INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Compliance and Technical Assistance Program Quality Assurance Guarantee
Identification Number: Water-007-NPD
Date Originally Effective: February 19, 2006
Dates Revised: None
Other Policies Repealed or Amended: None
Brief Description of Subject Matter: To provide a quality assurance guarantee to an individual, municipality, business or other entity ("Regulated Entities") that has received confidential compliance assistance from the Compliance and Technical Assistance Program ("CTAP") of the Office of Pollution Prevention and Technical Assistance ("OPPTA") and upon which such Regulated Entity may have relied to its detriment.
Citations Affected: IC 13-28, 13-30-6

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and if it conflicts with these laws, the laws shall control. This nonrule policy document may be put into effect by IDEM 30 days after presentation to the appropriate board. Pursuant to IC 13-14-1-11.5, this policy will be available for public inspection for at least 45 days prior to presentation to the appropriate board. If the nonrule policy is presented to more than one board, it will be effective 30 days after presentation to the last. IDEM will submit the policy to the Indiana Register for publication. Revisions to the policy will follow the same procedure of presentation to the board and publication.

1. PURPOSE: To provide a quality assurance guarantee to an individual, municipality, business or other entity ("Regulated Entities") that has received confidential compliance assistance from the Compliance and Technical Assistance Program ("CTAP") of the Office of Pollution Prevention and Technical Assistance ("OPPTA") and upon which such Regulated Entity may have relied to its detriment.

2. POLICY STATEMENT: This policy applies in instances where CTAP assistance may have either directly or indirectly lead The Office of Compliance and Enforcement ("OCE") to allege non-compliance by the Regulated Entity. In such instance, the Indiana Department of Environmental Management ("IDEM") shall not issue either a Violation Letter or a Notice of Violation assessing a gravity-based penalty against a Regulated Entity upon learning that a Regulated Entity sought out, received, and relied upon written confidential compliance assistance provided by CTAP prior to the alleged violation.

3. RESPONSIBILITIES: When requested by a regulated entity, it is the responsibility of OCE, the Office of Air Quality ("OAQ"), the Office of Land Quality ("OLQ"), and the Office of Water Quality ("OWQ") Compliance Branches to forward to CTAP written waivers of confidentiality regarding enforcement actions within ten (10) business days of receipt of such request. The request may be made at the time of an inspection or thereafter and be made by any written means (e.g. email, letter, facsimile). Upon receipt of a written waiver of confidentiality, CTAP will then provide documentation of its actions and will coordinate with OCE, OAQ, OLQ, and OWQ Compliance Branches to review and make an appropriate determination. It is the responsibility of CTAP to document the Regulated Entity's detailed requests for compliance and technical assistance and to enter this information into the CTAP database. It is the responsibility of the Regulated Entity to provide relevant compliance-related information in sufficient detail to CTAP. CTAP staff must ensure the CTAP database entry includes all relevant and appropriate information as supplied by the Regulated Entity. The database entry must also include a summary of the compliance assistance given, including information obtained from program areas, interpretation and documentation of all responses and program area contacts. Upon receipt of the regulated entity's written waiver of confidentiality, CTAP will provide OCE with the date of service, requested information, and response to the questions or issues. CTAP will also provide a means for the Regulated Entity to review the summary of information supplied to CTAP by the Regulated Entity and confidential compliance assistance given based on that information. This written summary will be generated by CTAP's database.

4. PROCEDURES: If and when a Regulated Entity claims that it has received and relied upon confidential compliance assistance provided by CTAP and that such reliance has either directly or indirectly lead to an allegation of non-compliance by OCE, OAQ, OLQ or OWQ, a written request for waiver of confidentially shall be sought from the Regulated Entity. If the Regulated Entity declines to waive confidentiality, then OCE, OAQ, OLQ or OWQ shall proceed with a relevant and appropriate compliance/enforcement response. If the regulated entity consents in writing to waiving confidentiality, then the confidential compliance assistance documentation maintained by CTAP shall be examined within five (5) business days after its receipt by appropriate representatives of OCE, OAQ, OLQ, OWQ and OPPTA to determine if the confidential compliance assistance provided by CTAP, and relied upon by the Regulated Entity, has either directly or indirectly lead to an allegation by OCE, OAQ, OLQ or OWQ of non-compliance against a Regulated Entity.

If the appropriate representatives of OCE, OAQ, OLQ, OWQ and CTAP agree that the confidential compliance assistance provided by CTAP and relied upon by the Regulated Entity has either directly or indirectly lead to an allegation of non-compliance, then OCE shall not proceed with assessing a gravity-based civil penalty against the Regulated Entity. However, OCE may elect to assess a civil penalty solely based on economic benefit of non-compliance, consistent with IDEM's Civil Penalty Policy.

If it is determined that the confidential compliance assistance provided by CTAP to a Regulated Entity has not directly or indirectly lead to an allegation of non-compliance against a Regulated Entity, then a relevant and appropriate compliance/enforcement response shall be provided by OCE. In the event that consensus on this determination is not achieved by the appropriate representatives of OCE, OAQ, OLQ, OWQ and CTAP, then the matter shall be resolved by the Assistant Commissioners of OCE and OPPTA.

In effectuating this policy, it may be necessary for a Regulated Entity and IDEM to enter into an Agreed Order specifying certain corrective measures needed to be performed by the Regulated Entity in order to return to compliance with Indiana law.

5. DISCLAIMER: Should a Regulated Entity intentionally, knowingly, or recklessly either (1) provide erroneous information to CTAP during its confidential compliance assistance efforts; or (2) prior to seeking confidential compliance assistance from CTAP, violate a rule or statute under I.C. § 13-30-6 directly or indirectly connected to the same issue for which the Regulated Entity subsequently sought confidential compliance assistance from CTAP, then this Policy shall not apply and OCE shall initiate an appropriate compliance/enforcement response.

Related Compliance Policies:

1. CTAP Confidentiality Policy (www.in.gov/idem/ctap/guidance.pdf)
2. IDEM's Civil Penalty Policy (www.in.gov/idem/enforcement/oe/policy/nrp/civil.html)
3. IDEM's Self-Disclosure and Environmental Audit Policy www.in.gov/idem/enforcement/oe/policy/nrp/self.html

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DEPARTMENT OF STATE REVENUE

02-20020321.LOF

LETTER OF FINDINGS NUMBER: 02-0321
CORPORATE INCOME TAX
For Years 1996-1999

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

ISSUES

I. Adjusted Gross Income Tax – Nexus and Public Law 86-272

Authority: *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977); *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992); *National Bellas Hess, Inc. v. Department of Revenue,* 386 U.S. 753 (1967); *Enterprise Leasing v. Dep't of Revenue*, 779 N.E.2d 1284 (Ind. Tax Ct. 2002); *Meridian Mortg. Co. v. State*, 395 N.E.2d 433, 439 (Ind. App. 1979); *National Serv-All v. Indiana Dep't of State Revenue*, 644 N.E.2d 954 (Ind. Tax Ct. 1994). *Dep't of Treasury v. Ice Service, Inc*., 41 N.E.2d 201 (Ind. 1942). IC 6-3-2-2(a); 45 IAC 3.1-1-38; 15 USC § 381—P.L. 86-272.

Taxpayer protests the imposition of adjusted gross income tax on the proceeds from sales it made to Indiana and other states.

STATEMENT OF FACTS

Taxpayer corporation is a California corporation with a wholly owned Subsidiary in Indiana. Subsidiary holds certain manufacturing and operating assets and properties. Subsidiary manufactures metal containers and component parts—as well as metal caps and closures—for Taxpayer and other unrelated third parties. Subsidiary does all of its manufacturing at four plants—all of which are located in Indiana.

When the manufacturing process is complete, Subsidiary stores its finished products either at its own plant or at a third-party warehouse until Subsidiary is instructed by its customer—in this case, Taxpayer—to drop ship its goods to the end purchaser—in this case—Taxpayer's customers. Subsidiary contracts with common carriers for delivery of its goods. Prior to the shipment, Subsidiary prepares invoices and corresponding bills of lading for the product being shipped. Subsidiary prepares this paperwork at the plant location from which the goods are shipped. Subsidiary prints these invoices on generic invoice forms. These invoices instruct the end purchaser to remit payment to Taxpayer directly.

Subsidiary drop ships its products to purchasers in numerous states. During the audit period, approximately 2 percent of the products were shipped to purchasers in Indiana. When Taxpayer's customers receive the product, the customers have the right to accept or reject the shipment. Until a shipment is accepted, Subsidiary retains the legal title to and bears the risk of loss for the products. When a purchaser accepts a shipment, the title for those products passes from Subsidiary to Taxpayer, and then from Taxpayer to its customer, the end purchaser. Each of these transactions occurs at the location of the end purchaser where the shipment is accepted.

Legal title, possession, and risk of loss and damage remain with Subsidiary until the goods are both received by and accepted by Taxpayer's customers. Pursuant to an agreement between Subsidiary and Taxpayer, Taxpayer is obligated to compensate

Subsidiary on a monthly basis at a contractually negotiated price for products and delivery costs. Taxpayer's obligation to Subsidiary occurs only after Taxpayer's customers have received and accepted the shipped goods.

Under the agreement, Taxpayer is required to compensate Subsidiary for Taxpayer's purchases—regardless of when Taxpayer receives payment from its customers. Generic invoices sent with the shipments to Taxpayer's customers require that payment for the goods be sent directly to Taxpayer.

In general, Taxpayer's customers deal directly with Taxpayer. These end purchasers also deal directly with Subsidiary on certain issues, such as production schedule changes, product delivery, and product warranty, If, after receiving and accepting the shipment of goods, Taxpayer's customer becomes dissatisfied with the product and reject the goods, Subsidiary is required to indemnify Taxpayer for those rejected goods. Specifically, Subsidiary agrees to warrant that all goods produced for Taxpayer are produced in conformity with Taxpayer's specifications; Subsidiary warranties to Taxpayer that all goods it produces for Taxpayer will meet or exceed Taxpayer's product warranties to its customers. Subsidiary is obligated under the agreement to indemnity Taxpayer for any breach of those customer warranties.

I. Adjusted Gross Income Tax – Nexus and Public Law 86-272

DISCUSSION

Substantial Nexus

Taxpayer believes it is not subject to adjusted gross income tax in Indiana. Its argument centers on the fact that it is located in California and claims it has no property or payroll in Indiana. Taxpayer claims that it does not have substantial nexus with Indiana pursuant to the Commerce Clause of the U.S. Constitution. Taxpayer cites the following Supreme Court cases in support of its position.

The requirement for a taxpayer to have substantial nexus with a taxing state is the first of four prongs of the test outlined in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). What constitutes substantial nexus was discussed in Quill Corp. v. North Dakota, 504 U.S. 298 (1992). In Quill, the Supreme Court reaffirmed the physical presence standard that it had adopted as the test for substantial nexus in National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). Therefore, according to the Supreme Court, a taxpayer must have a physical presence in a state to be subjected to its tax scheme. The Department will overlook, *in arguendo*, the fact that both Quill and National Bellas Hess are use tax cases, as it prefers to address Taxpayer's arguments directly.

Taxpayer contends that it has no physical presence in Indiana. However, when Taxpayer sells goods to its Indiana customers—despite the fact that Subsidiary retains title to the goods for nearly the entire time between the manufacture of the goods and its ultimate delivery—Taxpayer controls those goods and those goods are located in Indiana. That makes those goods inventory, thereby establishing a physical presence in Indiana.

Taxpayer is the parent corporation of the wholly-owned Subsidiary that manufactures, holds, and ships the products that the Taxpayer-parent sells. Subsidiary invoices Taxpayer-parent's customers. These facts are important in establishing the substance and nature of the transactions in comparison to the formality of the transactions. Indiana courts long have held that Indiana determines tax consequences based on the substance, not the form, of a transaction. *See, e.g.,* Enterprise Leasing v. Dep't of Revenue, 779 N.E.2d 1284, 1291 (Ind. Tax Ct. 2002). The three primary indicia of ownership of personal property are: title; possession; and control, which includes the right to sell, dispose of, or transfer. Meridian Mortg. Co. v. State, 395 N.E.2d 433, 439 (Ind. App. 1979).

The Indiana Tax Court has stated that "title alone is not necessarily dispositive." National Serv-All v. Indiana Dep't of State Revenue, 644 N.E.2d 954, 959 (Ind. Tax Ct. 1994). The court in Meridian Mortgage stated, "There is a considerable body of law to the effect that holding title alone does not necessarily confer ownership." Meridian Mortgage, 395 N.E.2d at 440. The court went on to discuss the analogy of a trust, in which the trustee has legal title to the property, but it is the beneficiary who is the equitable owner and who is entitled to the benefit and enjoyment of the property. *Id.* The court also provided the analogy of a stockbroker who holds stock for a customer—but legal title does not indicate the true owner. *Id.* The dispositive question is whether the holder of the property is entitled to exercise the incidents of ownership, such as the ability to sell the property.

In this case, Subsidiary does not have the right to sell the items it manufactures once Taxpayer has paid for those items. Information presented to the Department demonstrates that Subsidiary bills Taxpayer each month for product. Subsidiary then holds the product until Taxpayer names the customer to whom the product is to be shipped. The sale between Subsidiary and Taxpayer parent takes place whether or not the product is shipped at the time of payment. When the product is shipped, Subsidiary invoices and bills the customer at the mark-up price set by Taxpayer. These circumstances indicate that the Subsidiary has no discretion as to whom it may sell its product—these products were manufactured for and paid for by the Taxpayer. Taxpayer controls and directs the disposition of the product to the end customer. Under these circumstances, legal title and possession are secondary to the fact that Taxpayer controls this inventory. This control is indicium of ownership, despite the formalities of the transaction.

Taxpayer controls Subsidiary—to the extent that the Department considers Taxpayer and Subsidiary to be in an agency relationship. The Indiana Supreme Court has defined agency as "the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Dep't of Treasury v. Ice Service, Inc., 41 N.E.2d 201, 203 (Ind. 1942). The carefully constructed and executed business formalities between

Taxpayer and Subsidiary make Taxpayer the principal. The manufactured inventory held by Subsidiary is controlled by Taxpayer.

Therefore, the Department finds that Taxpayer has significant physical presence in Indiana to support a substantial nexus with the state in accord with the Commerce Clause and current line of Supreme Court cases.

Public Law 86-272

Taxpayer's next contention is that, even though it has been found to have substantial nexus with Indiana, its income is not derived from sources within Indiana, and that its activities in Indiana constitute nothing more than solicitation of sales and other activities ancillary to those solicitations.

The term "adjusted gross income derived from sources within Indiana" is defined in IC 6-3-2-2(a) to include the following:

(1) income from real or tangible personal property located in this state;
(2) income from doing business in this state;
(3) income from a trade or profession conducted in this state;
(4) compensation for labor or services rendered within this state; and
(5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property if the receipt from the intangible is attributable to Indiana under section 2.2 [IC 6-3-2-2.2] of this chapter.

Because Taxpayer is "doing business in this state," IC 6-3-2-2(a)(2) applies. 45 IAC 3.1-1-38 states that a taxpayer is "doing business" in a state if it operates a business enterprise or activity in such state including, but not limited to:

(1) Maintenance of an office or other place of business in the state
(2) Maintenance of an inventory of merchandise or material for sale, distribution, or manufacture, or consigned goods
(3) Sale or distribution of merchandise to customers in the state directly from company-owned or operated vehicles where title to the goods passes at the time of sale or distribution
(4) Rendering services to customers in the state
(5) Ownership, rental or operation of a business or of property (real or personal) in the state
(6) Acceptance of orders in the state
(7) Any other act in such state which exceeds the mere solicitation of orders so as to give the state nexus under P.L.86-272 (15 USC 381) to tax its net income.

Under the circumstances discussed above, because the Department finds that Taxpayer has inventory in Indiana, 45 IAC 3.1-1-38 (2) applies. Taxpayer specifically points to IC 6-3-2-2(a)(2) and 45 IAC 3.1-1-38(7) and states that it does not derive income from doing business in Indiana because its acts only constitute the mere solicitation of orders under the protection of Public 86-272 (15 USC § 381). This need not be discussed since the Department has established that taxpayer has inventory in Indiana. This makes an analysis of "acts exceeding mere solicitation" unnecessary. Taxpayer controls that inventory, thus establishing equitable ownership of that inventory.

FINDINGS

The taxpayer is respectfully denied.

DEPARTMENT OF STATE REVENUE

02-20020349.LOF

LETTER OF FINDINGS NUMBER: 02-0349
CORPORATE INCOME TAX
For Years 1996-1999

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

ISSUES

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

Authority: IC 6-2.1-2-2; IC 6-2.1-2-3; IC 6-2.1-2-4; IC 6-2.1-2-5; IC 6-2.1-3-3; 45 IAC 1.1-3-3(c).

Taxpayer protests the imposition of gross income tax on sales made to out-of-state customers.

STATEMENT OF FACTS

Taxpayer is a corporation that is wholly owned by a corporate Parent in California. Taxpayer holds certain manufacturing and operating assets and properties. Taxpayer manufactures metal containers and component parts, as well as metal caps and closures, for Parent and other unrelated third parties. Taxpayer does all of its manufacturing at four plants—all of which are located in Indiana.

When the manufacturing process is complete, Taxpayer stores its finished products either at its own plant or at a third-party warehouse until Taxpayer is instructed by its customer—in this case, Parent—to drop ship its goods to the end purchaser—in this case—Parent's customers. Taxpayer contracts with common carriers for delivery of its goods. Prior to the shipment, Taxpayer prepares invoices and corresponding bills of lading for the product being shipped. Taxpayer prepares this paperwork at the plant location from which the goods are shipped. Taxpayer prints these invoices on generic invoices. These invoices instruct the end purchaser to remit payment to Parent directly.

Taxpayer drop ships its products to purchasers in numerous states. During the audit period, approximately 2 percent of the products were shipped to purchasers in Indiana. When Parent's customers receive the product, the customers have the right to accept or reject the shipment. Until a shipment is accepted, Taxpayer retains the legal title to—and bears the risk of loss for—the products. When a purchaser accepts a shipment, the title for those products passes from Taxpayer to Parent, and then from Parent to its customer, the end purchaser. Each of these transactions occurs at the location of the end purchaser where the shipment is accepted.

Legal title, possession, and risk of loss and damage remain with Taxpayer until the goods are both received by and accepted by Parent's customers. Pursuant to an agreement between Taxpayer and Parent, Parent is obligated to compensate Taxpayer, on a monthly basis, at a contractually negotiated price for products and delivery costs. Parent's obligation to Taxpayer occurs only after Parent's customers have received and duly accepted the shipped goods.

Under the agreement, Parent is required to compensate Taxpayer for Parent's purchases—regardless of when Parent receives payment from its customers. Generic invoices sent with the shipments to Parent's customers require that payment for the goods be sent directly to Parent.

In general, Parent's customers deal directly with Parent. These end purchasers also deal directly with Taxpayer on certain issues, such as production schedule changes, product delivery, and product warranty, If, after receiving and accepting the shipment of goods, Parent's customer becomes dissatisfied with the product and reject the goods, Taxpayer is required to indemnify Parent for those rejected goods. Specifically, Taxpayer agrees to warrant that all goods produced for Parent are produced in conformity with Parent's specifications; Taxpayer warranties to Parent that all goods it produces for Parent will meet or exceed Parent's product warranties to its customers. Taxpayer is obligated under the agreement to indemnify Parent for any breach of those customer warranties.

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

DISCUSSION

IC 6-2.1-2-2(a)(1) imposes a gross income tax on the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana. The gross income tax also is imposed on a non-resident taxpayer who receives gross income derived from activities or businesses or any other sources within Indiana. IC 6-2.1-2-2(a)(2). The gross income tax is imposed at two rates, the high rate of 1.2 percent and the low rate of 0.3 percent. IC 6-2.1-2-3. The rate of tax is determined by the type of transaction from which the taxable gross income is received. IC 6-2.1-2-2(b). The receipts from wholesale sales and from selling at retail are taxed at the low rate. IC 6-2.1-2-4. Receipts from service activities and certain other business activities are taxed at the high rate. IC 6-2.1-2-5.

Gross income derived from business conducted in interstate commerce is exempt from the gross income tax to the extent such taxation is prohibited by the United States Constitution. IC 6-2.1-3-3. Gross income derived from the sale of tangible personal property in interstate commerce is not subject to the gross income tax if the sale is not completed in Indiana. 45 IAC 1.1-3-3(c).

Taxpayer asserts that its sales delivered out-of-state to Parent's non-Indiana customers are part of interstate commerce and as such are not subject to gross income tax. The Department concurs on the basis that these sales are completed when delivered to the customer.

FINDINGS

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0220030398.LOF

LETTER OF FINDINGS NUMBER: 03-0398
Corporate Adjusted Gross Income Tax
For the Tax Years 1998 - 2000

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

ISSUE

I. Adjusted Gross Income Tax—Income Derived from Sources within Indiana

Authority: IC 6-8.1-5-1(b); IC 6-3-2-2.

Taxpayer protests the exclusion by the Department of two affiliates from the consolidated corporate returns.

STATEMENT OF FACTS

Taxpayer included Parent MNY and subsidiaries MVet and MDE. Taxpayer filed a consolidated Indiana adjusted gross income tax return that included MVet and MNY. The Department conducted an audit and determined that neither MVet nor MNY had sufficient nexus with Indiana to permit them to file a consolidated return. Taxpayer protested and a hearing was held.

I. Adjusted Gross Income Tax—Income Derived from Sources within Indiana

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).

Taxpayer is the successor in interest to a consolidated group engaged in manufacturing. That group filed a consolidated income tax return for 1998 that included MNY, MVet, MChem, and MMed. MChem and MMed subsequently became MDE. In tax years 1999 and 2000, the consolidated income returns included MNY, MVet, MDE, NPB, and PB. For the years at issue, the consolidated income tax returns included MNY and MVet. According to the audit summary, MNY's only income in the audit period was from dividends, interest, and income reported on federal Schedule D and Form 4797. The audit summary stated MNY did not have nexus within Indiana; consequently the income and losses attributed to MNY were removed from the consolidated return.

MVet sold its operating assets and property to a third party in 1997. MVet had a lease on a building located within Indiana, Plant, in which it was to have produced products. The building lease began in 1990, and MVet exercised an option to terminate the lease in 2000. The Plant was initially designed for research and manufacture, but in 1997 the FDA refused to grant approval for the manufacture of MVet's product. As a result, the third party did not purchase the assets associated with this enterprise. MVet then transferred Plant to its parent, MDE. After the sale to the third-party and the transfer of the remaining assets to MDE, MVet did not have any assets left to manufacture any product.

MVet paid real estate taxes on land and structures in Indiana that had nominal value. The income tax returns for MVet for tax year 1998 showed no income rental and rental expenses of $214,464. The income tax returns for MVet for tax year 1999 showed only interest income and rent paid of $260,569. The income tax returns for MVet for tax year 2000 showed interest income, a nominal amount of other income, and rent paid of $124,967.

The audit summary stated MVet did not have any income from sources within Indiana during the audit period. Although it had to pay rent on the building, there was no manufacturing of products at this facility. The audit summary stated that MVet was without sufficient nexus in Indiana and did not allow it to include its income and losses within the consolidated income tax return.

MNY claimed to have Indiana nexus, stating it provided the funds to MVet to pay the Indiana lease payments and real estate taxes. MNY asserted its employees made several trips to Indiana to try to donate certain land to the State of Indiana. The audit summary concluded that these activities did not create sufficient nexus in Indiana for MNY.

At the hearing, Taxpayer argued that the activities of MVet and MNY created sufficient nexus to permit them to be included within the consolidated return. The calculation of Indiana adjusted gross income tax is based upon the combination of property, payroll, or sales within Indiana. IC 6-3-2-2. The statute states that income can be derived from:

(1) real or tangible personal property located in this state;
(2) income from doing business in this state;
(3) income from a trade or profession conducted in this state;
(4) compensation for labor or services rendered within this state; and
(5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property if the receipt from the intangible is attributable to Indiana under IC 6-3-2-2.2.

Id. Neither MVet nor MNY were in the real estate business. MVet had a failed enterprise and had an outstanding liability MNY was paying. The ownership of Plant was not a business enterprise; it was the holding of a capital asset. Neither MVet nor MNY were engaged with attempting to generate income from the Plant as real estate. For this reason, it was not an income-producing enterprise that would create sufficient nexus to allow them to be included in the consolidated returns.

FINDING

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

DEPARTMENT OF STATE REVENUE

0120040265.LOF

LETTER OF FINDINGS: 04-0265
Indiana Individual Income Tax
For 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Involuntary Servitude – Indiana Adjusted Gross Income Tax.

Authority: U.S. Const. amend. XIII; United States v. Drefke, 707 F.2d 978 (8th Cir. 1983); Ginter v. Southern, 644 F.2d 1226 (8th Cir. 1979); Kasey v. Commissioner, 457 F.2d 369 (9th Cir. 1972); Porth v. Brodrick, 214 F.2d 925 (10th Cir. 1954).

Taxpayer maintains that requiring him to pay state income tax constitutes "involuntary servitude" in violation of U.S. Const. amend. XIII.

II. Citizenship.

Authority: 26 U.S.C.S. § 7701(a)(14); United States v. Collins, 920 F.2d 619 (10th Cir. 1990); In re Becraft, 885 F2d 547 (9th Cir. 1989); United States v. Ward, 833 F2d 1538 (11th Cir. 1987).

Taxpayer argues that he is not required to pay federal or state income taxes because he is a "nonresident alien" and a "national of the United States."

III. Applicability of the State Adjusted Gross Income Tax.

Authority: 26 U.S.C.S. § 7701(a)(1); 26 U.S.C.S. § 7701(a)(14); United States v. Karlin, 785 F.2d 90 (3d Cir. 1986); United States v. Studley, 783 F.2d 934 (9th Cir. 1986); McKeown v. Ott, No. H 84-169, 1985 WL 11176 (N.D. Ind. Oct. 30, 1985)

Taxpayer argues that he is not a "person" required to report his income for federal or state income tax purposes.

IV. State Income Tax Liability.

Authority: IC 6-3-2-1(a); Black's Law Dictionary (7th ed. 1999).

Taxpayer maintains that there is nothing in Indiana law which makes him "liable" for paying income tax and that any tax payment made under Indiana law is a "donation."

STATEMENT OF FACTS

The Department of Revenue (Department) determined that taxpayer owed additional state income taxes for 2001. Accordingly, notices of "Proposed Assessment" were sent to taxpayer at his out-of-state location. Taxpayer disagreed and sent a 15-page document outlining the basis for his disagreement. The Department treated the document as a protest of the 2001 assessment. Taxpayer was invited to participate in an administrative hearing and to further explain the basis for the protest. Taxpayer chose not to take part. This Letter of Findings is based upon the taxpayer's protest letter.

This Letter of Findings refers to the petitioner as "taxpayer" a designation which taxpayer vigorously challenges. However, in the absence of a more suitable term, the Letter of Findings employs the term in its most generic sense and without any prejudice to the substance of taxpayer's legal arguments.

DISCUSSION

I. Involuntary Servitude – Indiana Adjusted Gross Income Tax.

Taxpayer claims that imposition of the state's adjusted gross income tax constitutes a form of involuntary servitude in violation of the U.S. Const. amend. XIII.

U.S. Const. amend. XIII provides that, "Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction."

The courts have uniformly rejected arguments that income tax is a form of "involuntary servitude" forbidden under U.S. Const. amend. XIII. "If the requirements of the tax laws were to be classed as servitude, they would not be the kind of involuntary servitude referred to in the Thirteenth Amendment." Porth v. Brodrick, 214 F.2d 925, 926 (10th Cir. 1954). *See also* United States v. Drefke, 707 F.2d 978, 983 (8th Cir. 1983); Ginter v. Southern, 644 F.2d 1226 (8th Cir. 1979); Kasey v. Commissioner, 457 F.2d 369 (9th Cir. 1972).

The Department does not agree with taxpayer's contention that imposition of the state's income tax places taxpayer in bondage; the Department concludes that taxpayer's argument is "clearly unsubstantial and without merit," as well as "far-fetched and frivolous." Porth, 214 F.2d at 926.

FINDING

Taxpayer's protest is denied.

II. Citizenship.

Taxpayer maintains that only those persons living in the District of Columbia or on land ceded to the federal government are subject to federal income tax or – by extension – Indiana income tax. In support of that contention, taxpayer cites to 26 U.S.C.S. § 7701(a)(10) which states that, "The term 'State' shall be construed to include the District of Columbia, where such construction is necessary to carry out provisions of this title."

The Internal Revenue Code imposes federal income tax upon all United States citizens and residents not simply those who reside in the District of Columbia, federal territories, and federal enclaves. United States v. Collins, 920 F.2d 619, 629 (10th Cir. 1990), *cert denied* 500 U.S. 920 (1991). "For seventy-five years, the Supreme Court has recognized that the sixteenth amendment authorizes a direct nonapportioned tax upon United States citizens throughout the nation, not just in federal enclaves." *See also* In re Becraft, 885 F2d 547, 549-50 (9th Cir. 1989); United States v. Ward, 833 F2d 1538, 1539 (11th Cir. 1987), *cert denied,* 485 U.S. 1022 (1988).

Taxpayer's reliance on 26 U.S.C.S. § 7701(a)(10) is misplaced; the cited provision means that the District of Columbia comes within the purview of the Internal Revenue Code. It does not means that *only* residents of the District of Columbia are subject to the IRC. It is plain that the use of the term "include" within 26 U.S.C.S. § 7701(a)(1) is a term of enlargement not limitation, and the reference to the District of Columbia is not intended to exclude other jurisdictions.

FINDING

Taxpayer's protest is denied.

III. Applicability of the State Adjusted Gross Income Tax.

Taxpayer argues that he is not a "person" required to report his income or to pay tax on that income. Taxpayer predicates this proposition on the ground that he is not subject to the provisions of the Internal Revenue Code (IRC). Taxpayer errs. The IRC clearly defines "persons" and sets out which persons are subject to federal taxes. 26 U.S.C.S. § 7701(a)(14) defines "taxpayer" as any person subject to any internal revenue tax. 26 U.S.C.S. § 7701(a)(1) defines a "person" as any individual, trust, estate, partnership, or corporation. Taxpayer's argument that an individual – such as himself – is not a "person" within the meaning of the IRC has been uniformly rejected. In United States v. Karlin, 785 F.2d 90, 91 (3d Cir. 1986), the court affirmed the defendant's conviction for failing to file income returns and rejected the defendant's contention that he was "not a 'person' within the meaning of 26 U.S.C. § 7203" as "frivolous and require[ing] no discussion." In United States v. Studley, 783 F.2d 934, 937 n.3 (9th Cir. 1986), the court affirmed defendant's conviction for failing to file income tax returns on the ground that defendant was "an absolute freeborn, and natural individual" stating that "this argument has been consistently and thoroughly rejected by every branch of the government for decades." "*[A]rguments about who is a 'person' under the tax laws,* the assertion that 'wages are not income', and maintaining that payment of taxes is a purely voluntary function do not comport with common sense - let alone the law." McKeown v. Ott, No. H 84-169, 1985 WL 11176 at *2 (N.D. Ind. Oct. 30, 1985) (*Emphasis added*).

Taxpayer's argument, that he is not a "person" subject to the IRC or to the Indiana individual income tax, does not warrant serious consideration.

FINDING

Taxpayer's protest is denied.

IV. State Income Tax Liability.

Taxpayer states that nothing in Indiana law makes him "liable" for paying Indiana income taxes. Taxpayer is mistaken. IC 6-3-2-1(a) states that, "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 non-resident person." (*Emphasis added*). The word "impose" means "to levy or exact a tax or duty." Black's Law Dictionary 759 (7th ed. 1999); "levy" means the "imposition of a fine or tax." Id. at 919. As a matter of law and simple common sense, whether a tax is levied or imposed, the person against whom the levy is made is "liable" for that amount.

Taxpayer set out other objections to the "Proposed Assessment" citing authorities such as former President Taft, the Congressional Record, the Copyright Act, Restatement (Second) Contracts, and Saint Paul's second letter to the apostle Timothy. Notwithstanding taxpayer's reliance on historical, legal, and Biblical authority, the Department will not expend further resources attempting to discern or refute taxpayer's wholly frivolous arguments.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220040269.LOF

LETTER OF FINDINGS NUMBER: 04-0269
Gross Income 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.

ISSUE

Gross Income Tax—Sale of an ownership interest

Authority: IC 6-8.1-5-1(b); IC 6-2.1-1-2; IC 6-2.1-1-11; IC 6-2.1-2-2; SFN Shareholders Grantor Trust v. Department of Revenue, 603 N.E.2d 194 (Ind. Tax Ct. 1992); LOF 95-0524; SLOF 97-0043; Revenue Ruling #2000-04IT; Revenue Ruling #2002-02IT;

Treasury Regulation 26 C.F.R. §301.7701-3(b).

Taxpayer protests the assessment of gross income tax on the sale of its membership interest.

STATEMENT OF FACTS

Healthcare is a QRS (Qualified Real Estate Investment Trust Subsidiary) of *Properties*; *Healthcare* is a wholly owned subsidiary of *Properties*. *Properties* is a REIT (Real Estate Investment Trust). One of *Heathcare's* holdings was *LLC*; *Healthcare* held a 100% membership interest in *LLC*. In 2001, *Healthcare* sold 100% of its membership interest in *LLC* to an unrelated third party.

For federal income tax purposes, *Healthcare* and *LLC* elected to be treated as disregarded entities. For Indiana adjusted gross income tax purposes, all income was reported under *Properties*, the parent of *Healthcare*. For Indiana gross income tax purposes, *Healthcare* filed a separate return to report gross income tax only. Included in the receipts of *Healthcare's* gross income were the receipts of *LLC*, which included the rental receipts from the rental of Indiana properties. *Healthcare* asserts that the sale of its membership interest in *LLC* was the sale of an intangible and that the sale was not sitused in Indiana. *Healthcare* argues that its commercial domicile is in Texas and that it had no business situs in Indiana. For this reason, when the sale of the membership interest occurred *Healthcare* did not include these gross receipts as being taxable in Indiana.

The Department issued an assessment on the basis that the sale of the membership interest in LLC was a sale of tangible assets subject to Indiana gross income tax. Taxpayer filed a protest and a hearing was held.

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).

For the year at issue, Indiana imposed a gross income tax. The gross income tax defined gross income as all gross receipts a taxpayer receives. *See* IC 6-2.1-1-2 (1998) (repealed 2003). IC 6-2.1-1-11 (1998) (repealed 2003) defined "receives" to mean the possession of income and the payment of a taxpayer's expense. IC 6-2.1-2-2 [repealed] imposed the gross income tax on the entire gross income of a taxpayer who is a resident or domiciliary of Indiana and the taxable gross income derived from activities, businesses, or any other sources within Indiana by a taxpayer who is not a resident or domiciliary of Indiana.

Properties and *Healthcare* were commercially domiciled in Texas. *LLC*, a Delaware limited liability company, had its principal office in Texas and owned two facilities in Indiana. In previous years, *Healthcare* paid Indiana gross income tax on the Indiana rental receipts received by *LLC* and passed through to *Healthcare*. As a single-member limited liability company, *LLC* was disregarded as a separate entity under Treasury Regulation 26 C.F.R. §301.7701-3(b). For federal income tax purposes, *Properties*, *Healthcare*, and *LLC* filed as one taxpayer under *Properties*. Likewise, for Indiana adjusted gross income tax purposes, *Properties* was the sole taxpayer. *Healthcare* was required to file a separate return for gross income tax purposes.

The Indiana Tax Court in SFN Shareholders Grantor Trust v. Department of Revenue, 603 N.E.2d 194 (Ind. Tax Ct. 1992) held that a non-resident holding company that owned 100% of a corporation's stock did not have a business situs in Indiana based on the corporation's ownership of a warehouse in Indiana; the non-resident holding company did not own the corporate assets for Indiana gross income tax purposes. The court also held that the shares of stock did not have an Indiana business situs. *Id*. at 197-98. The court also noted that because of separate identity, the shareholders were unable to sell corporate assets; the shareholders only could sell their shares. The doctrine of separate corporate identity does not break down merely because the corporation is a subsidiary—even if it is wholly owned. *Id*. at 198. The Tax Court has stated that it will not lightly disregard corporate form even in cases of close corporate relationship between a parent and subsidiary. *Id*. at 198-99. The Department has issued letters of findings and revenue rulings adhering to SFN. *See* LOF 95-0524, SLOF 97-0043, Revenue Ruling #2000-04IT, and Revenue Ruling #2002-02IT.

A reading of the contract to sell *LLC* indicates that the membership interest was sold. The contract and the ancillary documents outline what tangible assets were transferred. The sale of *LLC* was a sale of a membership interest. *Healthcare* was commercially domiciled in Texas and had no Indiana business situs. Therefore, the Indiana gross income tax assessment issued by the Department cannot be sustained.

FINDING

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

DEPARTMENT OF STATE REVENUE

0120040429P.LOF

LETTER OF FINDINGS NUMBER: 04-0429P
Individual Income 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 negligence penalty.

II. Tax Administration - Interest

Authority: IC 6-8.1-10-1

The taxpayer protests the interest assessment.

STATEMENT OF FACTS

The negligence penalty, underpayment penalty, and interest were assessed on the no-remit filing of an individual income tax return for the calendar year 2003. As the funds available to pay the 2003 tax were not in the Department's possession until February 2004, the taxpayer is only protesting the negligence penalty.

The taxpayer is an individual residing in Indiana.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the penalty should be waived as there was an overage in the 2001 tax account, and, there was miscommunication from the Department.

The Department agrees. The penalty will be waived as there was miscommunication from the Department, and, the funds were in the Department's possession at the due date of the 2003 return.

FINDING

The taxpayer's penalty protest is sustained.

II. Tax Administration – Interest

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

DEPARTMENT OF STATE REVENUE

0420050177.SLOF

SUPPLEMENTAL LETTER OF FINDINGS: 05-0177

Use Tax for the Years 2001 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. Advertising Materials—Use Tax

Authority: IC 6-2.5-3-2; IC 6-2.5-3-1; IC 6-2.5-3-5(a); KRS 139.200(1).

Taxpayer challenges the audit's decision imposing Indiana use tax on the cost of various advertising materials purchased by Taxpayer in Kentucky for use within Indiana.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation organized to operate a franchise restaurant located in Indiana. Taxpayer is co-owned by an Indiana resident and by a Kentucky resident. The Department conducted an audit review of Taxpayer's business records. The audit review resulted in the assessment of additional Indiana use tax. Taxpayer disagreed with the assessment and lodged a protest to that effect. Declining the opportunity to take part in an administrative hearing on the matter, taxpayer agreed to permit resolution of the protest based upon the contents of its written submission to the Department. The Letter of Findings denied Taxpayer's protest. Taxpayer requested a rehearing, citing additional evidence not available at the time of the hearing: a Technical Ruling on coupon printing issued by the Kentucky Department of Revenue. A rehearing was held and this Supplementary Letter of Findings is issued.

DISCUSSION

I. Advertising Materials—Use Tax.

The Department's audit concluded that Taxpayer owed use tax on the price of advertising materials destined for use within Indiana. Taxpayer disagreed.

The restaurant franchisor prepared advertising materials suitable for use by its individual franchisees. Taxpayer—as one of the individual franchisees—took advantage of these materials, using them to promote Taxpayer's Indiana business.

In Taxpayer's case, the franchisor's support service shipped the materials to a Kentucky mail service. According to Taxpayer, "The title of these inserts is assumed by [Taxpayer] or its designee in Kentucky. The mailer then adds the coupons/flyers to its other inserts and mails them to various locations in the state of Indiana." Taxpayer pays franchisor for the cost of the advertising materials. The audit based the use tax assessment on the cost of the advertising materials delivered into Indiana.

Taxpayer pointed out that it remitted Kentucky sales tax each time it paid an invoice for the advertising materials. Taxpayer contends that the proposed assessment of Indiana use tax "would result in double taxation at the Indiana franchisee level and would appear to violate the fundamental constitutional principals against double taxation."

Indiana imposes a use tax on the "storage, use, or consumption of tangible personal property in Indiana... regardless of the location of that transaction or of the retail merchant making that transaction." IC 6-2.5-3-2. The tax is imposed on transactions that occur outside of Indiana that would be taxable if they occurred within Indiana but only if property is stored, used or consumed in Indiana. IC 6-2.5-3-1. However, IC 6-2.5-3-5(a) provides:

> A person is entitled to a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state, territory, or possession of the United States for the acquisition of that property.

Taxpayer paid sales tax to Kentucky, for which Taxpayer has no recourse for a claim of refund. The Kentucky Department of Revenue issued to Taxpayer a Technical Ruling on coupon printing. The ruling outlined the transactions. Coupons are printed in Kentucky and then are mailed to a third-party sorting facility in Kentucky hired by Taxpayer. The franchisor bills Taxpayer for the coupons, adding to the price 6 percent Kentucky sales tax. Kentucky determined in the Ruling that title passed to Taxpayer in Kentucky when the coupons were sent from the franchisor to the third-party sorting facility for mailing. Because title had passed in Kentucky, the delivery of tangible personal property occurred in Kentucky and Kentucky sales tax was correctly levied and collected, pursuant to KRS 139.200(1).

The State of Indiana may pursue collection of use tax but must give credit to Taxpayer for sales tax properly paid to Kentucky. The imposition of use tax without credit would subject Taxpayer to double taxation. Taxpayer has provided approximately 25 original invoices indicating that it paid Kentucky sales tax on the purchase of the advertising materials sent into and used in Indiana. To the extent the Taxpayer asserts it is entitled to a credit against the Indiana use tax assessment, the Department concurs.

FINDING

For the reasons stated above, the Department sustains Taxpayer's protest.

DEPARTMENT OF STATE REVENUE

0420050265.SLOF

SUPPLEMENTAL LETTER OF FINDINGS: 05-0265
Gross Retail Tax
For 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Like-Kind Exchange – Gross Retail Tax.

Authority: IC 6-2.5-1-5(a); IC 6-2.5-1-6(a); IC 6-8.1-5-1(b).

Taxpayer challenges the Department of Revenue's decision denying a trade-in allowance – and the consequent assessment of additional gross retail (use) tax – on the purchase of a Cessna aircraft.

STATEMENT OF FACTS

Taxpayer states that it bought a Cessna aircraft from seller February 4, 2004. The cost of the Cessna was $1,800,000. At the time of the purchase, seller permitted a trade-in allowance of $1,000,000 for a Beechcraft aircraft. In addition to the Beechcraft, taxpayer paid seller $800,000 in cash. The seller did not collect sales tax on any portion of the transaction. Taxpayer afterwards paid approximately $48,000 (six percent of $800,000) in use tax.

The Department of Revenue (Department) found that the taxpayer did not own the Beechcraft on February 4, 2005. Therefore, the Department concluded that taxpayer was not entitled to the trade-in allowance and assessed taxpayer for additional use tax ($60,000) based on the claimed $1,000,000 trade-in allowance.

Taxpayer protested the decision arguing that when it "entered into the transaction, it did so with the contemplation that a like kind exchange would take place." Taxpayer pointed out that, "Like kind exchanges are exempt from gross retail tax...."

A hearing was held and a Letter of Findings (LOF) was issued denying taxpayer's protest. The LOF concluded that, "Taxpayer did not own the Beechcraft when it bought the Cessna; taxpayer was not entitled to offer the Beechcraft as a trade-in at the time it bought the Cessna." Taxpayer disagreed, requested a rehearing, the Department granted taxpayer's request, and a rehearing was held. This Supplemental Letter of Findings results.

DISCUSSION

Taxpayer maintains that at the time it bought the Cessna on February 4, 2004, it believed that a like-kind exchange would take place; taxpayer "swapped" its Beechcraft for the Cessna, paid the cash difference, and now maintains that it should not pay use tax on the amount equal to the value ($1,000,000) of the Beechcraft. Taxpayer bases its argument on IC 6-2.5-1-5(a) which states as follows:

"Gross retail income" means the total gross receipts, of any kind or character, received in a retail transaction, except that part of the gross receipts attributable to: (1) the value of any tangible personal property received in a like kind exchange in the retail transaction[.]

Like-kind exchanges are defined at IC 6-2.5-1-6(a) which states that:

"Like kind exchange" means the reciprocal exchange of personal property between two (1) persons when:

(1) the property exchanged is of the same kind or character, regardless of grade or quality; and (2) the persons exchanging the property both own the property prior to the exchange.

Taxpayer claims that between 2000 and 2004, the Beechcraft was jointly owed by two predecessor companies. According to taxpayer, the predecessor companies each owned 50 percent of the Beechcraft and that each predecessor company reported on its tax returns half the depreciation, revenues, and expenses related to the Beechcraft's operations. According to taxpayer, the two processor companies "decided to upgrade their Beechcraft to a Cessna and on February 4, 2004 formed a new entity for this purpose...." This "new entity" is the taxpayer. In creating this new entity, the two predecessor companies purportedly made a capital contribution consisting of the Beechcraft and $820,000 in cash.

The "Operating Agreement" for this "new entity" (taxpayer) indicates that it is "Effective February 6, 2004." The Operating Agreement states in Section 3.3 that, "The Members agree the Capital Contributions shall also include the contribution of an aircraft." Thereafter, on February 27, 2004, taxpayer acquired the Cessna for $800,000 in cash and by trading in the Beechcraft. Taxpayer states it "has already paid sales tax in the amount of $48,000 (6 [percent] on the $800,000 cash difference)."

As to the date the actual transaction took place, the documentary information is inconsistent. Taxpayer has provided registration materials indicating that the sales transaction took place on February 27. However, although taxpayer states that it bought the Cessna on February 27, the seller's invoice indicates that the Cessna was sold to taxpayer on February 2. A check written to seller by one of taxpayer's predecessor companies is also dated February 2. The Department's own records of the transaction indicate that the sale of the Cessna took place on May 5, 2004. The "Aircraft History Report," indicates that the Cessna was first registered by taxpayer on May 14, 2005.

In addition, the "Aircraft History Report" indicates that Beechcraft was never owned by both of the two predecessor companies; that report states that the Beechcraft was owned by *one* of the two predecessor companies and that it remained the property of that single company until August 31, 2004, when it was transferred – not to taxpayer – but to a third party not directly involved in the purchase of the Cessna. Taxpayer's own letter – dated November 4, 2004 – specifies that the Beechcraft was wholly owned by *one* of the two predecessor companies.

Further, information provided as to the purported transfer by the two predecessor companies to taxpayer is ambiguous. The parties' February 6, 2004, "Operating Agreement" simply states that "The Members agree the Capital Contributions shall also include the contribution of an aircraft." What aircraft is to be contributed? Who owns the contributed aircraft? Do both of the two predecessor companies have an equal ownership interest in the contributed plane? The apparent fact that both predecessor companies claimed depreciation would seem to indicate that each predecessor company had a 50/50 interest in the Beechcraft; however, there is no title or authoritative documentation indicating that both parties owned an equal share of the Beechcraft. The signatories of the "Operating Agreement" have treated the transfer of the Beechcraft to taxpayer with a casualness inconsistent with the substantial value ($1,000,000) of this asset.

Taxpayer's own November 4 letter summarizes it best. "The fact that the newly acquired aircraft was placed into a new entity [taxpayer] was based upon incomplete and ill thought out advice." Taxpayer admits that, "This was an error of timing, not an intentional action to avoid or diminish the amount of sales tax owed." Nonetheless, taxpayer asks that the Department honor the "spirit of this transaction."

The Department is unable to comply with taxpayer's request. Instead the Department concludes that, pursuant to IC 6-8.1-5-1(b), taxpayer has failed to meet its burden of demonstrating that the "proposed assessment is wrong." Id. The sales transaction is marked by contradictory, conflicting, and incomplete evidence. Taxpayer asks that the Department gloss over these inconsistencies and honor the parties' ambiguous intentions; taxpayer asks that the Department set aside or ignore the obvious discrepancies in the written record of a transaction involving the transfer of an asset worth close to $2,000,000. The Department must decline taxpayer's invitation to honor the "spirit" of the transaction because the Department agrees with taxpayer's own conclusion that the entire transaction was "incomplete and ill thought out...."

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

04-20050266P.LOF

LETTER OF FINDINGS NUMBER: 05-0266P
Sales/Use Tax
For the Period: 2001-2003

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 6-8.1-5-1; 45 IAC 15-11-2

The taxpayer protests the assessment of a penalty.

STATEMENT OF FACTS

The taxpayer is a grouping of doctors that formed a partnership for various purposes.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty assessment be abated. The taxpayer states,

> [Taxpayer] is a relatively new organization which has experienced personnel turnover throughout the entire accounting/finance department and changes of persons in the position of Chief Executive Officer and Chief Operations Officer within the last 2 years. Persons responsible for the non-compliance are no longer with our organization. The new staff is dedicated to compliance issues and the company is currently filing all sales tax returns on a timely basis.

And further:

> The ambiguity of law regarding use-tax on medical supplies and [Taxpayer's] complex organizational structure of 50+ physicians in 30+ autonomous medical practices further impaired compliance in years prior to our recent audit.

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.

45 IAC 15-11-2(c) is also of import, and states that the Department "shall waive the negligence penalty … if the taxpayer affirmatively establishes that the failure … was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c) notes:

> 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….

Finally, under IC 6-8.1-5-1 the burden of proof is on the taxpayer and the Department's proposed assessment is considered as *prima facie* valid.

The taxpayer offers no real arguments or evidence. Regarding the "turnover" of staff, the taxpayer is responsible for its staffing issues. The taxpayer is also responsible for its "complex organizational structure." The taxpayer, in a conclusory manner, states the law "regarding use-tax on medical supplies" is ambiguous, but does not show this nor does the taxpayer develop this argument. Therefore, for the above reasons, the taxpayer has not met its burden and has not established "reasonable cause." The penalty protest is denied.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

0320050300P.LOF

LETTER OF FINDINGS NUMBER: 05-0300P
Withholding Tax
For the Period March 31, 2005

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 6-8.1-10-2.1; IC 6-3-4-8.1; 45 IAC 15-11-2

The taxpayer protests the penalty assessed for failure to remit its withholding tax due by the due date of its return.

II. Tax Administration – Interest

Authority: IC 6-8.1-10-1

The taxpayer protests the assessment of interest.

STATEMENT OF FACTS

The taxpayer filed its monthly withholding tax return for the month ending March 31, 2005 after the due date. The calculated amount of tax due was remitted with the return. Accordingly, the department assessed a penalty for the taxpayer's failure to timely remit its tax. In his letter of protest, the taxpayer's representative requested that the penalty be abated due to reasonable cause.

I. Tax Administration – Penalty

The return in question was due on April 20, 2005. The taxpayer asserts that it filed its return and remitted its tax late because it "inadvertently did not get it (the return) in the mail until April 21, 2005." The taxpayer requests that the department reconsider the imposition of penalty because it regularly pays its taxes in a timely manner. The department does not consider this to be reasonable cause.

IC 6-3-4-8.1 states in relevant part:

Sec. 8.1. (a) Any entity that is required to file a monthly return and make a monthly remittance of taxes under sections 8, 12, 13, and 15 of this chapter shall file those returns and make those remittances twenty (20) days (rather than thirty (30) days) after the end of each month for which those returns and remittances are filed, if that entity's average monthly remittance for the immediately preceding calendar year exceeds one thousand dollars ($1,000).

(b) The department may require any entity to make the entity's monthly remittance and file the entity's monthly return twenty (20) days (rather than thirty (30) days) after the end of each month for which a return and payment are made if the department estimates that the entity's average monthly payment for the current calendar year will exceed one thousand dollars ($1,000).

The statute does not provide for any leniency based upon a taxpayer's superior filing history.

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 taxpayer has not established that its failure to timely file the return in question and pay the appropriate tax was due to reasonable cause and not due to negligence.

FINDING

The taxpayer's protest is denied.

II. Tax Administration – Interest

The taxpayer requests that the department waive the imposition of interest. According to IC 6-8.1-10-1(e), the department does not have the authority to waive the interest on tax liabilities.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320050420P.LOF

LETTER OF FINDINGS NUMBER: 05-0420P
Withholding Tax
For the Month of December 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. 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 the monthly withholding return for the month of December 2004.

The taxpayer is an out-of-state company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the late penalty be abated as the error was inadvertent, and, the taxpayer has a good compliance record.

With regard to the compliance record, the taxpayer has had several errors including a penalty in the amount of $1,226 for September 2001 that was abated. The Department does not feel the taxpayer's compliance record is a factor in the abatement of penalty.

With regard to the inadvertent error, the taxpayer was confused about the month-end due date since it was year-end and office activity was hectic. As a result, the taxpayer was four days late. The Department does not feel the taxpayer's confusion (inattention) would be a factor in the abatement of penalty.

The regulation which controls the application of 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 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

04-20050444.LOF

LETTER OF FINDINGS NUMBER: 05-0444
Sales and Withholding Tax
Responsible Officer
For the Year 2000

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

ISSUE

I. Sales and Withholding Tax-Responsible Officer Liability

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

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

STATEMENT OF FACTS

Taxpayer was a shareholder in a corporation in which Taxpayer had owned an interest, which Taxpayer sold in 1998. However, sales and withholding taxes were not remitted to the Department for a period of several months, which resulted in an assessment against Taxpayer as a responsible officer of the corporation. Taxpayer protested the assessment.

I. Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

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

An individual who:

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

(2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

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

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

Taxpayer has provided sufficient documentation to conclude that Taxpayer was not an officer or employee with the responsibility for holding and remitting the taxes in question.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0320050446.LOF

LETTER OF FINDINGS NUMBER: 05-0446
Withholding Tax
Responsible Officer
For the Tax Period 1999-2001

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

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 manager of a corporation. This corporation failed to pay its withholding taxes during the tax period 1999-2001. 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 requested that the Letter of Finding be based upon the documentation in the file.

1. Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

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

The proposed withholding taxes were assessed against the taxpayer pursuant to IC 6-3-4-8(f), which provides in relevant part 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 presented substantial documentation that he sold his interest in the corporation in 1993 and that he terminated his employment with the corporation on December 29, 1993. Therefore, he is not a responsible officer with the duty of remitting corporate withholding taxes to the Indiana Department of Revenue after December 29, 1993.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2006-01ST
January 9, 2006

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

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

ISSUE

Sales and Use Tax-Imposition

Authority: I.C. 6-2.5-2-1(a), IC 6-2.5-4-10, IC 6-2.5-1-5 (a), IC 6-2.5-2-2 (a).

The taxpayer requests that the department rule on the proper sales tax treatment of reimbursement of business personal property tax.

STATEMENT OF FACTS

The taxpayer is a corporation that leases business personal property in the state of Indiana. The taxpayer files the business personal property tax returns and makes payments to the proper taxing jurisdictions. The taxpayer then separately invoices its customers for the business personal property taxes on an annual basis. The taxpayer requests a ruling on two issues. First, are the monies received for reimbursement of business personal property taxes considered part of the taxpayer's rental gross receipts or gross retail income? Secondly, if the receipts are considered part of the taxpayer's rental gross receipts, then are they subject to Indiana sales tax?

DISCUSSION

I.C. 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. Leases of tangible property are specifically defined as retail transactions subject to the Indiana sales and use tax at IC 6-2.5-4-10.

The taxpayer's first question concerns whether or not the reimbursement of business personal property taxes is part of its gross receipts or gross retail income from the lease transaction. "Gross retail income" is defined at IC 6-2.5-1-5 (a) in pertinent part as follows:

> Except as provided in subsection (b), "gross retail income:" means the total gross receipts, or any kind or character, received in a retail transaction, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:
>
> (1) the seller's cost of the property sold;...

In the taxpayer's situation, the taxpayer has the obligation to pay business personal property taxes. The taxpayer receives reimbursement from its customers for these tax payments. The taxpayer is not allowed a deduction for the cost of the property sold in determining the amount of its gross retail income. Therefore, the monies received as reimbursement for business property taxes paid constitute gross retail income to the taxpayer.

Pursuant to IC 6-2.5-2-2 (a), "[t]he state gross retail tax is measured by the gross retail income received by a retail merchant in a retail unitary transaction.... "Indiana sales tax is imposed on the taxpayer's leases of business property to Indiana customers. The taxpayer's total gross retail income from the leases includes the reimbursement for business personal property taxes paid. Therefore, the receipts from the reimbursements paid by the customers are subject to the Indiana sales tax.

RULING

1. The monies received by the taxpayer for reimbursement of business personal property taxes are considered part of the taxpayer's rental gross receipts or gross retail income.

2. The taxpayer's receipts of the reimbursements are considered part of the taxpayer's rental gross receipts subject to Indiana sales 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.