted gross income tax on the unreported amounts represented by the taxpayer's personal loans to the corporation and/or deposits from the line of credit are sustained. The taxpayer's protest to the remainder of the assessments is denied.

2. Adjusted Gross Income Tax- Subcontractor Expense

DISCUSSION

The Indiana adjusted gross income is determined by starting with the taxpayer's federal adjusted gross income and making certain modifications. IC 6-3-1-3.5. A taxpayer's federal adjusted gross income is determined by taking the federal gross income and making certain adjustments. 26 USCA 62(a). One of the adjustments a person makes in determining the federal adjusted gross income is a deduction for "salaries or other compensation for personal services actually rendered;" 26 USCA 162(a)(1). Pursuant to this provision, the taxpayer took deductions on his federal Schedule C for subcontractor expenses. Pursuant to the investigation, the department disallowed some of these expenses. The taxpayer protested this disallowance.

During the investigation the taxpayer submitted 1099s showing payments to subcontractors. The calculator tapes totaling the 1099s for 1998 and 2000 included amounts that were not backed up by a 1099. As a result the taxpayer's totals were too high. The department adjusted the totals for 1998 and 2000 to reflect the correct totals. The taxpayer protested this adjustment. The taxpayer did not, however, present any documentation to explain why the total of subcontractor expenses reflected by 1099s was incorrect. Therefore, this point of the taxpayer's protest is denied.

The taxpayer also protested the department's failure to give it credit for subcontractor expenses that were not documented by 1099s. After the hearing, the taxpayer presented documentation other than 1099s substantiating payments to subcontractors for services rendered. These amounts totaled $45,563 for 1998, $11,035 for 1999 and $131,812 for 2000. The taxpayer's protest to the disallowance of subcontractor expense deductions in these amounts is sustained.

FINDING

The taxpayer's protest to the disallowance of subcontractor expense deductions is denied in part and sustained in part.

DEPARTMENT OF STATE REVENUE

0420030111.LOF

LETTER OF FINDINGS NUMBER: 03-0111
Use Tax: Production Exemption
Penalty: Request for Waiver
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. Use Tax—Production Exemption

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-7; IC § 6-2.5-5-5.1; 45 IAC 15-5-3(8); 45 IAC 2.2-2-1; 45 IAC 2.2-3-4; 45 IAC 2.2-5-8

Taxpayer protests the assessment of use tax, arguing that, because of the asset sale, it has no tax liability to pay. Further, taxpayer argues that the assessed items were used in production, and are therefore exempt from tax.

II. Penalty—Request for Waiver

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

Taxpayer protests the imposition of the 10% negligence penalty, and requests a waiver.

STATEMENT OF FACTS

Taxpayer was a manufacturer of printed circuit board assemblies before going out of business in March of 2002. During the audit of the tax years at issue, examination of purchase invoices revealed taxpayer was remitting estimated use tax each month. There was no audit trail to determine on what items taxpayer was remitting use tax. Also, during 1999, taxpayer leased a copier in which sales tax was not paid. The audit assessed use tax accordingly. Taxpayer went out of business because taxpayer had defaulted on loans from a bank in August of 2001. Under the loan agreement, all of taxpayer's assets were collateralized to the bank. Therefore, the bank, in a UCC Article 9 asset sale, sold all of taxpayer's assets to a newly formed corporation whose shareholders were completely different than taxpayer's. Approximately 18 months later, this corporation sold all the assets to another corporation, a subsidiary of yet another corporation. There are no common shareholders among any of these corporate entities. Further facts will be supplied as necessary.

DISCUSSION

I. Use Tax—Production Exemption

Taxpayer has offered no support for its argument that the items the audit assessed for additional use tax were consumed in the direct production of the products it sold. Instead, taxpayer has chosen to rest its entire protest on the asset sale, and the fact that the entity no longer exists. Taxpayer provided a copy of the loan agreement between itself and the bank; there is nothing relevant in that agreement that would relieve taxpayer of its use tax liability.

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 §§ 6-2.5-3-2 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. 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.

IC § 2.5-5-5.1 and 45 IAC 2.2-5-8 provide the statutory and regulatory basis for exempting from the state's gross retail and use taxes purchases of items directly used in the direct production of tangible personal property. Taxpayer has not provided any evidence to support the contention that the audit was incorrect is assessing use tax on the items in question.

FINDING

Taxpayer's protest of the assessment of use tax on items purchased, on both grounds—asset sale and the direct production exemption—is denied.

II. Penalty—Request for Waiver

Taxpayer protests the imposition of the 10% negligence penalty on the assessment.

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.

Taxpayer has not set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Therefore, given the totality of all the circumstances, waiver of the 10% negligence penalty is inappropriate in this particular instance.

FINDING

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

DEPARTMENT OF STATE REVENUE

02-20030181.LOF

LETTER OF FINDINGS NUMBER: 03-0181
Corporate Income Tax
For the Years 1995, 1996, 1997, and 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. Income Tax—Property tax add-back

Authority: IC 6-8.1-5-1(b); IC 6-3-1-3.5; Subaru-Isuzu Auto. v. Dept. of Revenue, 782 N.E.2d 1071 (Ind. Tax 2003).

Taxpayer protests the assessment by the Department in which it added back into Indiana income on the Indiana return the deduction taken on the federal return for state and local property taxes.

II. Income Tax—Tax refund carry-forward

Authority: IC 6-8.1-9-1; IC 6-8.1-9-2; IC 6-3-4-4.1(d).

Taxpayer protests the denial by the Department to carry-forward Taxpayer's tax refund beyond the three-year statute of limitations.

III. Income Tax—Enterprise Zone

Authority: IC 6-2.1-3-32; IC 6-8.1-5-1(b); 6-2.1-3-32(d).

Taxpayer protests the Department's apportionment of income earned by Taxpayer within and outside an enterprise zone.

IV. Income Tax—Interest paid by the federal government

Authority: Ind. Const. Art. 10, § 8; IC 6-2.1-3-1; IC 6-2.1-3-2; 45 IAC 1.1-3-1; Income Tax Information Bulletin #19: Government Obligations.

Taxpayer protests the assessment of income taxes on interest income earned on contracts paid by the U.S. Government.

STATEMENT OF FACTS

Taxpayer manufactures vehicles for sale to the federal government and the general public. Taxpayer maintains several office and manufacturing facilities within Indiana. Taxpayer is wholly-owned by a corporate parent. Taxpayer has two wholly owned subsidiaries. The Department conducted an audit of Taxpayer for fiscal years 1995, 1996, 1997, and 1998. While Department records indicated the timely receipt of quarterly estimated payments from Taxpayer, the Department had not received annual corporate income tax returns for the periods in question. Other facts will be provided concerning each specific protest within the discussion for that issue.

I. Income Tax—Property tax add-back

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). Subaru-Isuzu Auto. v. Dept. of Revenue, 782 N.E.2d 1071 (Ind. Tax 2003), held that a corporation's capitalized property taxes are exclusions, not deductions, under the statutory definition of adjusted gross income. Thus, capitalized property taxes are not subject to the property tax add-back provision of Indiana's income tax code.

In IC 6-3-1-3.5, the Indiana General Assembly defined **adjusted gross income** (AGI) for Indiana income tax purposes. The calculation of Indiana AGI begins with a taxpayer's federal AGI and is modified by additional Indiana deductions and the add-back of certain federal deductions. One such add-back is the inclusion back into Indiana income of state and local taxes deducted on the federal income return. *See* IC 6-3-1-3.5(b)(3). Subaru-Isuzu distinguished between capitalized property taxes and deducted property taxes. The decision held that capitalized property taxes are not added-back into Indiana AGI because the treatment of the tax is an exclusion from income—not a deduction from income. However, deducted property taxes are added-back into Indiana AGI because the treatment of the tax is not an exclusion, but a deduction. The Tax Court differentiated between exclusions and deductions in rendering the distinction in treatment of how property taxes are accounted for by a business for tax purposes.

Taxpayer expensed the property taxes it paid; it did not capitalize the property tax it paid. Because it is a deduction, it must be added-back into Indiana income to arrive at AGI.

FINDING

For the reasons stated above, Taxpayer's protest is denied

II. Income Tax—Tax refund carry-forward

DISCUSSION

The Department audited Taxpayer's corporate income tax returns for the fiscal years 1995, 1996, 1997, and 1998. At the beginning of the audit, the Department had no record of Taxpayer filing any income tax returns for 1995, 1996, 1997, and 1998. During the audit, returns marked by Taxpayer as "Duplicate Original or Return Previously Filed" were submitted to the auditor. The returns were dated February 25, 2000 and were received by the Department on February 29, 2000. Taxpayer argued the original returns had been filed timely each year and that the Department had lost each of the original returns. The IT-6 carry-forward from Taxpayer's submitted 1995 return was disallowed because the statute of limitations had expired for claiming a refund for 1995 pursuant to 6-8.1-9-1, which allows three years for a refund. No exceptions to the three year limitations apply in this case.

IC 6-8.1-9-2, **Excess tax payments; procedure for credit or refund**—which comes under Chapter 9, titled, **Refunds**—states:

> (a) If the department finds that a person has paid more tax for a taxable year than is legally due, the department shall apply the amount of the excess against any amount of that same tax that is assessed and is currently due. The department may then apply any remaining excess against any of the listed taxes that have been assessed against the person and that are currently due. If any excess remains after the department has applied the overpayment against the person's tax liabilities, the department shall either refund the amount to the person or, at the person's request, credit the amount to the person's future tax liabilities.
>
> …

IC 6-8.1-9-2 does not extend the three-year statute of limitations for claiming a refund. The provision is a procedure to instruct the Department where to apply excess tax payments; it is not a provision to extend the statute of limitations on refunds.

Form IT-6 is remitted with each quarterly estimated corporate income tax payment. Under Indiana statute, a corporation is required to remit to the Department the estimated income tax payment for the quarter. This is done by filing Form IT-6, which is due on April 20, June 20, September 20, and December 20—if the corporation files on a calendar year basis. If the corporation files on a fiscal year basis—which Taxpayer does—the estimated quarterly income tax return is due on the twentieth day of the fourth, sixth, ninth and twelfth months of the fiscal tax year. IC 6-3-4-4.1(d). Taxpayer's fiscal year is from November 1 to October 31. Taxpayer is required to file and pay the estimated quarterly income tax payments on March 20, May 20, August 20, and November 20. *Id*. The only payment applied to Taxpayer's account for fiscal year 1995 was a payment posted by the Department on August 6, 1996. According to Department records, Taxpayer failed to take credit for all estimated payment amounts credited to Taxpayer's account. The main discrepancy occurred in the fourth quarter of 1997; Taxpayer took credit for $34,455, but the Department's records show a payment of $263,095.

The annual corporate income tax return, IT-20, is required to be filed on or before the fifteenth day of the fourth month following the close of the tax year. For calendar year filers, the due date is April 15. For Taxpayer, the due date is February 15. An extension to file is permitted. The Department normally recognizes the Internal Revenue Service's application for automatic extension of time to file—Form 7004. A taxpayer must attach the federal extension form when the Indiana return is filed. If a federal extension is not needed, a corporation may request, in writing, from the Indiana Department of Revenue, Corporate Income Tax Section, an extension of time to file. In general, the federal government grants six month extensions. The due date for Taxpayer's return would have been August 15 of the year after the close of the fiscal year. Taxpayer's return for fiscal year 1995 would have been due by February 15, 1996—and August 15, 1996, if an extension was filed. When Taxpayer submitted copies of its Indiana income tax returns, Form 7004 was attached to each. Based on this, Taxpayer has indicated that it sought extensions for each of the returns in question. This establishes the August 15 due date.

Taxpayer argues that it filed its annual IT-20 corporate returns in a timely manner—before the due date. Taxpayer submitted photocopies of the return receipt for certified mail. The photocopies were low quality reproductions. The dates listed on the receipts—as best read—are: August 14, 1997; August 6, 1998; and August 3, 1999. The month of August was clearly legible on the photocopies. Taxpayer was unable to supply a return receipt for certified mail for the 1995 return—which according to the pattern Taxpayer is trying to establish, would be August 1996. The receipts are unconvincing evidence that the IT-20s were filed in a timely manner because the receipt does not list the contents of the mailing, nor does the address to which the mailing was sent offer an insight as to the nature of the contents.

Taxpayer has not presented reliable evidence of the timely filing of IT-20 returns. The statute of limitations for filing a claim for refund is three years. The submission of the 1995 return, dated February 25, 2000 and received by the Department on February 29, 2000 places the claim for refund outside the three year statute of limitations.

FINDING

For the reasons stated above, Taxpayer's claim for a tax-refund carry-forward is denied.

III. Income Tax—Enterprise Zone

DISCUSSION

Taxpayer operates several office and manufacturing sites within Indiana. One manufacturing site is located within a designated Enterprise Zone. IC 6-2.1-3-32, which has since been repealed, stated that qualified increased enterprise zone gross income received by a taxpayer is exempt from the Gross Income Tax. Taxpayer failed to take the exemption in 1995. In 1996, 1997, and 1998, Taxpayer deducted all sales receipts shipped from the facility located within the enterprise zone. Audit adjusted the Enterprise Zone Credit. Taxpayer disagrees with this adjustment.

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). 6-2.1-3-32(d) states that if business income derived from sources within an enterprise zone cannot be separated from business income derived from sources outside the enterprise zone—then the business income derived from sources inside the enterprise zone is determined by an apportionment formula. A reading of the statute supports apportionment as an assessment method **if** the incomes cannot be differentiated. Taxpayer is able and has separated its income from within the enterprise zone from the income outside the enterprise zone. Taxpayer is entitled to the presumption of segregation of income—so long as Taxpayer can and has separated the income. The interpretation of IC 6-2.1-3-32(d) indicates that separation of income is the default assessment. Taxpayer has done so, and is thus entitled to the deduction; assessment based on apportionment is not appropriate in this case.

FINDING

For the reasons stated above, Taxpayer's protest is sustained.

IV. Income Tax—Interest paid by the federal government

DISCUSSION

Taxpayer sold vehicles to the United States government under contract and was paid interest on the accounts receivable billed amount. Payment was made to Taxpayer directly by the U.S. Government at rates agreed to by the U.S. Government. Taxpayer is protesting the characterization of this interest income by the Department as taxable on Taxpayer's Gross Income Tax returns. Taxpayer seeks to have the interest income characterized as tax-exempt.

IC 6-2.1-3-1, which has since been repealed, stated:

Interest or other earnings paid upon bonds or other securities issued by the United States are exempt from gross income tax to the extent the United States Constitution prohibits the taxation of that gross income.

Article 10, § 8 of the Indiana Constitution permits the General Assembly to levy and to collect a tax upon income—**from whatever source derived**—at rates it prescribes, in the manner it prescribes, and with the exemptions it prescribes by law. IC 6-2.1-3-2, which has since been repealed, stated:

Gross income derived from sales to the United States government is exempt from gross income tax to the extent the state of Indiana is prohibited by the United States Constitution from taxing that gross income.

Taxpayer derived substantial income from sales of military vehicles to the United States Government. Taxpayer is not arguing that the income derived from those sales is prohibited from income taxation; taxpayer focuses on seeking an exemption on the portion of the income from sales derived from interest paid on outstanding accounts receivable. For the many years that the gross income tax statutes were in force, receipts derived from contracts with the federal government were properly taxable because it was determined that it is not the United States government—but the contractor—who is burdened with the tax. 45 IAC 1.1-3-2 fortifies this. It states:

(a) Gross income derived from sales to the federal government is taxable unless such income is prohibited from taxation by the United States Constitution.

(b) The income from such sales is taxable even though the gross income tax is paid indirectly by the federal government, either as a reimbursement or as an inclusion in the purchase price.

45 IAC 1.1-3-1 states:

(a) Earnings paid to holders of securities issued by the federal government are exempt from the gross income tax to the extent the United States Constitution prohibits the states from taxing such income.

(b) As used in this section, "earnings" means the amount paid less the expenses related to such income. The term does not include the gain derived from the sale of such securities.

(c) As used in this section, "securities issued by the federal government" means direct obligations issued by a federal agency. The term does not include the following:

(1) Securities issued by an entity sponsored by, but not a part of, the federal government.

(2) Securities guaranteed by, but not issued by, an agency of the federal government.

(d) The exemption provided by subsection (a) applies to the proportionate share of earnings received by a taxpayer from an **investment fund** that invests in federal government securities. In other words, the exemption passes through to the ultimate taxpayer.

[emphasis added]

The regulation clarifies that "security" refers to something held in an investment fund. It also includes "direct obligations issued by a federal agency." Taxpayer seeks to include interest paid on an account receivable as a "direct obligation." Such an expansive inclusion also would sweep in the earnings from the sale of the vehicles. That is an absurdity. An interpretation of the uniform application of the statutory and regulatory tax scheme does not support a statement that Indiana intends to tax earnings to the full extent allowed under the federal constitution and a statement that sales to the United States government are taxable—while also supporting statutes and regulations that would summarily exclude those earnings. That is contradictory.

The Department clearly stated on page 3 of the July 1992 version of **Income Tax Information Bulletin #19: Government Obligations** that interest or dividends received on "promissory notes of a federal instrumentality" are not exempt from gross income tax or adjusted gross income tax. Taxpayer referenced Bulletin #19 in the brief submitted to the Department to outline its tax protests. Taxpayer engaged in an elaborate discussion of Bulletin #19, outlining federal organizations that issue tax exempt obligations and those that do not. But Taxpayer fails to acknowledge the clear and simple statement on page 3 of the Bulletin confirming that interest on promissory notes of the federal government is not tax exempt income.

Interest received on the payment of an accounts receivable paid by the United States Government is taxable income in Indiana.

FINDING

For the reasons stated above, Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20030246.LOF

LETTER OF FINDINGS NUMBER: 03-0246
Gross Retail & Use Taxes: Out of State Vendor
Penalty: Request for Waiver
For Years 1998-2002

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 & Use Taxes—Out-of-state vendor

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1(c) IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-6; IC

§ 6-2.5-3-7; IC § 6-2.5-4-1; 45 IAC 15-5-3(8); 45 IAC 2.2-2-1; 45 IAC 2.2-3-4; 45 IAC 2.2-3-20; 45 IAC 2.2-5-54

Taxpayer, a Kentucky corporation, protests the Department's assessment of Indiana's use tax on sales to Indiana customers where the only presence taxpayer shows in the state of Indiana is taxpayer's delivery trucks, used to deliver the tangible personal property to its Indiana customers.

II. Penalty—Request for waiver

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

Taxpayer protests the imposition of the 10% negligence penalty, and requests a waiver.

STATEMENT OF FACTS

Taxpayer is a regular Kentucky corporation primarily engaged in the retail sale of new and used pianos. Taxpayer delivers pianos to Indiana customers via its own delivery trucks. Taxpayer did not charge Indiana's gross retail tax to its Indiana customers, believing that it was not a retail merchant doing business in the state of Indiana. Further facts will be added as necessary.

I. Gross Retail & Use Taxes—Out-of-state vendor

DISCUSSION

Taxpayer is a Kentucky corporation, in business since 1971, and has paid Kentucky gross retail tax since then on sales of pianos to Kentucky customers. Taxpayer has kept itself informed of its ongoing state and federal tax obligations over the years, including attempting to find out what, if any, tax obligations taxpayer needed to satisfy for its sales to Indiana customers. Based on taxpayer's reading of various Indiana publications, personal experience in purchasing tangible personal property from out-of-state vendors, and phone calls to the Indiana Department of Revenue, taxpayer concluded that it was not obligated to collect and remit Indiana gross retail tax on pianos sold to Indiana customers and delivered to Indiana customers in taxpayer's own delivery trucks. The entry of taxpayer's delivery trucks into Indiana is taxpayer's only contact with the state of Indiana.

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 §§ 6-2.5-3-2 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 if 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 statutes at issue, cited *supra*, seem clear cut when applied to "retail transactions made in Indiana" by retail merchants located in Indiana. (IC § 6-2.5-2-1(a)). A common sense application of subsection b is perfectly reasonable: a purchaser making a retail transaction in Indiana is "liable for the tax on the transaction and... shall pay the tax to the retail merchant" who "shall collect the tax as agent for the state." The phrase that causes complexity for both retail merchants and taxpayers is "except as otherwise provided in this chapter." Taxpayer in this protest is not "a retail merchant located in Indiana." What, exactly, is taxpayer's status?

IC § 6-2.5-1-2(a) defines a "retail transaction" as a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1...." Subsection b of IC § 6-2.5-4-1 provides in pertinent part:

> A person is engaged in selling at retail when, in the course of his regularly conducted trade or business, he:
>
> (1) acquires tangible personal property for the purpose of resale; and
>
> (2) transfers that property to another person for consideration.

Taxpayer certainly fits within this definition. However, a refinement of that definition occurs in IC § 6-2.5-3-1(c):

> "A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property for use, storage, or consumption in Indiana and who maintains:
>
> (1) an office, place of distribution, sales location, sample location, warehouse, storage place, or other place of business which is located in Indiana and which the retail merchant maintains, occupies, or uses, either permanently or temporarily, either directly or indirectly, and either by himself or through an agent or subsidiary; or
>
> (2) a representative, agent, salesman, canvasser, or solicitor who, while operating in Indiana under the authority of and on behalf of the retail merchant or a subsidiary of the retail merchant, sells, delivers, or takes orders for sales of tangible personal property to be used, stored or consumed in Indiana.

Information Bulletin # 37 (Sales Tax) has undergone a number of revisions over the years taxpayer has been in business, and twice during the tax years at issue. The Bulletin in effect until May of 1988 provides in pertinent part:

> An out-of-state vendor will be deemed to be engaged in business in Indiana as to required [sic] such vendor to become registered as an Indiana Retail Merchant and charge Indiana Use Tax on tangible personal property delivered in Indiana where

the out-of-state vendor's only Indiana activity is as mentioned in [IC § 6-2.5-3-1(c)]. This includes:

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

(emphasis in original)

The Bulletin in effect until January of 2003 provides in pertinent part:

An out-of-state vendor is engaged in business in Indiana and must be registered as an Indiana retail Merchant and charge Indiana Use Tax on tangible personal property delivered in Indiana if the out-of-state vendor's only Indiana activity is within [IC § 6-2.5-3-1(c)]. This activity includes:

(emphasis in original). The remainder of the section is identical to the previous Bulletin.

The Bulletin in effect until August of 2004 is identical to language already quoted. The Bulletin currently in effect has changes in the Definition of Indiana Retail Merchant, adding two categories to the two previously quoted. The two additional categories include being closely "related to another person that maintains a place of business in Indiana," or entering "into a contract to provide property or services to a state agency or a state educational institution." With respect to out-of-state vendors, they are "engaged in business in Indiana and must be registered" if their only Indiana activity falls within one of the now four categories. The section goes on to state: "This activity may include any of the following:", where the same five items appear as before. (emphasis added).

The regulation at issue, 45 IAC 2.2-5-54, *infra*, imposes either gross retail or use tax; 45 IAC 2.2-5-54(a) provides that sales of "tangible personal property which are delivered to the purchaser in Indiana are subject to gross retail or use tax, except (citation omitted) for certain sales of motor vehicles and aircraft."

The Department concludes that during the tax years at issue, taxpayer was a retail merchant delivering tangible personal property into Indiana, and therefore should have collected and remitted to the Department sales tax on sales to Indiana residents. Since taxpayer did not, taxpayer is liable for the use tax.

FINDING

Taxpayer's protest concerning the assessment of Indiana's use on sales to Indiana customers, where the only presence taxpayer shows in the state of Indiana is taxpayer's delivery trucks, is denied.

II. Penalty—Request for waiver

DISCUSSION

Taxpayer protests the imposition of the 10% negligence penalty on the assessment.

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.

Taxpayer has set forth a basis whereby the Department could conclude taxpayer exercised the degree of care statutorily imposed upon an ordinarily reasonable taxpayer. Therefore, given the totality of all the circumstances, waiver of the 10% negligence penalty is appropriate in this particular instance.

FINDING

Taxpayer's protest concerning the proposed assessment of the 10% negligence penalty is sustained.

DEPARTMENT OF STATE REVENUE

0420030399.LOF

LETTER OF FINDINGS: 03-0399
Gross Retail Tax
For 1999 and 2000

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

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

ISSUES

I. Automobile Sales – Gross Retail Tax.

Authority: IC 6-2.5-2-1(a, b); IC 6-2.5-6-1(a); IC 6-2.5-9-3; IC 6-8.1-5-1; IC 6-8.1-5-1(a); IC 6-8.1-5-1(b); 45 IAC 2.2-3-22.

Taxpayer maintains that he is not responsible for paying his S-Corporation's sales tax because the automobile sales – on which the sales tax was calculated – were neither made by nor authorized by taxpayer.

II. Twenty-Percent Penalty.

Authority: IC 6-8.1-10-2.1(b); IC 6-8.1-10-2.1(d); IC 6-8.1-10-3(b).

Taxpayer argues that the twenty-percent "failure-to-file" penalty should be abated.

STATEMENT OF FACTS

Taxpayer is an S-Corporation, is located in Indiana, and is in the business of selling used cars. The S-Corporation has a single shareholder. Even though the S-Corporation is technically the "taxpayer," for clarity's sake, the sole shareholder is hereinafter referred to as the "taxpayer" and his used car business is referred to as the "S-Corporation."

Taxpayer describes his S-Corporation as a "buy here – pay here" operation. According to taxpayer, most of the vehicles cost about $2,000. This means a customer could both purchase and finance a car through taxpayer's S-Corporation. The customer could buy a car from taxpayer's business, make an initial payment at the time of purchase, and subsequently make weekly payments directly to the S-Corporation. According to taxpayer – given the nature of his "buy here – pay here" car business – it is unusual for a retail customer to ever pay the full price of a purchased car. Taxpayer states that the cars sold by his business are typically repossessed, or the cars fail before the purchase price is fully paid.

Taxpayer started his business in 1997 and ran the business with occasional help from his brother. According to taxpayer, during 1998 brother expressed an interest in taking over the entire business; taxpayer turned control of the S-Corporation over to brother with the apparent understanding that brother would compensate taxpayer for the cost of the then existing inventory of cars.

Taxpayer indicates that he contacted the Department of Revenue (Department) and closed out his "withholding accounts" on December 31, 1998. One of the S-Corporation's two sales tax accounts was also closed at the end of 1998. The S-Corporation's remaining sales tax account remained current because it was assigned to the specific location from which brother continued to operate the used car business. That second account was not closed until the end of 2000. Eventually, the Department issued a letter which stated that "as of April 29, 2003, [S-Corporation] is closed with the state of Indiana."

After brother took over the used car business in 1998, he began to sell cars under the auspices of taxpayer's S-Corporation. According to taxpayer, brother later denied any responsibility for paying income tax on the money he received from operating the business. Brother apparently believed that the S-Corporation owed the income tax and any other unpaid tax.

Taxpayer had his accountant prepare a corporate tax return for 1999 and 2000 based upon partial records supplied by brother. According to brother, all original sales records "were destroyed by rats and rain" and were thrown away. The Department of Revenue (Department) conducted a sales and income tax audit investigation of taxpayer's available business records and tax returns. The Department concluded that the taxpayer owed both sales and additional income tax and sent taxpayer notices of "Proposed Assessment."

Taxpayer disagreed with the Department's conclusions and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer explained the basis for his protest. This Letter of Findings – addressing the *sales tax* issue – results.

DISCUSSION

I. Automobile Sales – Gross Retail Tax.

In Indiana, retail merchants are responsible for collecting gross retail (sales) tax on behalf of the state. IC 6-2.5-2-1(a, b) states that, "An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana. The 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.*" (*Emphasis added*).

No sales tax returns were originally filed during 1999 and 2000, the years during which brother purportedly operated taxpayer's S-Corporation. However, the audit investigation – by checking records with the Indiana Bureau of Motor Vehicles (BMV) – found that cars were sold under the auspices of the S-Corporation during 1999 and 2000.

The audit investigation assessed taxpayer for unpaid sales tax under authority of IC 6-8.1-5-1 which states in part that, "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department." IC 6-8.1-5-1(a). In order to determine the amount of sale tax due, the audit employed information supplied by the BMV; for example, if the BMV recorded that a customer purchased a $2,000 car from taxpayer's S-Corporation, the audit calculated that taxpayer's S-Corporation had collected 5 percent of $2,000 in sales tax and owed $100 in sales tax.

Taxpayer's argument – that his customers rarely paid off the full amount of the price of the used cars – is irrelevant because the S-Corporation collected the sales tax on the entire amount of the sale "up front." If the S-Corporation sold customer a $2,000 car but agreed to accept a down payment with weekly payments to follow, the S-Corporation would have nonetheless collected the entire $100 at the time of the initial contract otherwise the customer could not have received a license for the car. 45 IAC 2.2-3-22 states as follows:

> No vehicle shall be licensed by Indiana for highway use in Indiana unless the registered owner thereof shall present to the licensing agency at the time such vehicle is first licensed in his name proper evidence, as prescribed by the Department, of the payment of the state gross retail tax or use tax owing in respect to his acquisition of ownership of such vehicle, or shall then pay to such agency upon forms and receipts prescribed by the Department, the amount of any such tax owing and unpaid on the purchase of such vehicle.

The sales tax assessment was based upon the amount of sales tax that should have been collected by the S-Corporation at the time the initial sale to the customer was completed. The fact that the customer stopped making weekly payments or simply abandoned the car does not change the fact that the S-Corporation was expected to collect the entire amount of sales tax up front on each sales transaction. Having collected the sales tax, that amount was held in trust on behalf of Indiana and should have been timely forwarded to the Department. *See* IC 6-2.5-6-1(a); IC 6-2.5-9-3.

Taxpayer also contests the audit's conclusions by arguing that the audit misinterpreted information obtained from the BMV. Taxpayer points to the S-Corporation's purported sale of a $15,000 vehicle. Taxpayer indicates that this particular sale is suspect because of the high dollar value of the vehicle and because "the record keeping behind the sale also raises questions as to the true identity of the individual selling the car." Taxpayer suspects that the sale of the $15,000 vehicle was actually a private transaction made by an unknown person who improperly used the S-Corporation's identity to facilitate the sale.

Taxpayer also points to BMV records indicating that the S-Corporation sold a $6,000 vehicle. Again, taxpayer points out that the sales price for this particular vehicle is unusually high given the nature of the S-Corporation's "buy here – pay here" business and that the transaction took place more than five months after the S-Corporation closed its physical location.

The Department does not challenge taxpayer's assertion that at least two of the sales transactions took place under unusual or suspect conditions. However, the audit arrived at its conclusion based upon the "best information available." IC 6-8.1-5-1(a). Given the lack of more authoritative records, the Department can find no fault in the audit's attempt to piece together the details of sales transactions which took place two or three years earlier. "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 raised facially legitimate questions concerning two of the sales attributable to the S-Corporation; however, taxpayer has not his burden of "*proving* that the proposed assessment is wrong...." Id. (*Emphasis added*).

Brother may have assumed operational control of the car sales business during this period, but the S-Corporation remained as the entity under which brother conducted the business. As sole officer and shareholder of the S-Corporation, taxpayer remained responsible for collecting and forwarding to the Department the sales tax collected on each transaction. As set out in IC 6-2.5-9-3, "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. (*Emphasis added*).

Brother conducted an auto sales business under the auspices of taxpayer's S-Corporation. The audit investigation calculated the amount of 1999 and 2000 sales based upon the best information available at the time the audit was conducted. The S-Corporation was responsible for collecting and forwarding the sales tax to the state. As sole shareholder of the S-Corporation, taxpayer is now personally responsible for those taxes.

FINDING

Taxpayer's protest is respectfully denied.

II. Twenty-Percent Penalty.

The Department assessed a twenty-percent penalty on the ground that taxpayer failed to file sales tax returns during 1999 and 2000 and because the Department prepared sales tax returns on taxpayer's behalf. The Department did so under authority of IC 6-8.1-10-3(b) which states that, "If the department prepares a person's return under this section, the person is subject to a penalty of twenty percent (20%) of the unpaid tax. In the absence of fraud, the penalty imposed under this section is in place of and not in addition to the penalties imposed under any section."

Taxpayer cites to IC 6-8.1-10-2.1(d) asking that the Department exercise its discretion to abate the twenty-percent penalty. That particular section states that, "If a person subject to the 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 tax held in trust, or pay the deficiency determined by department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty." Id. Taxpayer believes it had reasonable cause for failing to pay sales tax because he had turned over operation of the S-Corporation to brother.

Taxpayer's reliance on IC 6-8.1-10-2.1(d) is unfounded because that portion of the law permits the Department to abate the ten-percent "negligence" penalty assessed under IC 6-8.1-10-2.1(b). The twenty-percent "failure to file" penalty is an entirely different matter. Once the twenty-percent penalty is assessed, the Department is without authority to abate the amount.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0120030400.LOF

LETTER OF FINDINGS: 03-0400
Adjusted Gross Income Tax
For 1999 and 2000

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

ISSUES

I. Money Received from S-Corporation – Adjusted Gross Income Tax.

Authority: IC 6-8.1-5-1; IC 6-8.1-5-1(a); IC 6-8.1-5-1(b); 45 IAC 3.1-1-66.

Taxpayer argues that he did not receive income from his S-Corporation during 1999 and 2000.

II. 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 because he was not responsible for car sales made during 1999 and 2000 and had no control over his S-Corporation during that time, he should not be penalized.

STATEMENT OF FACTS

Taxpayer incorporated his used car business in Indiana electing S-Corporation status. Taxpayer is the sole shareholder of the business. The used car business operated as a "buy here – pay here" operation in which a customer would both purchase and finance the car through taxpayer's S-Corporation. According to taxpayer, most of the vehicles cost about $2,000.

Taxpayer stated that he ran the business with the help of his brother until late 1998. According to taxpayer, brother expressed interest in taking over the business in 1998, and taxpayer permitted brother to do so.

Brother began to sell cars under the auspices of taxpayer's S-Corporation. According to taxpayer, brother later denied any responsibility for paying income tax on the money he received from operating the business. Brother apparently believed that the S-Corporation owed the income tax.

Taxpayer had his accountant prepare a corporate tax return for 1999 and 2000 based upon records supplied by brother. The Department of Revenue (Department) conducted a sales and income tax audit investigation of taxpayer's business records and tax returns. The Department concluded that the taxpayer owed both sales and additional income tax and sent taxpayer notices of "Proposed Assessment."

Taxpayer disagreed with the Department's conclusions and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer explained the basis for his protest. This Letter of Findings – addressing the *income tax* issue – results.

DISCUSSION

I. Money Received from S-Corporation – Adjusted Gross Income Tax.

An S corporation normally does not pay income tax. 45 IAC 3.1-1-66 states that, "Corporations electing Subchapter S status under Internal Revenue Code § 1372... are exempt from adjusted gross and supplemental net income tax on all income except capital gains...." Rather than taxing the income at the business level, an S corporation's income is passed through to the shareholders. The shareholders then must report the income on their own income tax return. 45 IAC 3.1-1-66 states that, "Subchapter S corporation shareholders are taxed on their distributive shares of income at the individual income tax rate." This is the rule which the audit followed; the audit assessed taxpayer additional income tax based upon the amount of money which the S-Corporation purportedly received from selling cars during 1999 and 2000.

Taxpayer maintains that the audit erred when it determined the amount of income received from the S-Corporation. Taxpayer states that the audit erred by including the total sales price of the cars sold during 1999 and 2000. Taxpayer states that – given the nature of the "buy here – pay here" car business – it is unusual for a retail customer to ever pay the full price of a purchased car. Taxpayer states that the cars sold by his business are typically repossessed or the cars fail before the purchase price is fully paid. For example, customer agrees to purchase a $2,000 car, makes a limited series of weekly payments, but then stops making payments either because the customer is no longer able to afford the payments or because the car simply stops working. In either case, taxpayer states that it is unusual for a customer to ever pay $2,000 for a car which cost $2,000.

The audit based its income tax calculation based upon 1999 and 2000 Bureau of Motor Vehicles (BMV). The audit made at least one correction of the information supplied by the BMV and provided taxpayer an opportunity to provide more detailed and presumably more accurate sales information. According to brother – who purportedly operated the car sales business during 1999 and 2000 – the original sales records “were destroyed by rats and rain” and were thrown away.

The audit investigation assessed taxpayer for unpaid income tax under authority of IC 6-8.1-5-1 which states in part that, “If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department.” IC 6-8.1-5-1(a).

The Department does not quarrel with taxpayer’s description of his “buy here – pay here” car business. However, taxpayer has provided no specific information which would justify altering the audit’s determination as to the amount of money the S-Corporation earned from selling cars during 1999 and 2000. The income tax assessment was based upon the “best information available to the department.” Id. Given the lack of more complete records, the Department can find no fault in the audit’s attempt to piece together the details of sales transactions which took place two or three years earlier. “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 that burden.

However, taxpayer sets out a secondary argument. Taxpayer points that he closed out the S-Corporation’s sales tax account and withholding account effective December 31, 1998. On the ground that the sales tax and withholding account was closed at the end of 1998, the Department should have realized that “the company was no longer a party-in-interest to the auto sales business.” Taxpayer argues that because his S-Corporation “did not receive the economic benefit of the sales conducted in 1999 and 2000 by [brother], then [taxpayer] as sole share of [S-Corporation], did not receive any benefit either.” Taxpayer is correct in noting that he notified the Department to close out one of the S-Corporation’s sales tax accounts and the S-Corporation’s withholding account. However, the S-Corporation maintained two sales accounts with the Department only one of which was closed in December 1998. The remaining sales tax account – representing the second of the two locations from which the S-Corporation originally conducted business – was not closed out until 2000. As far as the Department was concerned, the S-Corporation remained a viable entity in the business of buying and selling used cars during 1999 and 2000. Brother may have assumed operational controls of the car sales business during this period, but the S-Corporation remained as the entity under which brother conducted the business. As the sole shareholder of that S-Corporation, any income received by the S-Corporation “flowed through” to taxpayer.

FINDING

Taxpayer’s protest is respectfully denied.

II. Ten-Percent Negligence Penalty.

Taxpayer maintains that “it is patently unfair to assess the... a penalty for not reporting the income imputed by the Department, when [taxpayer] had no control over the operations of the auto business that [brother] was operating, and did not receive any economic benefit of the imputed sales.”

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 must question whether taxpayer’s business decisions constitute the “reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer.”

FINDING

Taxpayer’s protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0320040039.LOF

LETTER OF FINDINGS NUMBER 04-0039
RESPONSIBLE OFFICER
SALES TAX and WITHHOLDING TAX
For Tax Period 1993-1998

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 specific issues.

ISSUE

Sales and Withholding Tax -Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b).

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

STATEMENT OF FACTS

The taxpayer was a director and vice- president of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana for the tax period 1993-1998. The Indiana Department of Revenue (department) assessed the outstanding corporate withholding and sales taxes, interest, and penalty against the taxpayer personally. The taxpayer protested the assessment and a telephone hearing was held. This Letter of Findings results.

Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

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

An individual who:

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

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

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

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."

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. The taxpayer bears the burden of proving that the assessment is incorrect. IC 6-8.1-5-1 (b).

The taxpayer contended that she was not responsible for the payment of the taxes to the state because she did not have control over the financial affairs of the corporation. The taxpayer did not offer adequate documentation to sustain her burden of proving that she was not responsible for the remittance of the trust taxes to the state.

The taxpayer also argued that since the corporation and its debts were awarded to her ex-husband at the time of the dissolution of their marriage, she does not owe the trust taxes to the state. The department disagrees with this conclusion. The settlement of the dissolution proceedings is between the taxpayer and her ex-spouse. Their agreement does not dissolve the taxpayer's liability for taxes or preclude the state from collecting from her. She is still personally responsible for the payment of the trust taxes to the state.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420050050.LOF

LETTER OF FINDINGS NUMBER: 04-0050

Sales and Use Tax

For Tax Years 2003

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

ISSUE

I. Sales and Use—Aircraft Purchase

Authority: Gregory v. Helvering, 293 U.S. 465 (1935); IC 6-2.5-2-1; IC 6-2.5-5-27; IC 6-6-6.5-9; 45 IAC 2.2-5-15; 45 IAC 2.2-4-27; Horn v. Commissioner of Internal Revenue, 968 f.2d 1229 (D.C. Cir. 1992); Commissioner v. Transp. Trading and Terminal Corp., 176 F.2d 570 (2nd Cir. 1949); Black's Law Dictionary (7th ed. 1999)

Taxpayer protests the imposition of use tax on the purchase of an aircraft.

STATEMENT OF FACTS

Taxpayer purchased an aircraft, but did not pay sales tax on the purchase. Taxpayer claimed that the purchase was exempt from sales tax because the aircraft was to be used for rental or leasing to others. The Indiana Department of Revenue ("Department") conducted an investigation regarding the rental or leasing of the aircraft and determined that there was insufficient evidence to support the claim of rental or leasing as the use of the aircraft. As a result of this investigation, the Department denied the claim for exemption and issued a proposed assessment for use tax on the purchase of the aircraft. Taxpayer protests the assessment. Further facts will be supplied as required.

I. Sales and Use—Aircraft Purchase

DISCUSSION

Taxpayer purchased an aircraft for two hundred fifteen thousand dollars ($215,000.00) and claimed a sales tax exemption. The Department compared a non-related aircraft rental company's rate for the same type of aircraft, to the rate taxpayer charged for its aircraft. The rental rate was far below the market rate. The Department determined that taxpayer was not renting the aircraft and denied the exemption. Taxpayer protests the denial.

Taxpayer offers several arguments in support of its claim for the exemption. First, taxpayer refers to IC 6-6-6.5-9(a)(4), which states:

(a) The provisions of this chapter pertaining to registration and taxation shall not apply to any of the following;

…

(4) An aircraft owned or operated by a person who is either an air carrier certified under Federal Air Regulation Part 121 or a scheduled air taxi operator certified under Federal Air Regulation Part 135, unless such person is a corporation incorporated under the laws of the state of Indiana or an individual who is a resident of Indiana.

Taxpayer states that IC 6-6-6.5-9(a)(4) provides that an aircraft owned or operated by a person who is either an air carrier certificated under Federal Air Regulation Part 121 or an air taxi operator certified under Federal Air Regulation Part 135, is exempt to state sales and use tax. Taxpayer is incorrect.

As plainly stated in IC 6-6-6.5-9(a), "The provisions of this chapter pertaining to registration and taxation shall not apply to any of the following;". The chapter referred to is chapter 6.5 of article 6 of title 6 of the Indiana Code. Chapter 6.5 of article 6 of title 6 deals with aircraft license excise tax. IC 6-6-6.5-9(4) only applies to aircraft license taxes, not the sales tax which is the tax at issue in this protest. Therefore, taxpayer's reliance on that subsection is misplaced.

The sales tax is established at IC 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The 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.

Sales tax is due on retail transactions, such as the purchase or rental of an aircraft. Neither taxpayer nor its customer provided documentation establishing exempt use of the aircraft. The Department considered this insufficient to prove that the aircraft was used for renting or leasing. The Department never received any documentation establishing that any other third party used the aircraft. This contributed to the Department's determination that taxpayer was not renting or leasing the aircraft.

Next, taxpayer refers to IC 6-2.5-5-27, which states:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

Taxpayer claims that this exemption applies to its purchase of the aircraft.

By taxpayer's own explanation, it did not directly use the aircraft in providing public transportation. Taxpayer states that it rented to another business which in turn provided public transportation. The exemption, if applicable at all, would apply to taxpayer's customer since it is the one claiming to directly use the aircraft in public transportation. Therefore, the exemption found in IC 6-2.5-5-27 is not applicable to taxpayer.

Next, taxpayer states that the aircraft was used for rental to others, and therefore was exempt from sales tax under 45 IAC 2.2-5-15, which states:

(a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.

(b) General rule. Sales of tangible personal property for resale, renting or leasing are exempt from tax if all of the following conditions are satisfied:

(1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;

(2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and

(3) The property is resold, rented or leased in the same form in which it was purchased

(c) Application of general rule.

(1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling,

renting or leasing the property. This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendition of services or performance of work with respect to such property.

(2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.

(3) The property must be resold, rented or leased in the same form in which it was purchased.

Taxpayer states that it was in the business of leasing aircraft and therefore qualifies for the exemption provided by 45 IAC 2.2-5-15. 45 IAC 2.2-5-15(b) requires that three conditions be met in order to qualify for the exemption. One condition is 45 IAC 2.2-5-15(b)(2) states that the purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. The Department notes that a single individual signed as both lessee and lessor on the leasing agreement. Combined with the rental rate far below normal market rates, this shows that taxpayer was not occupationally engaged in reselling, renting or leasing the aircraft in the regular course of its business. Under these circumstances, taxpayer does not satisfy 45 IAC 2.2-5-15-(b)(2) and does not qualify for the leasing exemption.

Next, taxpayer explains that its customer paid a lower lease rate because it was paying other expenses which, when added to the lease rate, brought the total customer paid closer to comparable lease rates. Taxpayer explains that, under the "dry lease", the lessee was responsible for paying expenses such as insurance, hangar, fuel, maintenance and crew. This supposedly brought the leasing costs to appropriate levels. 45 IAC 2.2-4-27(d) states in relevant part:

The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

(1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental or lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals.

…

This regulation means that taxpayer was required to collect sales tax on all consideration it received from its customer for lease of the aircraft. Taxpayer was not collecting sales tax on the consideration it received from its customer when the customer paid for insurance, hangar, fuel, maintenance and crew. This is further evidence that taxpayer's relationship with its customer was not a valid lessor/lessee relationship.

Next, taxpayer states that it only created the leasing corporation in order to avoid liability in the event of a catastrophic loss. Taxpayer explained that it was difficult if not impossible to purchase enough insurance to cover potential liabilities from a crash, so it created the lessee corporation to shelter the lessor corporation from those potential liabilities. While this may or may not be the case, it is ultimately irrelevant since it does not explain why the rental rate was set at a fraction of the rate charged for comparable aircraft in the area. The fact that the rental rate was so low makes it plain that the rental agreement was set up to avoid sales tax, since the rental rate would have nothing to do with potential liabilities from a crash.

Finally, the Department notes that a lease is defined as "[a] contract by which the rightful possessor of personal property conveys the right to use that property in exchange for consideration." Black's Law Dictionary 898 (7th ed. 1999). The parties' agreement reflected the fact that pilot/lessee never expected to pay consideration sufficient to justify recognizing the agreement as a lease. Instead, the lease agreement falls squarely within the definition of a "sham transaction." The "sham transaction" doctrine is long established both in state and federal tax jurisprudence dating back to Gregory v. Helvering, 293 U.S. 465 (1935). In that case, the Court held that in order to qualify for a favorable tax treatment, a corporate reorganization must be motivated by the furtherance of a legitimate corporate business purpose. Id at 469. A corporate business activity undertaken merely for the purpose of avoiding taxes was without substance and "[t]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." Id at 470. The courts have subsequently held that "in construing words of a tax statute which describe [any] commercial transactions [the court is] to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation." Commissioner v. Transp. Trading and Terminal Corp., 176 F.2d 570, 572 (2nd Cir. 1949), *cert. denied*, 338 U.S. 955 (1950). "[t]ransactions that are invalidated by the [sham transaction] doctrine are those motivated by nothing other than the taxpayer's desire to secure the attached tax benefit" but are devoid of any economic substance. Horn v. Commissioner of Internal Revenue, 968 f.2d 1229, 1236-7 (D.C. Cir. 1992). The rental/lease rate charged by taxpayer for the aircraft in question here can only be considered a "sham transaction". The only reason to charge a fraction of the fair market rate for rental/lease of the aircraft and arrange for alternate compensation is to avoid tax. Since taxpayer was not involved in a valid lease or rental agreement with its sole customer the Department was correct to deny taxpayer's claim for the rental/lease exemption.

In conclusion, taxpayer's reference to IC 6-6-6.5-9(a)(4) is inapplicable since it deals with aircraft licensing tax rather than sales tax. Taxpayer was not directly providing public transportation and was not eligible for the exemption described in IC 6-2.5-5-27. Taxpayer was not occupationally engaged in renting to others and does not qualify for the exemption found in 45 IAC 2.2-5-15. It is irrelevant if the leasing corporation was formed to shield taxpayer from liability in the event of a crash, since that would have no influence on the rental rate. Taxpayer was not collecting sales tax on the consideration it received from its customer when the customer paid for insurance, hangar, fuel, maintenance and crew, as required by 45 IAC 2.2-4-27(d). Taxpayer's relationship with its customer was too close and the terms of the rental agreement too generous to establish an arms-length business relationship. The rental/lease arrangement between taxpayer and its customer constitutes a "sham transaction" entered into for the sole purpose of avoiding taxes, as established in Gregory v. Helvering. Without a valid rental/lease agreement, taxpayer is ineligible for the rental exemption on the purchase of the aircraft.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20040102.LOF

LETTER OF FINDINGS: 04-0102
Sales and Use Tax
For 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax—Delivery charges

Authority: Ind. Code § 6-2.5-4-10; 45 IAC 2.2-4-3.

Taxpayer protests the assessment of sales tax with respect to delivery charges incurred in transporting rental property to customers.

II. Tax Administration: Negligence Penalty

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

Taxpayer protests the assessment of a negligence penalty.

STATEMENT OF FACTS

Taxpayer is in the business of renting and leasing modular buildings. The buildings will be delivered to the customer's locations in Taxpayer's own vehicles. The contracts between Taxpayer and its customers separately state delivery charges and do not specify F.O.B. terms.

The Department audited Taxpayer for the years in question, and assessed sales tax for the delivery charges imposed, as well as use tax for several items not in dispute here. The Department also assessed penalties on the entire assessment, which Taxpayer has protested as well.

DISCUSSION

I. Sales and Use Tax—Delivery charges

In general, the lease or rental of tangible personal property is subject to sales tax. Ind. Code § 6-2.5-4-10(a), which stated during the relevant period "[a] person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person." This statute is silent with respect to delivery charges. By contrast, Ind. Code § 6-2.5-4-1(e)(2) provided that:

> Except as provided in subsection (g), any bona fide charges which are made or preparation, fabrication, alteration, modification, finishing, completion, delivery or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.

Taxpayer argues that the delivery charges should not be subject to sales tax based on the language of 45 IAC 2.2-4-3, which provides:

> Sec. 3. (a) Separately 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.
> (b) The following guidelines have been developed:
> (1) Delivery charge separately stated with F.O.B. destination-taxable.
> (2) Delivery charge separately stated with F.O.B. origin-non taxable.
> (3) Delivery charge separately stated where no F.O.B. has been established-non taxable.

(4) Delivery charges included in the purchase price are taxable.

(c) Two considerations must always be kept in mind in applying these guidelines:

(1) The rules do not override established interstate commerce exemptions recognized by IC 6-2.1-3-3 (see 6-2.5-5-24(b)(010) *[45 IAC 2.2-5-54]*).

(2) The rules are only applicable in determining whether or not the delivery charge of an otherwise taxable sale is also subject to sales or use tax.

The statute and regulation discussing exemption for certain delivery charges hinges on the point at which title in the underlying tangible personal property transfers between buyer and seller, indicating a sale of tangible personal property. In this case, the tangible personal property that Taxpayer transports is not sold to customers, but rather is rented or leased. Accordingly, because the property in question was not sold, the delivery charges were subject to sales tax.

FINDING

Taxpayer's protest is denied.

II. Tax Administration: Negligence Penalty

The Department may impose a ten percent (10%) negligence penalty. Ind. Code § 6-8.1-10-2.1 and 45 IAC 15-11-2. Taxpayer's failure to timely file income tax returns, generally, will result in penalty assessment. Ind. Code § 6-8.1-10-2.1(a)(1). The Department, however, may waive this penalty if the taxpayer can establish that its failure to file "was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c). A taxpayer may demonstrate reasonable cause by showing "that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed…." *Id*. Taxpayer has not made the necessary showing in this case.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420050126.LOF

LETTER OF FINDINGS NUMBER: 04-0126
Sales and Use Tax
For Tax Years 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

I. Sales and Use—Aircraft Purchase

Authority: Gregory v. Helvering, 293 U.S. 465 (1935); IC 6-2.5-2-1; IC 6-6-6.5-9; 45 IAC 2.2-5-15; 45 IAC 2.2-4-27; Horn v. Commissioner of Internal Revenue, 968 f.2d 1229 (D.C. Cir. 1992); Commissioner v. Transp. Trading and Terminal Corp., 176 F.2d 570 (2nd Cir. 1949); Black's Law Dictionary (7th ed. 1999)

Taxpayer protests the imposition of use tax on the purchase of an aircraft.

STATEMENT OF FACTS

Taxpayer purchased an aircraft, but did not pay sales tax on the purchase. Taxpayer claimed that the purchase was exempt from sales tax because the aircraft was to be used for rental or leasing to others. The Indiana Department of Revenue ("Department") conducted an investigation regarding the rental or leasing of the aircraft and determined that there was insufficient evidence to support the claim of rental or leasing as the use of the aircraft. As a result of this investigation, the Department denied the claim for exemption and issued a proposed assessment for use tax on the purchase of the aircraft. Taxpayer protests the assessment. Further facts will be supplied as required.

I. Sales and Use—Aircraft Purchase

DISCUSSION

Taxpayer purchased an aircraft for two million, seven hundred fifteen thousand, two hundred thirty dollars ($2,715,230.00) with a trade-in aircraft valued at one million, two hundred fourteen thousand, forty two dollars ($1,214,042.00) for a final purchase price of one million, five hundred one thousand, one hundred eighty eight dollars ($1,501,188.00) and claimed a sales tax exemption. The Department compared a non-related aircraft rental company's rate for the same type of aircraft, to the rate taxpayer charged for its aircraft. Taxpayer's rental rate was far below the market rate. The Department determined that taxpayer was not renting the aircraft and denied the exemption. Taxpayer protests the denial.

Taxpayer offers several arguments in support of its claim for the exemption. First, taxpayer refers to IC 6-6-6.5-9(a)(4), which states:

(a) The provisions of this chapter pertaining to registration and taxation shall not apply to any of the following;

…

(4) An aircraft owned or operated by a person who is either an air carrier certified under Federal Air Regulation Part 121 or a scheduled air taxi operator certified under Federal Air Regulation Part 135, unless such person is a corporation incorporated under the laws of the state of Indiana or an individual who is a resident of Indiana.

Taxpayer states that IC 6-6-6.5-9(a)(4) provides that an aircraft owned or operated by a person who is either an air carrier certificated under Federal Air Regulation Part 121 or an air taxi operator certified under Federal Air Regulation Part 135, is exempt to state sales and use tax. Taxpayer is incorrect.

As plainly stated in IC 6-6-6.5-9(a), "The provisions of this chapter pertaining to registration and taxation shall not apply to any of the following;". The chapter referred to is chapter 6.5 of article 6 of title 6 of the Indiana Code. Chapter 6.5 of article 6 of title 6 deals with aircraft license excise tax. IC 6-6-6.5-9(4) only applies to aircraft license taxes, not the sales tax which is the tax at issue in this protest. Therefore, taxpayer's reliance on that subsection is misplaced.

The sales tax is established at IC 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The 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.

Sales tax is due on retail transactions, such as the purchase or rental of an aircraft. Neither taxpayer nor its customer provided documentation establishing exempt use of the aircraft. The Department considered this insufficient to prove that the aircraft was used for renting or leasing. The Department never received any documentation establishing that any other third party used the aircraft. This contributed to the Department's determination that taxpayer was not renting or leasing the aircraft.

Next, taxpayer states that the aircraft was used for rental to others, and therefore was exempt from sales tax under 45 IAC 2.2-5-15, which states:

(a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.

(b) General rule. Sales of tangible personal property for resale, renting or leasing are exempt from tax if all of the following conditions are satisfied:

(1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;

(2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and

(3) The property is resold, rented or leased in the same form in which it was purchased

(c) Application of general rule.

(1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendition of services or performance of work with respect to such property.

(2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.

(3) The property must be resold, rented or leased in the same form in which it was purchased.

Taxpayer states that it was in the business of leasing aircraft and therefore qualifies for the exemption provided by 45 IAC 2.2-5-15. 45 IAC 2.2-5-15(b) requires that three conditions be met in order to qualify for the exemption. One condition is 45 IAC 2.2-5-15(b)(2) states that the purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. The Department notes that the same individual signed the leasing agreement as lessor and as lessee. Also, the Department has not received any documentation establishing that taxpayer's leasing business ever showed a profit. While profitability of a business is not normally germane as to the existence of a true lessor/lessee relationship, in this case it does indicate that taxpayer had arranged for its two owner/renter parties to pay much less than a fair market value for the rental of the aircraft. The rental at issue here was not an arms-length transaction. Under these circumstances, taxpayer does not satisfy 45 IAC 2.2-5-15-(b)(2) and does not qualify for the leasing exemption.

Next, taxpayer explains that its customer paid a lower lease rate because it was paying other expenses which, when added to the lease rate, brought the total customer paid closer to comparable lease rates. Taxpayer explains that, under the "dry lease", the lessee was responsible for paying expenses such as insurance, hangar, fuel, maintenance and crew. This supposedly brought the leasing costs to appropriate levels. 45 IAC 2.2-4-27(d) states in relevant part:

The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

(1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental or lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals.

…

This regulation means that taxpayer was required to collect sales tax on all consideration it received from its customer for lease of the aircraft. Taxpayer was not collecting sales tax on the consideration it received from its customer when the customer paid for insurance, hangar, fuel, maintenance and crew. This is further evidence that taxpayer's relationship with its customer was not a valid lessor/lessee relationship.

Next, taxpayer states that it only created the leasing corporation in order to avoid liability in the event of a catastrophic loss. Taxpayer explained that it was difficult if not impossible to purchase enough insurance to cover potential liabilities from a crash, so it created the lessee corporation to shelter the lessor corporation from those potential liabilities. While this may or may not be the case, it is ultimately irrelevant since it does not explain why the rental rate was set at a fraction of the rate charged for comparable aircraft in the area. The fact that the rental rate was so low makes it plain that the rental agreement was set up to avoid sales tax, since the rental rate would have nothing to do with potential liabilities from a crash.

Finally, the Department notes that a lease is defined as "[a] contract by which the rightful possessor of personal property conveys the right to use that property in exchange for consideration." Black's Law Dictionary 898 (7th ed. 1999). The parties' agreement reflected the fact that pilot/lessee never expected to pay consideration sufficient to justify recognizing the agreement as a lease. Instead, the lease agreement falls squarely within the definition of a "sham transaction." The "sham transaction" doctrine is long established both in state and federal tax jurisprudence dating back to Gregory v. Helvering, 293 U.S. 465 (1935). In that case, the Court held that in order to qualify for a favorable tax treatment, a corporate reorganization must be motivated by the furtherance of a legitimate corporate business purpose. Id at 469. A corporate business activity undertaken merely for the purpose of avoiding taxes was without substance and "[t]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." Id at 470. The courts have subsequently held that "in construing words of a tax statute which describe [any] commercial transactions [the court is] to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to escape taxation." Commissioner v. Transp. Trading and Terminal Corp., 176 F.2d 570, 572 (2nd Cir. 1949), *cert. denied*, 338 U.S. 955 (1950). "[t]ransactions that are invalidated by the [sham transaction] doctrine are those motivated by nothing other than the taxpayer's desire to secure the attached tax benefit" but are devoid of any economic substance. Horn v. Commissioner of Internal Revenue, 968 f.2d 1229, 1236-7 (D.C. Cir. 1992). The rental/lease rate charged by taxpayer for the aircraft in question here can only be considered a "sham transaction". The only reason to charge a fraction of the fair market rate for rental/lease of the aircraft and arrange for alternate compensation is to avoid tax. Since taxpayer was not involved in a valid lease or rental agreement with its sole customer the Department was correct to deny taxpayer's claim for the rental/lease exemption.

In conclusion, taxpayer's reference to IC 6-6-6.5-9(a)(4) is inapplicable since it deals with aircraft licensing tax rather than sales tax. Taxpayer was not occupationally engaged in renting to others and does not qualify for the exemption found in 45 IAC 2.2-5-15. It is irrelevant if the leasing corporation was formed to shield taxpayer from liability in the event of a crash, since that would have no influence on the rental rate. Taxpayer was not collecting sales tax on the consideration it received from its customer when the customer paid for insurance, hangar, fuel, maintenance and crew, as required by 45 IAC 2.2-4-27(d). Taxpayer's relationship with its customer was too close and the terms of the rental agreement too generous to establish an arms-length business relationship. The rental/lease arrangement between taxpayer and its customer constitutes a "sham transaction" entered into for the sole purpose of avoiding taxes, as established in Gregory v. Helvering. Without a valid rental/lease agreement, taxpayer is ineligible for the rental exemption on the purchase of the aircraft.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

1820040179.LOF

LETTER OF FINDINGS: 04-0179
Financial Institutions Tax
For the 2001 Tax Year

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. Net Operating Loss Carryforward – Financial Institutions Tax.

Authority: IC 6-3-2-1; IC 6-3-2-2; IC 6-3-2-2.6; IC 6-3-2-2.6(a); IC 6-5.5 et seq.; IC 6-5.5-2-1(a); IC 6-5.5-2-1(a)(2); 45 IAC 3.1-1-9; 45 IAC 17-2-1(a).

Taxpayer maintains that the Department of Revenue's audit erred when it disallowed a net operating loss carryforward originally attributable to taxpayer's subsidiary.

STATEMENT OF FACTS

Taxpayer is an out-of-state company which files Indiana Financial Institution Tax (FIT) returns. The Department of Revenue (Department) conducted an audit review of taxpayer's returns and financial records during 2003.

During 2001, taxpayer acquired a brokerage company which became taxpayer's subsidiary. Previously, the brokerage company had filed Indiana IT-20 returns because it was subject to the state's adjusted gross income tax. In calculating its adjusted gross income tax, the subsidiary determined that it was entitled to claim a net operating loss (NOL) and to "carry forward" that amount. 2001 was the last year in which the brokerage firm filed its own IT-20 returns.

In the belief that – along with the brokerage firm's other assets and liabilities – it had acquired the NOL, taxpayer "carried forward" the NOL on its own 2001 FIT return.

During the course of the audit review, the audit came to the conclusion that taxpayer – as an FIT filer – was not entitled to carry forward the subsidiary's Adjusted Gross Income tax NOL. Taxpayer disagreed and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer explained the basis for the protest. This Letter of Findings results.

FINDING

I. Net Operating Loss Carryforward – Financial Institutions Tax.

The audit disallowed taxpayer's NOL on that ground that, "A net operating loss calculated under the adjusted gross income tax statutes cannot be used to offset income subject to the financial institutions tax pursuant to IC 6-5.5-2[-]1(a)(2)." The relevant portion of the law states as follows:

> The amount of [FIT] for a taxable year shall be determined by multiplying eight and one-half percent (8.5%) times the remainder of: (1) the taxpayer's adjusted gross income or apportioned income; minus (2) the taxpayer's deductible Indiana net operating losses as determined under this section.... IC 6-5.5-2-1(a).

Taxpayer disagrees with the audit's conclusion stating that it "feel[s] the utilization of this NOL on [its] 2001 Indiana FIT return is justified based on a fair and rational interpretation of the statute and to disallow the NOL entirely is unreasonable." In effect, taxpayer argues that it should be permitted to carry forward the previously unabsorbed net operating loss sustained by its brokerage subsidiary. According to taxpayer, since the brokerage subsidiary ceased its independent corporate existence during 2001 and ceased filing its own adjusted gross income tax return, disallowing the carryforward operates to "strand" the unabsorbed net operating loss.

Indiana imposes a franchise tax, known as the FIT, on corporations transacting the business of a financial institution within the state. IC 6-5.5 et seq. The tax is imposed on resident financial institutions, nonresident financial institutions, and on non-bank entities that transact the business of a financial institution. 45 IAC 17-2-1(a). Taxpayer qualifies as a financial institution and filed FIT returns under the provisions of that particular portion of the state's tax law.

Elsewhere in the state's tax structure, the state imposes a tax on the adjusted gross income of resident and nonresident corporations and individuals. IC 6-3-2-1; IC 6-3-2-2. The tax is imposed on that portion of the taxpayer's income derived from sources from within the state. Under the provisions of the Indiana's Adjusted Gross Income (AGI) tax, nonresident corporations – such as the formerly independent brokerage – are permitted to carry forward net operating losses (*See* IC 6-3-2-2.6; 45 IAC 3.1-1-9).

Taxpayer maintains that an NOL created under the AGI tax statutes and modified using the receipts factor in accordance with IC 6-5.5-2-1(c), can be carried forward into taxpayer's FIT calculation. The Department must respectfully disagree with taxpayer's conclusion. Despite the fact that NOL carryforward provisions are found under both the AGI tax and the FIT, the two taxing schemes are operationally and functionally distinct from one another. The FIT operates as a franchise tax while the AGI tax operates as a tax on the corporation's income. While taxpayer is correct in pointing out that both the FIT and the AGI tax borrow from and define themselves in reference to the Internal Revenue Code, there is nothing within their respective statutory or regulatory provisions which permits a taxpayer to carry forward net operating losses back and forth between the two distinct schemes. To the contrary, the statutory language within each of the two taxing provisions would seem to indicate that the Legislature intended each provision to operate independently. For example, the FIT provides that the taxpayer's net operating losses are calculated in a manner "as determined under *this* section." IC 6-5.5-2-1(a)(2) (*Emphasis added*). Similarly, the brokerage's adjusted gross income tax – including any relevant net operating loss – was calculated relative to the provisions of IC 6-3-2-2.6(a) exclusive to the "purposes of section 1 of *this* chapter." (*Emphasis added*).

While taxpayer's decision to acquire the brokerage may have had the unexpected effect of "stranding" unabsorbed net operating losses to which the brokerage was otherwise entitled, neither the Department nor the taxpayer has the discretionary authority to create from whole cloth the authority to carry over net operating losses, attributable to an AGI calculation, to taxpayer's FIT returns.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0320040221P.LOF

LETTER OF FINDINGS NUMBER: 04-0221P
Withholding Tax
For the Calendar Year 2003

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late payment and filing of an annual withholding tax return for the calendar year 2003. The taxpayer is a company residing outside of Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the late penalty should be abated as the taxpayer did not receive the WH-1 form, and, the taxpayer has a good compliance record.

With regard to the good compliance record, the Department notes the taxpayer has had several errors in the past. On this point, the Department does not consider the taxpayer's compliance record a factor in waiving penalty.

With regard to the unreceived WH-1, the Department points out the taxpayer did not contact the Department until March 23, 2004 which was eight days after the due date. The Department considers the taxpayer to be negligent on this point as the taxpayer was already late (negligent) before contacting the Department 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

04-20040227.LOF

LETTER OF FINDINGS NUMBER: 04-0227
Sales/Use Tax
For the Year 2001

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

ISSUES

I. Sales and Use Tax-Vehicles

Authority: Ind. Code § 6-2.5-2-1; Ind. Code § 6-2.5-3-6; Ind. Code § 6-2.5-3-7; Ind. Code § 6-2.5-4-1; Ind. Code § 6-2.5-5-15.

Taxpayer protests the Department's assessment of sales tax with respect to the sale of trailers by Taxpayer, which Taxpayer claims were titled outside Indiana.

II. Sales and Use Tax-Services

Authority: Ind. Code § 6-8.1-5-4.

Taxpayer protests the imposition of sales tax with respect to charges that Taxpayer maintains were for services.

III. Sales and Use Tax-Imposition

Authority: Ind. Code § 6-2.5-3-2; Ind. Code § 6-2.5-3-5.

Taxpayer protests the imposition of use tax with respect to items that were purchased outside Indiana or constituted overhead expenses.

STATEMENT OF FACTS

Taxpayer is a corporation engaged in the sale of cargo trailers. Taxpayer purchases the trailers from another company, and then in turn sells them to purchasers, both in and out of Indiana according to Taxpayer.

During late 2002, Taxpayer's office was burglarized. After the burglary, Taxpayer reported a number of items stolen during the burglary. Later that same year, Taxpayer was audited by the Department. In the early part of 2003, after the Department notified Taxpayer of the audit, Taxpayer amended the original police report to include many other items, including Taxpayer's business records.

During the audit, the Department noted a difference between Taxpayer's sales reported for income tax purposes and sales reported for sales tax purposes. Taxpayer has protested this assessment, arguing that the sales were shipped to out-of-state purchasers or that the sales represented fees received for services performed by Taxpayer. Taxpayer has further protested the imposition of use tax with respect to several items that Taxpayer maintains were purchased outside Indiana or represented overhead expenses.

I. Sales and Use Tax-Vehicles

DISCUSSION

Taxpayer argues that the sales in controversy were to out of state purchasers, and therefore exempt from sales tax. Taxpayer maintains, however, that the records were stolen in a burglary in late 2002. Taxpayer provided a list of sales indicating the various destinations of the trailers in controversy.

Under Ind. Code § 6-2.5-4-1, the sale of tangible personal property in the regular course of a person's regularly conducted trade or business is subject to sales tax. The sale of trailers constituted Taxpayer's regularly conducted trade or business, and accordingly Taxpayer had a responsibility to collect sales and use tax with respect to the sale of trailers. Ind. Code § 6-2.5-2-1(b); Ind. Code § 6-2.5-3-6(b).

Further, under Ind. Code § 6-2.5-3-7, property purchased in Indiana is presumed to be purchased for use in Indiana unless the seller has either been provided an exemption certificate by the purchaser or the seller or purchaser can otherwise establish that the property purchased was not used in Indiana, or was used for an exempt purpose.

However, Ind. Code § 6-2.5-5-15 stated that, for the years in question, trailers were exempt from sales tax if the purchaser immediately transports the trailer outside Indiana, titles or registers the vehicle in another state and does not title or register the trailer in Indiana.

Taxpayer has two avenues for establishing that Taxpayer is not liable for the tax in question. The first is to demonstrate that Taxpayer received an exemption certificate from the purchaser at the time of the purchase. Ind. Code § 6-2.5-3-7(b). Taxpayer has not done this.

In the alternative, Taxpayer can establish that the property was transported for use outside Indiana. To do this, Taxpayer would need to establish that the property was titled outside Indiana. Under the laws of Indiana and many other states, trailers are required to be registered with a relevant state agency. A quick analysis revealed that third-party title searches generally may be done at certain state offices for a very modest price per search, and at least one state may permit such searches to be done online. Even though Taxpayer is a short distance from two states that border Indiana, Taxpayer has not provided such documentation for even those jurisdictions, much less other jurisdictions.

The Department is generally sympathetic to taxpayers whose records are lost or destroyed due to no fault of the taxpayer. However, Taxpayer does not explain how the absence of business records for the period prior to the burglary escaped his notice, nor does he provide any documentation for the period after the burglary-when new records were presumably maintained. Taxpayer further does not explain how his federal income tax returns-documenting several hundred thousands of dollars of sales-were prepared, nor does Taxpayer explain why no backup or supporting documentation was provided.

FINDING

Taxpayer's protest is denied.

II. Sales and Use Tax-Services

DISCUSSION

Taxpayer further argues that a portion of the sales in controversy actually represented service fees rather than the sale of tangible personal property, but lost his records in the 2002 burglary. While Taxpayer does make a correct statement of law if the charges in question were separately stated on the taxpayer's records, the issue becomes Taxpayer's records. Under Ind. Code § 6-8.1-5-4, a taxpayer is required to maintain books and records necessary to permit Department review of a taxpayer's liability by reference to those books and records. Otherwise, the taxpayer becomes subject to liability on the best information available to the Department. Without the records to substantiate this claim, the best information available in this case is Taxpayer's gross sales per his federal income tax return. Accordingly, Taxpayer's protest is denied.

FINDING

Taxpayer's protest is denied.

III. Sales and Use Tax-Imposition

DISCUSSION

Taxpayer protests the imposition of use tax with respect to several items. In particular, Taxpayer argues that the items constituted overhead expenses or were purchased outside of Indiana (both representations were contained in Taxpayer's protest), and accordingly is not subject to use tax on these items.

Indiana, like other states with sales taxes, imposes a use tax to complement its sales tax. In Indiana, a taxpayer is generally responsible for use tax with respect to all tangible personal property purchased in retail transactions, along with automobiles, watercraft and aircraft regardless of whether those items are purchased at retail, if the property in question is used in Indiana. Ind. Code § 6-2.5-3-2. If a taxpayer has paid sales or use tax to another state, the taxpayer is eligible for a credit against the use tax. Ind. Code § 6-2.5-3-5. Taxpayer has not demonstrated that the purchases qualified for statutory exemptions (e.g,, manufacturing), that the purchases were casual sales of certain items, that the items were not used in Indiana, or that sales or use tax payments sufficient to allow for an offsetting credit were made.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02-20040304P.LOF

LETTER OF FINDINGS NUMBER 04-0304P
TAX ADMINISTRATION—NEGLIGENCE PENALTY FOR
THE PERIOD COVERING CALENDAR YEARS 2000-2002

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

ISSUE

I. Tax Administration—Negligence Penalty

Authority: IC article 6-2.1 (1998) (repealed 2003); IC §§ 6-8.1-1-1, -5-1(b) and -10-2.1 (1998) (current respective versions at *id.* (2004)); 45 IAC article 1.1 (1996) (2001) (repealed 2003)

The taxpayer protests the assessment of the negligence penalty.

STATEMENT OF FACTS

The taxpayer is a holding corporation organized in Delaware in 1994 and headquartered in a state other than Delaware or Indiana. During calendar years 2000-02 (hereinafter "the audit period") it had no physical presence, and was not authorized to do business, in Indiana. However, the taxpayer is a wholly owned subsidiary of another foreign corporation that is so authorized. The taxpayer's main assets consist of the trade names and trademarks developed for that business by, sold by, and licensed back to, the parent. It continues to use the licensed intellectual property in that business, which it conducted, among other places, at three Indiana locations during the audit period. During that time taxpayer and its parent filed separate Indiana income tax returns.

The Department conducted a simultaneous audit of the taxpayer and its parent for all types of Indiana income tax they incurred during the audit period. The field auditor ultimately adjusted the gross income tax ("GIT") liability of the taxpayer. The Audit Division issued Notices of Proposed Assessment of GIT to the taxpayer based on the adjustments made to its liability. The taxpayer paid the respective base taxes and interest, but protested the proposed negligence penalty. The Department will provide additional facts as needed.

DISCUSSION

The field auditor recognized that for GIT purposes the taxpayer could not have joined in filing consolidated returns with the parent because the taxpayer was a foreign corporation not authorized to do business in Indiana. *See* IC § 6-2.1-5-5(b) (1998) and 45 IAC § 1.1-5-3(a) and (b) (2001) (both repealed 2003) (permitting corporations incorporated or authorized to do business in

Indiana to file consolidated gross income tax returns). The auditor therefore conducted a separate audit of the taxpayer under the Gross Income Tax Act of 1933, IC article 6-2.1 (1998), and its implementing regulations at 45 IAC article 1.1 (2001) (both repealed 2003). He adjusted the taxpayer's GIT liability by treating the licensing royalties it received as gross income derived from business situses within the state pursuant to 45 IAC § 1.1-6-2 and calculating gross income tax on those royalties at high rate.

The taxpayer's sole argument, as stated in its protest letter, consists of the bare statement that it had no intention to purposely disregard the law. For the reasons the Department will set out below, this allegation is insufficient as a matter of law to sustain, and the Department must therefore deny, the taxpayer's protest.

IC § 6-8.1-10-2.1 (1998) (current version at *id.* (2004)) is the statute that authorizes the Department to impose a penalty for any negligence of a taxpayer in failing to comply with the tax laws the Department administers. These taxes are listed in IC § 6-8.1-1-1 and until 2003 included the gross income tax. IC § 6-8.1-10-2.1(a) states the circumstances under which the Department may impose a negligence penalty. It states in relevant part that "(a) [i]f a person:… (3) [i]ncurs, upon examination by the department, a deficiency that is due to negligence;… the person is subject to a penalty." *Id*. The formula for calculating the penalty is set out in IC § 6-8.1-10-2.1(b), which states in relevant part that "(b) [e]xcept as provided in subsection (g) [,] [not in issue here], the penalty described in subsection (a) is ten percent (10%) of:… (4) the amount of deficiency as finally determined by the department[.]" *Id.* However, IC § 6-8.1-10-2.1(d) states that "[i]f a person subject to the penalty imposed under this section can show that the failure to file a return, timely remit tax 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." *Id.* (Emphasis added.)

The taxpayer has not submitted any evidence or legal authority whatever to the Department to support its assertion. Nor has the taxpayer even mentioned, much less discussed or proven, the existence of reasonable cause. The taxpayer has therefore failed to sustain the burden of proof imposed on it by IC § 6-8.1-5-1(b) as to protests in general and IC § 6-8.1-10-2.1(e) as to penalty protests in particular, that the proposed assessment of the negligence penalty is wrong.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120040318.LOF

LETTER OF FINDINGS NUMBER: 04-0318
ADJUSTED GROSS INCOME TAX
FOR TAX PERIOD: 2003

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

ISSUES

Adjusted Gross Income Tax: Imposition

Authority: IC 6-3-1-12, IC 6-8.1-5-1(b), IC 6-3-2-2 (a), *State Election Board v. Evan Bayh*, 521 N.E.2d 1212, (Ind. 1988).

The taxpayer protests the imposition of the adjusted gross income tax.

STATEMENT OF FACTS

The taxpayer moved to Nevada in April, 2003. He filed an Indiana Adjusted Gross Income Tax return for 2003. Later he filed an amended return requesting a refund of Indiana taxes paid for the period after April, 2003. The Indiana Department of Revenue (department) denied the taxpayer's request for refund. The taxpayer protested the denial and a hearing was scheduled. The taxpayer submitted documentation supporting his request for refund and requested that the decision be based upon review of the submitted documentation in lieu of a hearing.

Adjusted Gross Income Tax: Imposition

DISCUSSION

Indiana imposes an adjusted gross income tax pursuant to the following provisions of IC 6-3-2-1 (a):

> Each taxable year, a tax at the rate of three and four-tenths percent (3.4%) of adjusted gross income is imposed upon the adjusted gross income of every resident person, and on that part of the adjusted gross income derived from sources within Indiana of every nonresident person.

The department denied the taxpayer's request for refund of the Indiana adjusted gross income taxes remitted to Indiana for the period May, 2003 through December, 2003. The taxpayer contends that he earned that income as a nonresident of Indiana and is not subject to the imposition of the tax. The issue to be determined is whether or not the taxpayer was an Indiana resident for purposes of Indiana adjusted gross income taxation during the 2003. tax year. Nevada does not have an adjusted gross income tax. Therefore there is no possibility of double taxation.

For purposes of adjusted gross income tax, IC 6-3-1-12 defines the term "resident" as "any individual who was domiciled in this state during the taxable year." In accordance with this definition, the taxpayer would be considered an Indiana resident and subject to tax on income earned during the period when he was domiciled in Indiana.

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

The Indiana Supreme Court considered the issue of the meaning of domicile in *State Election Board v. Evan Bayh*, 521 N.E.2d 1212, (Ind. 1988). In that case, Mr. Bayh desired to run for governor of the state. Pursuant to public discussion concerning whether Mr. Bayh met the residency requirements for governor, Mr. Bayh sought a declaratory judgment determining that he met the residency requirement. The Indiana Supreme Court affirmed the trial court's decision that the standard for residency was whether or not Mr. Bayh had an Indiana domicile. It also affirmed that Mr. Bayh was domiciled in Indiana.

Domicile in Indiana is defined as "the place where a person has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning." *State Election Board* at page 1317. Once established, a person's domicile is presumed to continue until the person's actions provide adequate evidence that along with moving to another jurisdiction, the person intends to establish a domicile in the new residence. Whether or not the person has successfully established a new domicile is a question of fact to be determined by the trier of fact. *Id.* at page 1317. Some of the facts considered were that Mr. Bayh paid in-state tuition at Indiana University, out -of -state tuition at the University of Virginia law school and voted in the elections in Vigo County, Indiana. He also registered for the draft from Indiana. The Supreme Court considered these acts adequate evidence to prove that Mr. Bayh intended to return to Indiana and retained his Indiana domicile even though he had lived outside the state for several years.

The taxpayer accepted a transfer to a job in Nevada in April, 2003. The taxpayer argues that this move established his domicile in Nevada in April, 2003. However, the taxpayer did not move his car to Nevada, obtain a Nevada driver's license or register to vote in Nevada until 2004. He actually renewed his Indiana license plate for his car in September, 2003. These acts on the part of the taxpayer indicate that he did not establish his domicile in Nevada until 2004.

The taxpayer did not meet his burden of proving that he changed his domicile from Indiana to Nevada during the 2003 tax period.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120040320P.LOF

LETTER OF FINDINGS NUMBER: 04-0320P
Individual Income Tax
For Calendar Year 2002

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

ISSUES

I. Tax Administration – Penalty

Authority: IC 6-8.1-6-1(a) and (c); IC 6-8.1-10-2.1; 45 IAC 15-11-2

The taxpayers protest the penalty assessed for failure to remit 90% of their Indiana individual income tax liability by the original due date of their return.

STATEMENT OF FACTS

The taxpayers filed their individual income tax return for 2002 after the due date. The calculated amount of tax due was remitted with the return. However, the taxpayers failed to remit 90% of their Indiana individual income tax liability by the original due date of the return. Accordingly, the department assessed a penalty for the taxpayers' failure to timely remit their tax. In her letter of protest, the taxpayers' representative requested that the penalty be abated due to reasonable cause.

I. Tax Administration – Penalty

The taxpayers assert that the penalty should be waived because an extension of time to file their return was submitted. In her correspondence, she makes statements that appear to be in conflict:

- "An extension of time to file was submitted (on April 15, 2003) with payment for the projected tax liability."
- "The taxpayers did pay the tax plus the interest due on the extended due date of the return."

IC 6-8.1-6-1(a) and (c) state as follows:

(a) If a person responsible for filing a tax return is unable to file the return by the appropriate due date, he may petition the department, before that due date, for a filing extension. The person must include with the petition a payment of at least ninety percent (90%) of the tax that is reasonably expected to be due on the due date. When the department receives the petition and the payment, the department shall grant the person a sixty (60) day extension…

(c) If the Internal Revenue Service allows a person an extension on his federal income tax return, the corresponding due dates for the person's Indiana income tax returns are automatically extended for the same period as the federal extension, plus thirty (30) days. However, the person must pay at least ninety percent (90%) of the Indiana income tax that is reasonably expected to be due on the original due date by that due date, or he may be subject to the penalties imposed for failure to pay the tax.

Hence, there exists an extension of time to file a return, but there is no extension with regard to the payment of tax. Further, the department's records indicate that no request for an extension of time to file the 2002 return was ever submitted.

Administrative Rule 45 IAC 15-11-2 (b) states the following:

"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 taxpayers have not established that their failure to timely pay 90% of the full amount of tax due was due to reasonable cause and not due to negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120040321P.LOF

LETTER OF FINDINGS NUMBER: 04-0321P
Individual Income Tax
For Calendar Year 2002

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

ISSUES

I. Tax Administration – Penalty

Authority: IC 6-8.1-6-1(a) and (c); IC 6-8.1-10-2.1; 45 IAC 15-11-2

The taxpayers protest the penalty assessed for failure to remit 90% of their Indiana individual income tax liability by the original due date of their return.

STATEMENT OF FACTS

The taxpayers filed their individual income tax return for 2002 after the due date. The calculated amount of tax due was remitted with the return. However, the taxpayers failed to remit 90% of their Indiana individual income tax liability by the original due date of the return. Accordingly, the department assessed a penalty for the taxpayers' failure to timely remit their tax. In her letter of protest, the taxpayers' representative requested that the penalty be abated due to reasonable cause.

I. Tax Administration – Penalty

The taxpayers assert that the penalty should be waived because an extension of time to file their return was submitted. In her correspondence, she makes statements that appear to be in conflict:

• "An extension of time to file was submitted (on April 15, 2003) with payment for the projected tax liability."

• "The taxpayers did pay the tax plus the interest due on the extended due date of the return."

IC 6-8.1-6-1(a) and (c) state as follows:

(a) If a person responsible for filing a tax return is unable to file the return by the appropriate due date, he may petition the department, before that due date, for a filing extension. The person must include with the petition a payment of at least ninety percent (90%) of the tax that is reasonably expected to be due on the due date. When the department receives the petition and the payment, the department shall grant the person a sixty (60) day extension…

(c) If the Internal Revenue Service allows a person an extension on his federal income tax return, the corresponding due dates for the person's Indiana income tax returns are automatically extended for the same period as the federal extension, plus thirty (30) days. However, the person must pay at least ninety percent (90%) of the Indiana income tax that is reasonably expected to be due on the original due date by that due date, or he may be subject to the penalties imposed for failure to pay the tax.

Hence, there exists an extension of time to file a return, but there is no extension with regard to the payment of tax. Further, the department's records indicate that no request for an extension of time to file the 2002 return was ever submitted.

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The taxpayers have not established that their failure to timely pay 90% of the full amount of tax due was due to reasonable cause and not due to negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120040322P.LOF

LETTER OF FINDINGS NUMBER: 04-0322P
Individual Income Tax
or Calendar Year 2002

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

ISSUES

I. Tax Administration – Penalty

Authority: IC 6-8.1-6-1(a) and (c); IC 6-8.1-10-2.1; 45 IAC 15-11-2

The taxpayers protest the penalty assessed for failure to remit 90% of their Indiana individual income tax liability by the original due date of their return.

STATEMENT OF FACTS

The taxpayers filed their individual income tax return for 2002 after the due date. The calculated amount of tax due was remitted with the return. However, the taxpayers failed to remit 90% of their Indiana individual income tax liability by the original due date of the return. Accordingly, the department assessed a penalty for the taxpayers' failure to timely remit their tax. In her letter of protest, the taxpayers' representative requested that the penalty be abated due to reasonable cause.

I. Tax Administration – Penalty

The taxpayers assert that the penalty should be waived because an extension of time to file their return was submitted. In her correspondence, she makes statements that appear to be in conflict:

• "An extension of time to file was submitted (on April 15, 2003) with payment for the projected tax liability."

• "The taxpayers did pay the tax plus the interest due on the extended due date of the return."

IC 6-8.1-6-1(a) and (c) state as follows:

(a) If a person responsible for filing a tax return is unable to file the return by the appropriate due date, he may petition the department, before that due date, for a filing extension. The person must include with the petition a payment of at least ninety percent (90%) of the tax that is reasonably expected to be due on the due date. When the department receives the petition and the payment, the department shall grant the person a sixty (60) day extension…

(c) If the Internal Revenue Service allows a person an extension on his federal income tax return, the corresponding due dates for the person's Indiana income tax returns are automatically extended for the same period as the federal extension, plus thirty (30) days. However, the person must pay at least ninety percent (90%) of the Indiana income tax that is reasonably expected to be due on the original due date by that due date, or he may be subject to the penalties imposed for failure to pay the tax.

Hence, there exists an extension of time to file a return, but there is no extension with regard to the payment of tax. Further, the department's records indicate that no request for an extension of time to file the 2002 return was ever submitted.

Administrative Rule 45 IAC 15-11-2 (b) states the following:

"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 taxpayers have not established that their failure to timely pay 90% of the full amount of tax due was due to reasonable cause and not due to negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420040374.LOF

LETTER OF FINDINGS NUMBER: 04-0374
Sales Tax
For the period ending 2002

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

ISSUE

I. Sales Tax—Assessment on Unreported Taxable Sales

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

Taxpayer protests the assessment of sales tax on unreported taxable sales.

STATEMENT OF FACTS

Taxpayer is an Indiana resident engaged in the business of purchasing pre-owned vehicles for resale in retail transactions. Taxpayer failed to file some of his sales and use tax returns and was billed using the best information available. Business income was determined by examining bank statements. Business expenses were recorded based on cancelled checks, automobile purchase invoices, credit card statements, and cash disbursement journal. Additional taxable sales were determined.

I. Sales Tax—Assessment on Unreported Taxable Sales

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). IC 6-8.1-5-4 affirmatively requires a taxpayer to keep books and records so that the Department can review the documents to determine the amount of a taxpayer's liability for applicable taxes. If the Department reasonably believes that a taxpayer has not reported the proper amount of tax due, IC 6-8.1-5-1(a) mandates the Department to make a proposed assessment of the amount of unpaid tax on the basis of the best information available to the Department.

Taxpayer was audited and assessed additional sales tax based on a best information available audit. The auditor took Taxpayer's total bank deposits, backed out insurance proceeds and loans, and then determined the remaining deposits were taxable sales. Credit was given for reported taxable sales, and the balance was assessed for additional sales tax.

Taxpayer protested, arguing that within the total bank deposits, there were two items for the sale of real estate which should be backed out. Taxpayer asserted that he sold one piece of real estate for $3,000 and the other for $7,500. Taxpayer's protest letter indicated a check for $3,000 dated January 16, 2002 and a check for $7,500 dated March 29, 2002. At the hearing, copies of the checks were presented. It needs to be noted that the check dated January 16, 2002 was $2,900, not $3,000. That has little bearing on the disposition of the case; it simply needs to be stated so as to establish the correct amount of each check.

Taxpayer's records did not support these large deposits. There is no indication that these checks were deposited into Taxpayer's bank account. When questioned about this, Taxpayer told the auditor he cashed the two checks and then deposited them into the bank, little by little. These cash deposits could not be verified.

Auditor tried to verify the two checks in Taxpayer's records. Taxpayer's January 2002 total deposit was only $1360 and the March total deposit was only $3215. The April deposits also were considered. Since the business income of Taxpayer was based on his deposit history, the two alleged checks were disregarded in the audit.

At the hearing, Taxpayer offered no new or compelling evidence to rebut the best information available assessment made by the Department. Taxpayer did present copies of the checks and copies of the deeds and contracts supporting the sale of real estate, but these do not offer evidence that the income was deposited and that those deposits would support a different assessment.

FINDING

For the reasons stated above, Taxpayer's protest is denied. The Department's assessment is sustained.

DEPARTMENT OF STATE REVENUE

0420040441.LOF

LETTER OF FINDINGS NUMBER: 04-0441
Sales/Use Tax
For the Year 2003

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

ISSUE

I. Sales/Use Tax—Assessment on Purchase of Aircraft

Authority: IC 6-2.5-5-27; IC 6-8.1-5-1(b); IC 6-6-6.5-2; IC 6-2.5-9-6; IC 6-2.5-2-1; IC 6-2.5-8-8; IC 6-6-6.5-5; IC 6-6-6.5-3; IC 6-6-6.5-12; IC 6-6-6.5-13; 45 IAC 2.2-5-61(b); Panhandle Eastern Pipeline Company v. Dept. of Revenue, 741 N.E.2d 816 (Ind. Tax 2001); Carnahan Grain, Inc. v. Department of State Revenue, 2005 Ind. Tax LEXIS 29; Cambria Iron Co., v. Union Trust Co., 154 Ind. 291, 55 N.E. 745 (1899); Department of Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003); Title 14 CFR, Part 91, 119, 121, 125, 135; FAA AC 120-12A (4/24/86).

Taxpayer protests the assessment of sales tax on the purchase of an aircraft Taxpayer asserts is used in public transportation.

STATEMENT OF FACTS

Taxpayer is a single member LLC. Taxpayer stated it provides transportation services to affiliated entities. In May 2003, Taxpayer purchased an aircraft. Taxpayer seeks the public transportation exemption to sales and use tax permitted in IC 6-2.5-5-27, which states:

Public transportation; acquisitions

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

The Department has promulgated a regulation addressing and defining public transportation, as it relates to the exemption. 45 IAC 2.2-5-61(b) states:

Definition: Public Transportation.

Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.

Taxpayer operates the aircraft under a Part 91 certification by the FAA.

I. Sales/Use Tax—Assessment on Purchase of Aircraft

DISCUSSION

All tax assessments are presumed to be accurate; the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1(b). Tax exemption statutes are construed strictly in favor of taxation. Panhandle Eastern Pipeline Company v. Dept. of Revenue, 741 N.E.2d 816, 818 (Ind. Tax 2001). To prevail, a taxpayer must prove that it meets the requirements of IC 6-2.5-5-27. *See id*. Taxpayer asserts that it meets the statutory requirements of IC 6-2.5-5-27 for entitlement to the public transportation exemption. Taxpayer asserts it meets the regulatory requirements of 45 IAC 2.2-5-61(b) to be defined as a public transportation company. Taxpayer asserts it operates under 45 IAC 2.2-5-61(b) as a contract carrier.

Having received the evidence presented by Taxpayer and having considered the testimony given at hearing, the Department must apply the elements of the public transportation exemption statute and regulation.

The Tax Court has stated that the public transportation exemption provided by IC 6-2.5-5-27 is an all-or-nothing exemption; a taxpayer must acquire tangible personal property for predominate use in providing public transportation for third parties to be entitled to the exemption. Panhandle, 741 N.E.2d at 819; *see also*, Carnahan Grain, Inc. v. Department of State Revenue, 2005 Ind.

Tax LEXIS 29.

Public transportation of others is a serious matter—a high duty of care is imposed. Air travel is highly regulated. The Indiana Supreme Court—as well as courts across the land—have stated that a party cannot have the benefits without the burdens. *See* Cambria Iron Co., v. Union Trust Co., 154 Ind. 291, 301-02; 55 N.E. 745, 749 (1899). Taxpayer is seeking the benefits of the public transportation exemption—without assuming the burdens of being a public transportation entity. 45 IAC 2.2-5-61(b) states that public transportation carriers are required to operate under an authority of a regulatory agency—unless specifically exempted.

The aircraft is registered with the FAA to operate under Part 91; the aircraft has yet to be registered by Taxpayer with the State of Indiana. Under the Department's public transportation regulation, an entity seeking the public transportation exemption is required to demonstrate that it is a public transportation entity by operating under the authority of—in this case—the U.S. Department of Transportation, specifically the FAA. Taxpayer has stated that it operates under the authority of the FAA. While Taxpayer is authorized to operate its aircraft—Taxpayer has not registered to operate its aircraft under FAA regulations as a public transportation entity.

The FAA has issued an Advisory Circular discussing private carriage versus common carriage of persons or property. FAA AC 120-12A (4/24/86). The FAA states that the advisory circular furnishes general guidelines for determining whether transportation operations constitute private or common carriage. *Id*. at 1.

All aircraft are required to possess an airworthiness certificate—an FAA document which grants authorization to operate an aircraft in flight. There are two different classifications of FAA airworthiness certificates: FAA Form 8100-2, **Standard Airworthiness Certificate**, and FAA Form 8130-7, **Special Airworthiness Certificate**. Standard Airworthiness Certificates are airworthiness certificates issued for aircraft types certificated in the normal, utility, acrobatic, commuter, or transport category, and for manned free balloons, and for aircraft designated by the FAA Administrator as special classes of aircraft. Taxpayer's aircraft qualifies under a standard airworthiness certificate..

Under Standard Airworthiness Certificates, a registered owner or an owner's agent of an aircraft applies for particular operation certificates. These commonly are referred to as (FAR) Part Registrations. There are four Part Registrations:

Part 91—**Private Carriers**
General Operating and Flight Rules
Part 121—**Airline Operators**
Air Carriers and Commercial Operators
Part 125—**Business and Commercial Airlines**
Airplanes having a Seating Capacity of 20 or more passengers or a maximum payload capacity of 6,000 pounds or more
Part 135—**Air Taxi Operators**
Commuter and On-Demand Operations

As can be seen, Parts 121, 125, and 135 are operation certificates for airlines, commercial operators, commuter, and on-demand (charter) services. Taxpayer's aircraft is not an airliner; for this reason, it would not be registered under Part 121 or 125, but would be registered under Part 135 to obtain FAA authority to conduct public transportation operations. Parts 121, 125, and 135 are classified under Subchapter G of Title 14. Subchapter G is entitled, **Air Carriers and Operators for Compensation or Hire: Certification and Operations**. Those operating under these Parts need to acquire a Part 119 Air Carriers and Commercial Operations Certification. Part 91 is classified under Subchapter F, entitled, **Air Traffic and General Operating Rules**. Those operating under a Part 91 certification operate in private carriage; in general—with strict and narrow exceptions—those operating under Part 91 are restricted from engaging in carriage for hire. Those operating under Part 91 maintain operational control of the aircraft; passengers on the aircraft are extensions of those who operate the aircraft. Those who claim to be operating as a public transportation entity are by definition operating in carriage for hire; the passengers are not extensions of those operating the aircraft.

A Part 91 registration is the baseline registration. All owners and aircraft are required to adhere to these general operating and flight rules—as well as the basic pilot and maintenance requirements. Specific types of aircraft and business operations are required to obtain more stringent Part Registrations and to operate under more demanding regulations. For example, under a Part 91 registration, any qualified pilot may fly an aircraft—regardless of the pilot's age. But under a Part 121 registration, a pilot over the age of 60 may no longer fly an airline aircraft after age 60—because of safety and operation concerns. There are five pilot certificates (licenses) granted by the FAA:

1. A **student pilot certificate** (license) is designed for the initial training period of flying. The student pilot must have a flight instructor present. He or she can solo after appropriate instructor endorsements.
2. A **recreational pilot certificate** limits the holder to: specific categories and classes of aircraft, the number of passengers which may be carried, the distance that may be flown from the departure point, flight into controlled airports, and other limitations.
3. A **private pilot certificate** lets the pilot carry passengers and provides for limited business use of an airplane.
4. A **commercial pilot certificate** lets the pilot conduct some operations for compensation and hire.
5. An **airline transport pilot certificate** is required to fly as captain by some air transport operations.

The FAA regulations require that a pilot operating under a Part 135 air carrier certificate hold a commercial pilot license—with a minimum of 1200 hours of experience as a pilot-in-command. FAR Part 135.243(c)(2). Some operations are required to have a flight crew of at-least two pilots, depending on the size of the aircraft and the number of passengers.

Under a Part 135, those engaged in commuter or air-taxi operations are held to higher safety and operation standards than Part 91—because they are no longer operating in private carriage but are operating in the carriage of others for hire and compensation. FAR Part 135.141 prescribes the additional aircraft and equipment requirements for operations as an air carrier. Some of the heightened requirements apply only to certain aircraft or passenger numbers, but all demonstrate heightened regulation of those being carried in public transportation.

Taxpayer seeks the benefits of the public transportation exemption without the burdens of public transportation regulations. The Department requires those seeking the public transportation exemption to act as a public transportation entity—subject to the stringent regulations of Part 135. Taxpayer operates under Part 91—a less stringent set of regulations. If Taxpayer seeks the public transportation exemption—then Taxpayer is required to seek authority to do so and must submit and operate as required by that authority.

Taxpayer asserts it purchased the aircraft for the purpose of engaging in public transportation. Concerning Taxpayer's assertion that it is a public transportation entity, this introduces evidence of Taxpayer's intentions when Taxpayer acquired the aircraft. It is well established that exemption statutes are strictly construed against a taxpayer; as such, Taxpayer has the burden of establishing entitlement to the exemption. *See*, Department of Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003).

IC 6-6-6.5-2 requires an Indiana resident who owns an aircraft to register the aircraft with the Department within 31 days after the purchase date. This is done by submitting Form 7695, **Application for Aircraft Registration or Exemption**. IC 6-2.5-9-6 states that the State of Indiana may not register an aircraft unless the person obtaining the registration:

(1) presents proper evidence, prescribed by the department, showing that the state gross retail and use taxes imposed in respect to the aircraft have been paid or that the state gross retail and use taxes are inapplicable because of an exemption; or

(2) files the proper form and pays the state gross retail and use taxes imposed in respect to the aircraft.

Taxpayer has yet to file Form 7695 with the Department—despite the fact that the Department sent an application for registration to Taxpayer in August 2003. The Department became aware of Taxpayer's ownership of the aircraft during a comparison of FAA registration records to the Department's records. The FAA records showed that the Taxpayer was issued a certificate on June 18, 2003. Based on this, the Department sent Taxpayer a letter notifying it that the aircraft must be properly registered with the state and informing Taxpayer that sales and use tax was due. Taxpayer did not return the Form 7695 provided by the Department. Taxpayer instead wrote a letter stating that it had attached a check for the registration fees and an exemption certificate. The certificate attached was a Form ST-105, **General Sales Tax Exemption Certificate**. Form ST-105 is given to a merchant by a taxpayer for sales tax exempt purchases. Merchants are required under Indiana law to collect sales tax on all sales unless the purchaser provides the merchant with a sales tax exemption certificate. *See* IC 6-2.5-2-1 and IC 6-2.5-8-8. In this case, Taxpayer did not purchase the aircraft from the Department. Presumably, Taxpayer submitted Form ST-105 in an attempt to substantiate an exemption.

In the two years since acquiring the aircraft, Taxpayer has not complied with Indiana law; Taxpayer has yet to submit a valid registration Form 7695. The registration process is similar to the registration of a motor vehicle—legal registration occurs and a concurrent assessment of applicable taxes, including sales tax, is made. The form contains sections requiring the owner to state the particulars of the aircraft, such as the FAA registration number, the serial number, the make and model, the type and number of engine(s), and the gross landing weight. These are used to determine the fees and taxes due on the aircraft—sales/use tax, annual excise tax, and the annual registration fee.

Registration of an aircraft is valid for one year; the registration fee is $10. IC 6-6-6.5-5 and IC 6-6-6.5-3. As well, an annual aircraft license excise tax is imposed; the tax is in lieu of the ad valorem property tax. IC 6-6-6.5-12. The tax imposed is based on the age, class, and maximum landing weight of the taxable aircraft; computed based on a statutory table. IC 6-6-6.5-13. In order for the Department to calculate the aircraft license excise tax due, it needs to have a record of the particulars of an aircraft. Form 7695 collects and consolidates the necessary information.

As well, the registration form has the owner state the ownership details, such as who owns the aircraft, the type of ownership, the taxpayer ID numbers, and the address of the owners. The owner is to state at which airport the aircraft is to be based. The registration form also provides a section in which sales and use tax due is determined. In this section, the owner states if an exempt use is being claimed. If an exempt use is being claimed, the owner is to provide its retail merchant number and is to state which exemption is being claimed. In order to claim the public transportation exemption, Form 7695 requires Taxpayer to state the FAA Part it operates under and to submit a copy of the FAA Certificate for Public Transportation. Finally, the form requires the owner to provide purchase and trade-in allowance amounts so that sales and use tax due can be computed.

Taxpayer has not completed and submitted the registration form. The Department provided Form 7695 to Taxpayer. The registration form is the statutory means imposed so that the Department has the information on file in a consolidated and unified manner so as to administer the taxes imposed on aircraft. The Department has needed to piece together—without the benefit of the registration form—the information necessary to assess Taxpayer the statutory taxes due. Taxpayer is seeking the benefit of sales tax exemption without complying with the burden—albeit it a modest burden—of providing the necessary information so as to claim and substantiate an exemption. Under Indiana law, it is Taxpayer's responsibility to substantiate an exemption; tax statutes are construed in favor of taxation.

Taxpayer is not operating as a public transportation entity; it is operating as a private carrier under FAR Part 91. It has not secured authority to be a public transportation entity. Additionally, Taxpayer has not registered the aircraft with the state as required by law; Taxpayer has not met the threshold requisite documentation to begin establishing an exempt use.

FINDING

For the reasons stated above, Taxpayer's claim for the public transportation exemption is denied.

DEPARTMENT OF STATE REVENUE

0220050004P.LOF

LETTER OF FINDINGS NUMBER: 05-0004P
Income Tax
For the Calendar Year 2002

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

ISSUE

I. Tax Administration – Penalty

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

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

STATEMENT OF FACTS

The late penalty and underpayment penalty were assessed on the filing of a calendar year corporate income tax return for the year 2002.

The taxpayer is an out-of-state company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be abated as the error was the fault of the taxpayer's accountant.

The Department points out the accountant is an agent of the taxpayer, and therefore the taxpayer is liable for the actions of the accountant. "Generally, a principal who controls or has the right to control the physical conduct of his agent in the performance of a service is an employer upon whom liability for the torts of the agent may be imposed." Dague v. Fort Wayne Newspapers, 647 NE 2nd 1138 (Ind. Ct. App.) (1995).

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

0420050047P.LOF

LETTER OF FINDINGS NUMBER: 05-0047P
Sales/Use Tax
For the Calendar Year 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(S)

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1(d); IC 6-8.10-5; 45 IAC 15-11-2

Taxpayer protests the penalty assessed.

STATEMENT OF FACTS

Taxpayer in a letter dated December 3, 2004 protested the late payment penalty assessed and states it exercised due diligence in registering with the department and making payment prior to receipt of returns. Taxpayer further states that this is their first contract in Indiana and that they had personnel changes, which delayed the registration and payment process. This letter of finding is based on the contents of the file, because after April 1, 2005, the taxpayer failed to respond to telephone calls or correspondence. Taxpayer requests an abatement of penalty due to the above unusual circumstances.

I. Tax Administration – Penalty

DISCUSSION

Taxpayer requests the penalty be abated because it has established reasonable cause. Taxpayer states that it did not wait until it received form to pay the tax, but sent the entire amount collected with the BT-1 application. Further, the taxpayer stated that there were changes in personnel and that this is their first business in Indiana. The taxpayer alleges that this constitutes reasonable cause. The Department does not view these reasons as establishing reasonable cause. The taxpayer did not register or attempt to register and review the laws in Indiana prior to commencing doing business in Indiana. It is not apparent that the taxpayer did reasonable due diligence prior to commencing business in Indiana, and did not register to do business until three months after it had commenced doing business in Indiana.

Taxpayer has not shown reasonable cause.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420050051.LOF

LETTER OF FINDINGS NUMBER 05-0051
RESPONSIBLE OFFICER
SALES TAX and WITHHOLDING TAX
For Tax Period 1999-2003

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

ISSUE

Sales and Withholding Tax -Responsible Officer Liability

Authority: IC 6-2.5-9-3, IC 6-3-4-8 (f), IC 6-8.1-5-1 (b).

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

STATEMENT OF FACTS

The taxpayer was a director, incorporator and officer of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana for the tax period 1999-2003. The Indiana Department of Revenue (department) assessed the outstanding corporate withholding and sales taxes, interest and penalty against the taxpayer personally. The taxpayer protested the assessment and a telephone hearing was held. This Letter of Findings results.

Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

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

An individual who:

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

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

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

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."

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. The taxpayer bears the burden of proving that the assessment is incorrect. IC 6-8.1-5-1 (b).

The taxpayer contended that he left his involvement with the corporation prior to June 18, 1998. The taxpayer offered substantial documentation that he was no longer affiliated with the corporation prior to the tax period, 1999-2003. He sustained his burden of proving that he is not personally responsible for corporate trust taxes that were not paid to the state during the tax period.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0120050131.LOF

LETTER OF FINDINGS: 05-0131
Individual Adjusted Gross Income Tax
For 1999 through 2003

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

ISSUE

I. Unapportioned State Income Tax.

Authority: Ind. Const. art. X, § 8; IC 6-3-1-3.5 et seq.; IC 6-8.1-5-1(b).

Taxpayer maintains that Indiana is without authority to impose a state income tax.

STATEMENT OF FACTS

The Department of Revenue (Department) sent taxpayer notices of "Proposed Assessment" stating that taxpayer owed unpaid state income tax. Taxpayer responded with a letter stating that he was not subject to the Indiana income tax, that he was not required to submit state tax returns, that he was not a "taxpayer," and that his letter did not constitute a "protest." Nonetheless, the Department chose to treat his letter as a "protest." The "protest" was assigned to a hearing officer, and taxpayer was offered the opportunity to explain his challenge of the proposed assessments during an administrative hearing. Taxpayer declined the opportunity on the ground he was not subject to the Indiana state tax laws.

DISCUSSION

I. Unapportioned State Income Tax.

Taxpayer argues that Indiana is without authority to levy an unapportioned state income tax. Taxpayer maintains that the Department has not proven he owes income tax and that the "department has long ago defaulted on its opportunity to offer any complete and accurate written rebuttal."

Taxpayer's apportionment argument has been previously addressed by the Department in Letter of Findings 01-20050055 issued April 14, 2005. The Indiana Constitution states that, "The general assembly may levy and collect a tax upon income from whatever source derived, at such rates, in such manner, and with such exemptions as may be prescribed by law." Ind. Const. art. X, § 8. The Indiana General Assembly has exercised its constitutional prerogative by imposing a state adjusted gross income tax on individuals and corporations. IC 6-3-1-3.5 et seq. Taxpayer's apportionment argument is patently frivolous and will not be readdressed here.

Taxpayer further maintains that the Department has not proven he owes income tax. Taxpayer has it backwards. IC 6-8.1-5-1(b) provides that "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against person against whom the proposed assessment is made."

Taxpayer makes reference to the Uniform Commercial Code, Black's Law Dictionary, and the United States Constitution in support of his contention that he is not a person required to report his income or to pay state income tax on that income. Taxpayer's arguments are vague, insubstantial, and totally without merit. Taxpayer has failed to meet his burden of proving that the proposed assessments are incorrect.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120050144P.LOF

LETTER OF FINDINGS NUMBER: 05-0144P
Income Tax
For the Calendar Years 2001 and 2002

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

ISSUE

I. Tax Administration – Penalty

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

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

II. Tax Administration - Interest

Authority: IC 6-8.1-10-1

The taxpayer protests the interest assessment.

STATEMENT OF FACTS

The late penalty and underpayment penalty were assessed on the late filing of calendar year individual income tax returns for the years 2001 and 2002.

The taxpayer is an individual residing in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be abated as the error was the fault of the taxpayer's accountant.

The Department points out the accountant is an agent of the taxpayer, and therefore the taxpayer is liable for the actions of the accountant. "Generally, a principal who controls or has the right to control the physical conduct of his agent in the performance of a service is an employer upon whom liability for the torts of the agent may be imposed." Dague v. Fort Wayne Newspapers, 647 NE 2nd 1138 (Ind. Ct. App.) (1995).

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.

II. Tax Administration – Interest

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

DEPARTMENT OF STATE REVENUE

0320050152.LOF

LETTER OF FINDINGS NUMBER: 05-0152
Withholding Tax
Responsible Officer
For the Tax Period April, 1999-2003

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

ISSUE

1. Withholding Tax-Responsible Officer Liability

Authority: IC 6-8.1-5-1(b), IC 6-3-4-8(f).

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

STATEMENT OF FACTS

The taxpayer was an incorporator, member of the board of directors and officer of a corporation that did not remit the proper amount of withholding taxes during the tax period of April, 1999- 2003. The Indiana Department of Revenue assessed the unpaid withholding taxes, interest, and penalty against the taxpayer as a responsible officer of that corporation. The taxpayer protested the assessment of tax and requested that the decision be reached based upon the documentation he submitted.

1. 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 assessments are incorrect. IC 6-8-1-5-1(b).

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."

The taxpayer produced substantial documentation that he ended his relationship with the corporation on February 14, 1999, prior to the tax period. Therefore, he had no duty to collect and remit withholding taxes to the state. He is not personally responsible for the payment of the corporate withholding taxes.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

02-20050156P.LOF

LETTER OF FINDINGS NUMBER: 05-0156P
Income Tax
For the Short Period ended June 30, 2003

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

ISSUE

I. Tax Administration – Penalty

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

The taxpayer protests the negligence penalty.

STATEMENT OF FACTS

The negligence penalty was assessed on a calculation error resulting from the filing of an income tax return for the short period ended June 30, 2003.

The taxpayer is an out-of-state company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues that since the Federal regulations allow for waiver of penalty when a taxpayer relies on a tax preparer, the Department should allow waiver as Indiana regulations are closely tied to the Federal regulations.

First of all, the Department points out the accountant is an agent of the taxpayer, and therefore the taxpayer is liable for the actions of the accountant. "Generally, a principal who controls or has the right to control the physical conduct of his agent in the performance of a service is an employer upon whom liability for the torts of the agent may be imposed." Dague v. Fort Wayne Newspapers, 647 NE 2nd 1138 (Ind. Ct. App.) (1995).

With regard to the regulations, the wording between the Federal and Indiana is different. For one thing, the Federal regulations allow the IRS to directly penalize the tax preparer while Indiana regulations have no such wording. Indiana's regulations only assess penalty on the taxpayer.

The regulation which controls penalty is 45 IAC 15-11-2(b) which states, "Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to 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 negligent of tax duties as the taxpayer's tax preparer (agent) was inattentive. 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

0320050161.LOF

LETTER OF FINDINGS NUMBER: 05-0161
Withholding Tax
Responsible Officer
For the Tax Period December, 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

1. Withholding Tax-Responsible Officer Liability

Authority: IC 6-8.1-5-1(b), IC 6-3-4-8(f).

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

STATEMENT OF FACTS

The taxpayer was a shareholder and employee of a corporation that did not remit the proper amount of withholding taxes during the tax period of December, 1998. The Indiana Department of Revenue assessed the unpaid withholding taxes, interest, and penalty against the taxpayer as a responsible officer of that corporation. The taxpayer protested the assessment of tax. Pursuant to the taxpayer's request, this Letter of Findings is based upon the documentation in the file.

1. 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 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."

The taxpayer argued that she was not involved with the corporation as a shareholder or employee after her December 21, 1996 divorce from her husband who was the other shareholder and an employee. Pursuant to the Property Settlement, provided by the taxpayer, the taxpayer assigned all of her rights and interests in the corporation to her ex-husband. Since this liability is for a period after the time she left all association with the corporation, the taxpayer had no duty to collect and remit the December, 1998 withholding taxes to the state. She is not personally responsible for the payment of these corporate withholding taxes.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0320050189.LOF

LETTER OF FINDINGS NUMBER: 05-0189
Withholding Tax
Responsible Officer
For the Tax Period 1997-2001

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

ISSUE

1. Withholding Tax-Responsible Officer Liability

Authority: IC 6-8.1-5-1(b), IC 6-3-4-8(f).

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

STATEMENT OF FACTS

The taxpayer was an incorporator and officer of a corporation that did not remit the proper amount of withholding taxes during the tax period of 1997-2001. The Indiana Department of Revenue assessed the unpaid withholding taxes, interest, and penalty against the taxpayer as a responsible officer of that corporation. The taxpayer protested the assessment of tax and a hearing was held.

1. 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 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."

The taxpayer produced substantial documentation that he ended his relationship with the corporation in 1996, prior to the tax period. Therefore, he had no duty to collect and remit withholding taxes to the state for later periods. He is not personally responsible for the payment of the corporate withholding tax liabilities.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2005-03IT
July 15, 2005

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

ISSUES

Community Revitalization Enhancement District Tax Credit – Entitlement to CReED Tax Credit

Authority: IC 6-3.1-19-2, IC 6-3.1-19-3, IC 6-3.1-19-1.5, IC 6-3.1-19-5, IC 6-3-1-11

Taxpayer #1 requests the Department to rule on the following issues:

1. As the sole member of taxpayer #2, taxpayer #1 will be entitled to any CReED tax credit attributable to the Qualified Investment made by taxpayer #2 pursuant to the Equipment Installation Agreement in accordance with the Redevelopment Plan and in an amount approved by the IEDC.
2. Members of taxpayer #1, a "pass through entity" without a state or local tax liability against which the CReED tax credit may be applied, are entitled to the CReED tax credit determined for taxpayer #1.
3. Each member of taxpayer #1 will be entitled to a CReED tax credit equal to the CReED tax credit determined for taxpayer #2 during taxpayer #1's taxable year multiplied by the percentage of taxpayer #1's distribution income to which the member is entitled for such taxable year in which the Qualified Investment is made.

STATEMENT OF FACTS

1. Taxpayer #1 is a limited liability company ("LLC") and currently has, and will continue to have at least two (2) members. Taxpayer #1 will not make an election to be treated as a corporation pursuant to Section 301.7701 of the Treasury Regulations. Therefore, taxpayer #1 will continue to be taxed as a partnership.
2. Taxpayer #1 will not have any state or local tax liability against which a CReED tax credit may be applied for its taxable year ending December 31, 2005.
3. Taxpayer #2 is a single member LLC, wholly owned by taxpayer #2. Taxpayer #2 will not make an election to be treated as a corporation pursuant to Section 301.7701 of the Treasury Regulations. Therefore, as a wholly owned single member LLC of taxpayer #1, taxpayer #2 will be treated as a "disregarded entity" for federal income tax purposes.
4. The contractor is an Indiana LLC that is taxed as a partnership.
5. On or about June 10, 2005, taxpayer #2 and the contractor will enter into an Equipment Installation and Purchase Agreement ("Equipment Installation Agreement"), whereby the contractor will buy and install equipment with respect to the redevelopment and rehabilitation of a building as part of a plan adopted by the Commission on Industrial Development of an Indiana city to redevelop and rehabilitate the vacant building to serve as a manufacturing plant ("Redevelopment Plan").
6. In accordance with the Equipment Installation Agreement, the contractor will buy and install equipment (which will take

approximately two (2) months) at the building. After the equipment is installed and tested to meet the specifications set forth in the Equipment Installation Agreement, taxpayer #2 will purchase the installed equipment from the contractor (the "Closing"). It is anticipated that the Closing will occur on or about August 1, 2005.

7. On May 13, 2005, the Indiana city's CReED Industrial Development Commission approved as a part of its CReED Area Redevelopment Plan the equipment expenditure to be made by taxpayer #2 pursuant to the Equipment Installation Agreement as a Qualified Investment as required by IC 6-3.1-19-2(2).

8. The Indiana Economic Development Corporation approved the equipment expenditure made by taxpayer #2 pursuant to the Equipment Installation Agreement as a Qualified Investment as required by IC 6-3.1-19-2(3).

9. Taxpayer #2 and taxpayer #1 will not be ceasing or reducing its operation to relocate within the CReED District.

10. The contractor will not claim as a Qualified Investment any portion of it's expenditures for the equipment purchased and installed at the building pursuant to the Equipment Installation Agreement.

DISCUSSION

IC 6-3.1-19-3(A) PROVIDES THAT "Subject to section 5 of this chapter, a taxpayer is entitled to a credit against the taxpayer's state and local tax liability for a taxable year if the taxpayer makes a qualified investment in that year."

A qualified investment is defined in IC 6-3.1-19-2 as follows:

"[Q]ualified investment" means the amount of a taxpayer's expenditure that is:

(1) for redevelopment or rehabilitation of property located within a community revitalization enhancement district designated under IC 36-7-13;

(2) made under a plan adopted by an advisory commission on industrial development under IC 36-7-13; and

(3) approved by the Indiana Economic Development Corporation before the expenditure is made.

IC 6-6-3.1-19-3 states that "If a pass through entity is entitled to credit under this chapter but does not have state and local tax liability against which the tax credit may be applied, a … member of the pass through entity is entitled to a tax credit equal to:

(1) the tax credit determined for the pass through entity for the taxable year: multiplied by

(2) the percentage of the pass through entity's distributive income to which the … member is entitled."

A pass through entity is defined in IC 6-3.1-19-1.5 to include a limited liability company and under Tax Policy Directive #2, interpreting IC 6-3-1-11, a single member LLC is a disregarded entity.

IC 6-3.1-19-5 generally provides that a taxpayer is not entitled to claim the CReED credit to the extent that the taxpayer substantially reduces or ceases its operations in Indiana in order to relocate them within a CReED district.

Based upon the aforementioned, as of the date of the Closing, the purchase of the installed equipment by taxpayer #2 from the contractor pursuant to the Equipment Installation Agreement will constitute a Qualified Investment pursuant to IC 6-3.1-19-2.

Further, since taxpayer #2 is a "disregarded entity", taxpayer #1 will be entitled to the CReED tax credits generated by the Qualified Investment made by taxpayer #2, and, as members of a pass through entity without a state or local tax liability against which the CReED tax credit may be applied, CReED tax credits derived from taxpayer #2 will pass through to the members of taxpayer #1.

RULING

The Department rules:

1. As the sole member of taxpayer #2, taxpayer #1 will be entitled to any CReED tax credit attributable to the Qualified Investment made by taxpayer #2 pursuant to the Equipment Installation Agreement in accordance with the Redevelopment Plan and in an amount approved by the IEDC.

2. Members of taxpayer #1, a "pass through entity" without a state or local tax liability against which the CReED tax credit may be applied, are entitled to the CReED tax credit determined for taxpayer #1.

3. Each member of taxpayer #1 will be entitled to a CReED tax credit equal to the CReED tax credit determined for taxpayer #2 during taxpayer #1's taxable year multiplied by the percentage of taxpayer #1's distributive income to which the member is entitled for such taxable year in which the Qualified Investment is made.

CAVEAT

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

Indiana Department of State Revenue

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2005-04IT
July 15, 2005

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

ISSUES

Community Revitalization Enhancement District Tax Credit – Entitlement to CReED Tax Credit

Authority: IC 6-3.1-19-2, IC 6-3.1-19-3, IC 6-3.1-19-1.5, IC 6-3.1-19-5, IC 6-3-1-11

Taxpayer #1 requests the Department to rule on the following issues:

1. As the sole member of taxpayer #2, taxpayer #1 will be entitled to any CReED tax credit attributable to the Qualified Investment made by taxpayer #2 pursuant to the Real Estate Development Agreement in accordance with the Redevelopment Plan and in an amount approved by the IEDC.
2. Members of taxpayer #1, a "pass through entity" without a state or local tax liability against which the CReED tax credit may be applied, are entitled to the CReED tax credit determined for taxpayer #1.
3. Each member of taxpayer #1 will be entitled to a CReED tax credit equal to the CReED tax credit determined for taxpayer #2 during taxpayer #1's taxable year multiplied by the percentage of taxpayer #1's distribution income to which the member is entitled for such taxable year in which the Qualified Investment is made.

STATEMENT OF FACTS

1. Taxpayer #1 is a limited liability company ("LLC") and currently has, and will continue to have at least two (2) members. Taxpayer #1 will not make an election to be treated as a corporation pursuant to Section 301.7701 of the Treasury Regulations. Therefore, taxpayer #1 will continue to be taxed as a partnership.
2. Taxpayer #1 will not have any state or local tax liability against which a CReED tax credit may be applied for its taxable year ending December 31, 2005.
3. Taxpayer #2 is a single member LLC, wholly owned by taxpayer #2. Taxpayer #2 will not make an election to be treated as a corporation pursuant to Section 301.7701 of the Treasury Regulations. Therefore, as a wholly owned single member LLC of taxpayer #1, taxpayer #2 will be treated as a "disregarded entity" for federal income tax purposes.
4. The contractor is an Indiana LLC that is taxed as a partnership.
5. On or about June 10, 2005, taxpayer #2 and the contractor will enter into a Real Estate Development and Purchase Agreement ("Real Estate Development Agreement"), whereby the contractor will buy and undertake certain redevelopment and rehabilitation actions concerning a building as part of a plan adopted by the Commission on Industrial Development of an Indiana city to redevelop and rehabilitate the vacant building to serve as a manufacturing plant ("Redevelopment Plan").
6. In accordance with the Real Estate Development Agreement, the contractor will buy and undertake certain redevelopment and rehabilitation actions (which will take approximately two (2) months) at the building. After certain redevelopment and rehabilitation actions are taken as set forth in the Real Estate Development Agreement, taxpayer #2 will purchase the real estate from the contractor (the "Closing"). It is anticipated that the Closing will occur on or about August 1, 2005.
7. On May 13, 2005, the Indiana city's CReED Industrial Development Commission approved as a part of its CReED Area Redevelopment Plan the equipment expenditure to be made by taxpayer #2 pursuant to the Real Estate Development Agreement as a Qualified Investment as required by IC 6-3.1-19-2(2).
8. The Indiana Economic Development Corporation approved the real estate expenditure made by taxpayer #2 pursuant to the Real Estate Development Agreement as a Qualified Investment as required by IC 6-3.1-19-2(3).
9. Taxpayer #2 and taxpayer #1 will not be ceasing or reducing its operation to relocate within the CReED District.
10. The contractor will not claim as a Qualified Investment any portion of it's expenditures for the real estate acquisition, redevelopment and rehabilitation at the building pursuant to the Real Estate Development Agreement.

DISCUSSION

IC 6-3.1-19-3(A) PROVIDES THAT "Subject to section 5 of this chapter, a taxpayer is entitled to a credit against the taxpayer's state and local tax liability for a taxable year if the taxpayer makes a qualified investment in that year."

A qualified investment is defined in IC 6-3.1-19-2 as follows:

"[Q]ualified investment" means the amount of a taxpayer's expenditure that is:

(1) for redevelopment or rehabilitation of property located within a community revitalization enhancement district designated under IC 36-7-13;

(2) made under a plan adopted by an advisory commission on industrial development under IC 36-7-13; and

(3) approved by the Indiana Economic Development Corporation before the expenditure is made.

IC 6-6-3.1-19-3 states that "If a pass through entity is entitled to credit under this chapter but does not have state and local tax liability against which the tax credit may be applied, a … member of the pass through entity is entitled to a tax credit equal to:

(1) the tax credit determined for the pass through entity for the taxable year: multiplied by

(2) the percentage of the pass through entity's distributive income to which the … member is entitled."

A pass through entity is defined in IC 6-3.1-19-1.5 to include a limited liability company and under Tax Policy Directive #2, interpreting IC 6-3-1-11, a single member LLC is a disregarded entity.

IC 6-3.1-19-5 generally provides that a taxpayer is not entitled to claim the CReED credit to the extent that the taxpayer substantially reduces or ceases its operations in Indiana in order to relocate them within a CReED district.

Based upon the aforementioned, as of the date of the Closing, the purchase of the installed real estate by taxpayer #2 from the contractor pursuant to the Real Estate Development Agreement will constitute a Qualified Investment pursuant to IC 6-3.1-19-2.

Further, since taxpayer #2 is a "disregarded entity", taxpayer #1 will be entitled to the CReED tax credits generated by the Qualified Investment made by taxpayer #2, and, as members of a pass through entity without a state or local tax liability against which the CReED tax credit may be applied, CReED tax credits derived from taxpayer #2 will pass through to the members of taxpayer #1.

RULING

The Department rules:

1. As the sole member of taxpayer #2, taxpayer #1 will be entitled to any CReED tax credit attributable to the Qualified Investment made by taxpayer #2 pursuant to the Real Estate Development Agreement in accordance with the Redevelopment Plan and in an amount approved by the IEDC.
2. Members of taxpayer #1, a "pass through entity" without a state or local tax liability against which the CReED tax credit may be applied, are entitled to the CReED tax credit determined for taxpayer #1.
3. Each member of taxpayer #1 will be entitled to a CReED tax credit equal to the CReED tax credit determined for taxpayer #2 during taxpayer #1's taxable year multiplied by the percentage of taxpayer #1's distributive income to which the member is entitled for such taxable year in which the Qualified Investment is made.

CAVEAT

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

Indiana Department of State Revenue

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2005-08ST
July 25, 2005

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

ISSUES

Sales and Use Tax—Acquisition and use of construction materials in qualified projects and the subsequent leasing of the realty

Authority: IC 6-2.5-5-16; IC 6-2.5-3-4; IC 6-2.5-4-9; IC 6-2.5-3-2; Grand Victoria Casino & Resort v. Indiana Department of Revenue, 789 N.E.2d 1041 (Ind. Tax 2003)

STATEMENT OF FACTS

The taxpayer is authorized by Indiana statute to finance, construct, develop, and improve facilities through the issuance of revenue bonds. The taxpayer is expressly authorized by statute to acquire and dispose of real and personal property in the performance of its duties. The taxpayer is charged to construct and lease any project for promoting economic growth and development, as well as retaining and attracting new employment opportunities within Indiana. The Indiana Supreme Court has ruled that taxpayer is a public corporate entity which is an instrumentality or agency of the state. The taxpayer seeks a ruling concerning Indiana sales and use tax treatment on these issues:

1. The taxpayer's acquisition and use of tangible personal property, public utility commodities, and public utility services in connection with the construction of a qualified project;
2. Whether the taxpayer, contractor, or other person acting on the behalf of the taxpayer has any liability for sales and use tax

in connection with the acquisition or use of tangible personal property which is added to the improvements for a qualified project and becomes part of the real estate on which the improvements are located; and

3. Whether the taxpayer's leasing of the improvements for a qualified project to the lessee or the lessee's acquisition or use of the improvements for a qualified project is subject to sales or use tax.

DISCUSSION

1. Acquisition and Use of Property and Services

IC 6-2.5-5-16 states:

Transactions involving tangible personal property, public utility commodities, and public utility service are exempt from the state gross retail tax, if the person acquiring the property, commodities, or service:

(1) is the state of Indiana, an agency or instrumentality of the state, a political subdivision of the state, or an agency or instrumentality of a political subdivision of the state, including a county solid waste management district or a joint solid waste management district established under IC 13-21 or IC 13-9.5-2 (before its repeal); and

(2) predominantly uses the property, commodities, or service to perform its governmental functions.

With exceptions that are not relevant to this discussion, IC 6-2.5-3-4 exempts from use tax the storage, use, and consumption of tangible personal property if the property was acquired in a transaction that is exempt from sales tax and the property is being used, stored, or consumed for the purpose for which it was exempted.

The taxpayer's acquisition and use of tangible personal property, public utility commodities, and public utility services in connection with the construction of qualified improvement projects fall within the exemption named in IC 6-2.5-5-16.

2. Construction Materials Incorporated into the Improvements

IC 6-2.5-4-9 states:

(a) A person is a retail merchant making a retail transaction when the person sells tangible personal property which:

(1) is to be added to a structure or facility by the purchaser; and

(2) after its addition to the structure or facility, would become a part of the real estate on which the structure or facility is located.

(b) Notwithstanding subsection (a), a transaction described in subsection (a) is not a retail transaction, if the ultimate purchaser or recipient of the property to be added to the structure or facility would be exempt from the state gross retail and use taxes if that purchaser or recipient had directly purchased the property from the supplier for addition to the structure or facility.

IC 6-2.5-3-2 provides, in relevant part:

(a) [U]se 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 that transaction or of the retail merchant making that transaction.

***

(c) The use tax is imposed on the addition of tangible personal property to a structure or facility, if, after its addition, the property becomes part of the real estate on which the structure or facility is located. However, the use tax does not apply to additions of tangible personal property described in this subsection, if:

***

(2) the ultimate purchaser or recipient of that property would have been exempt from the state gross retail and use taxes if that purchaser or recipient had directly purchased the property from the supplier for addition to the structure or facility.

The taxpayer's acquisition and use of any tangible personal property in connection with a project is exempt from sales and use tax. Accordingly, the acquisition or use of construction materials—tangible personal property incorporated into the realty—is not subject to sales and use tax, regardless of the person acquiring or using the materials.

3. Leasing of the Improvements

With exceptions not relevant to this discussion, neither sales nor use tax applies to the sale or leasing of real property. *See, e.g.* Grand Victoria Casino & Resort v. Indiana Department of Revenue, 789 N.E.2d 1041 (Ind. Tax 2003). In a qualified improvement project, the improvements will be constructed by and owned by the taxpayer during the construction. Neither possession nor control over the improvements will pass to a lessee until the completion of construction. Once completed, possession and control over the improvements—now realty—will be transferred to lessee pursuant to a long-term lease. Thus, no sales or use tax will apply to the taxpayer's lease of the realty to the lessee.

RULING

The Department rules:

1. The taxpayer's acquisition and use of tangible personal property, public utility commodities, and public utility services in connection with the construction of improvements are exempt from sales and use tax.

2. The taxpayer's acquisition and use of any tangible personal property in connection with a project is exempt from sales and use tax. Accordingly, the acquisition or use of construction materials—tangible personal property incorporated into the realty—is not subject to sales and use tax, regardless of the person acquiring or using the materials.

3. Neither sales nor use tax apply to the taxpayer's leasing of realty to a lessee.

CAVEAT

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

Indiana Department of State Revenue

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2005-09ST
July 26, 2005

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

ISSUES

Food and Beverage Tax—Application to single-serving potato chips, pre-made sandwiches, and 20 ounce sealed soft drinks.
Authority: IC 6-9-12-3; Departmental Notice # 21, July 2005.

STATEMENT OF FACTS

The taxpayer is a convenience store that sells ready to eat food, grocery items, and other products. Taxpayer requests a ruling on whether these items are subject to the food and beverage tax: single-serving bags of potato chips, pre-made sandwiches, and 20 ounce sealed soft drinks. Taxpayer states that typically customers select the items they wish to purchase, pick them up from the store's display shelving, and present them to the sales clerk for purchase at the checkout stand. The taxpayer makes available on the sales floor for the customers various eating utensils, such as napkins. The taxpayer allows customers to take without charge the eating utensils they desire, but the taxpayer does not directly give any utensil to the customer.

DISCUSSION

IC 6-9-12-3 names the taxable transactions subject to the food and beverage tax. Tax is imposed on any transaction in which food or beverage is furnished, prepared, or served and then sold with eating utensils provided by the retail merchant. Examples of eating utensils include plates, knives, forks, spoons, glasses, cups, napkins, and straws. The taxpayer has stated that it does make eating utensils available to their customers when they purchase the food and beverage items named above. Departmental Notice # 21, July 2005, restates IC 6-9-12-3. The notice states succinctly: "Food sold with eating utensils provided by a retail merchant, including plates, knives, forks, spoons, glasses, cups, napkins, or straws will make the food or beverage subject to the food and beverage tax."

RULING

The Department rules that the single-serving potato chips, pre-made sandwiches, and 20 ounce sealed soft drinks sold by the taxpayer are subject to food and beverage tax because the taxpayer makes eating utensils available to its customers with the purchase of these items.

CAVEAT

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

Indiana Department of State Revenue

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2005-10ST
July 26, 2005

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

ISSUE

Sales/Use Tax – Out-of-State Delivery

Authority: IC 6-2.5-13-1, IC 6-2.5-5-24

The taxpayer requests the Department to rule on the application of sales/use tax to sales that are delivered out-of-state.

STATEMENT OF FACTS

The taxpayer sells furniture products, including sales to customers outside the State of Indiana. For some out-of-state sales, the customer will request the furniture be delivered to the customer's out-of-state location. Delivery may occur by the taxpayer's company-owned vehicles or by common carrier.

DISCUSSION

IC 6-2.5-13-1(d) provides:

The retail sale, excluding lease or rental, of a product shall be sourced as follows:

(2) When the product is not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by purchaser… occurs, including the location indicated by instructions for delivery to the purchaser…

IC 6-2.5-5-24(b) provides:

Transactions are exempt from the state gross retail tax to the extent that the gross retail income from those transactions is derived from gross receipts that are:

(2) derived from business conducted in commerce between the state and either another state or a foreign country, to the extent the state is prohibited from taxing that gross income by the Constitution of the United States.

It is clear then, by both the above "sourcing" statute and the "interstate commerce statute", the sale of furniture delivered to an out-of-state location is not subject to sales/use tax.

RULING

The Department rules the sale of furniture delivered to an out-of-state location, by either the taxpayer's own conveyance or common carrier, is not subject to sales/use tax.

CAVEAT

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

Indiana Department of State Revenue