INDIANA ELECTION COMMISSION
ORDER 2006-90

BEFORE THE
INDIANA ELECTION COMMISSION

IN THE MATTER OF THE	)	ADMINISTRATIVE CAUSE
ADMINISTRATIVE DISSOLUTION OF:	)	NUMBER: 05-4527-98
CITIZENS FOR CRABTREE	)	
	)	

ORDER ADMINISTRATIVELY DISSOLVING COMMITTEE

This administrative dissolution proceeding came before the Indiana Election Commission (hereinafter "the Commission") at its September 22, 2005 meeting. The Commission, after due consideration of the evidence and record, hereby determines as follows:

1) Notice of hearing has been served pursuant to IC 3-9-1-12 and posted pursuant to IC 5-14-1.5;
2) The above-named committee has not filed any report of expenditures within the previous three (3) calendar years;
3) The above named committee owes no debt to any person other than a civil penalty assessed by the Commission or owes no debt to any person other than a debt to a candidate who is the chairman or treasurer of the candidate's committee and the committee filed a report under IC 3-9; and
4) The last reported cash on hand does not exceed one thousand dollars ($1000) and the committee filed a report under IC 3-9.

Further, the Commission finds:

1) There is no evidence that the committee continues to receive contributions, make expenditures, or otherwise functions as a committee;
2) According to the best evidence available to the Commission, the dissolution of the committee will not impair any contract or impede the collection of a debt or judgment by any person.

IT IS THEREFORE ORDERED that Citizens for Crabtree committee is hereby administratively dissolved.

SO ORDERED THIS 28th DAY OF FEBRUARY, 2006:
THE INDIANA ELECTION COMMISSION:

Thomas E. Wheeler, II, Chairman	**Butch Morgan, Member**
S. Anthony Long, Vice-Chairman	**Thomas John, Member**

INDIANA ELECTION COMMISSION
ORDER 2006-91

BEFORE THE
INDIANA ELECTION COMMISSION

IN THE MATTER OF THE	)	ADMINISTRATIVE CAUSE
ADMINISTRATIVE DISSOLUTION OF:	)	NUMBER: 05-4472-99
HOOSIERS FOR CRAZY TAXES	)	
	)	

ORDER ADMINISTRATIVELY DISSOLVING COMMITTEE

This administrative dissolution proceeding came before the Indiana Election Commission (hereinafter "the Commission") at its September 22, 2005 meeting. The Commission, after due consideration of the evidence and record, hereby determines as follows:

1) Notice of hearing has been served pursuant to IC 3-9-1-12 and posted pursuant to IC 5-14-1.5;
2) The above-named committee has not filed any report of expenditures within the previous three (3) calendar years;
3) The above named committee owes no debt to any person other than a civil penalty assessed by the Commission or owes no debt to any person other than a debt to a candidate who is the chairman or treasurer of the candidate's committee and the committee filed a report under IC 3-9; and
4) The last reported cash on hand does not exceed one thousand dollars ($1000) and the committee filed a report under IC 3-9.

Further, the Commission finds:
1) There is no evidence that the committee continues to receive contributions, make expenditures, or otherwise functions as a committee;
2) According to the best evidence available to the Commission, the dissolution of the committee will not impair any contract or impede the collection of a debt or judgment by any person.

IT IS THEREFORE ORDERED that Hoosiers for Crazy Taxes committee is hereby administratively dissolved.

SO ORDERED THIS 28TH DAY OF FEBRUARY, 2006:
THE INDIANA ELECTION COMMISSION:

Thomas E. Wheeler, II, Chairman	**Butch Morgan, Member**
S. Anthony Long, Vice-Chairman	**Thomas John, Member**

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Title: Risk Integrated System of Closure (RISC), User's Guide, Chapter 3 – UST, LUST and ELTF Programs
Identification Number: W0046
Date Originally Effective: February 15, 2001
Dates Revised: 10/15/2001, 4/20/2006
Other Policies Repealed or Amended:
Brief Description of Subject Matter: RISC User's Guide, Chapter 3 provides program-specific requirements to the regulated community regarding the use of RISC at Leaking Underground Storage Tank (LUST) sites. The chapter includes the narrative description nine (9) standardized report formats.
Citations Affected: IC 13-12-3-2 – Environmental policy: remediation objectives; IC 13-23 – Underground Storage Tanks; 329 IAC 9 – Underground Storage Tanks; and 328 IAC 1 – Underground Storage Tank Financial Assurance Board (ELTF)

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 13-14-11.5, 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.

Chapter 3 may be viewed at http://www.in.gov/idem/land/risc/user_guide/index.html

DEPARTMENT OF INSURANCE
March 30, 2006
Bulletin 136
Insurance Coverage for Pervasive Developmental Disorders

This Bulletin is directed to all insurance companies that issue accident and sickness insurance policies as defined in IC 27-8-

14.2-1 and to health maintenance organizations (HMOs) as defined in IC 27-13-1-19. Coverage for Pervasive Developmental Disorders (PDD) is a very complex issue. In 2001, the Indiana General Assembly passed P.L.148-2001 adding IC 27-8-14.2 and IC 27-13-7-14.7. These provisions increased insurance coverage for persons suffering with PDD from what was available in the insurance market at that time. As is often the case, the bill that was passed contained compromises from the bills that were introduced, debated and amended. After a bill is passed and the statute is implemented it is not uncommon for interested persons to continue to dispute the meaning of the final language. The Department of Insurance is charged with implementing the provisions of Title 27. The Department must implement the statutes as they are written, giving meaning to each word of the statute. This Bulletin is intended to provide guidance to insurers and to consumers on contract language and administration of claims for the treatment of PDD as required by IC 27-8-14.2 and IC 27-13-7-14.7.

IC 27-8-14.2-4 requires that a group accident and sickness insurance policy must provide coverage for the treatment of PDD of an insured. IC 27-8-14.2-5 requires insurers that issue individual policies of accident and sickness insurance to offer to provide coverage for the treatment of PDD. And, IC 27-13-7-14.7 requires an HMO that provides basic health care services to provide services for the treatment of PDD of an enrollee. Neither insurers nor HMOs can deny or refuse to issue coverage on, refuse to contract with, or refuse to renew, or reissue or otherwise terminate coverage on an individual solely because the individual is diagnosed with PDD.

A written treatment plan for each individual with PDD must be developed and signed by the treating physician. The treatment plan should be submitted to the insurer or HMO as soon as possible after its development to facilitate the payment of claims. If a non-physician recommends the treatment plan, it must be approved and signed by the treating physician. The Department of Insurance recognizes the insurer's or HMO's right to review the services prescribed under the treatment plan as to medical necessity. The insurer or HMO shall consult with the treating physician in its consideration of the treatment plan. Any challenge to medical necessity will be viewed as reasonable only if the review is by a specialist in the treatment of PDD. A specialist includes a clinical employee such as a medical director or PhD clinical administrator, provider or consultant of the insurer or HMO, and has specialized and current knowledge of PDD. Any challenge to medical necessity will be treated the same as any other grievance, following the grievance and appeals process as defined in IC 27-8-28, IC 27-8-29, IC 27-13-10, and IC 27-13-10.1.

The treatment plan must include all elements necessary for the insurer or HMO to appropriately pay claims. These elements include but are not limited to: a diagnosis, proposed treatment by type(s), frequency and duration of treatment(s), the anticipated outcomes stated as goals, the frequency by which the treatment plan will be updated, and the treating physician's signature. The insurer must provide, in writing, its determination regarding coverage for the services and supplies prescribed by the treatment plan within thirty (30) days of the insurer or HMO receiving the treatment plan. The insurer or HMO shall provide specific contact information for provider or member questions and shall facilitate filing of claims. An insurer or HMO that fails to provide its determination on the treatment plan within 30 days may be subject to enforcement action under IC 27-4-1-4.5.

Recognizing that PDD is a neurological condition, services will be provided without interruption, as long as those services are consistent with the treatment plan and with medical necessity decisions. Service exclusions contained in the insurance policy or HMO contract that are inconsistent with the treatment plan will be considered invalid as to PDD. However, coverage of services may be subject to other general exclusions and limitations of the contract or benefit plan, such as coordination of benefits, participating provider requirements, services provided by family or household members, eligibility, appeals processes, and carved out services (e.g. if the employer elects not to provide pharmacy coverage for any employees). IC 27-8-14.2-4(b), IC 27-8-14.2-5(b) and IC 27-13-7-14.7(c) and (e) state that the coverage or services that must be offered "may not be subject to dollar limits, deductibles, or coinsurance provisions that are less favorable to an insured than the dollar limits, deductibles, or coinsurance provisions that apply to physical illness generally" under the accident and sickness policy or contract with the health maintenance organization. This provision allows the insurer or HMO to apply dollar limits, deductibles, co-payments and coinsurance as long as the application is consistent with coverage for physical illness generally. The Department considers dollar limits and visit limits to be synonymous for the purposes of this bulletin.

It is the Department's position that behavioral therapies such as Applied Behavioral Analysis Services may not be subject to limitations that apply to therapies such as physical, occupational or speech therapy. Further, Indiana does not currently have a licensing requirement for persons who perform Applied Behavioral Analysis Services. It is, therefore, inappropriate at this time for an insurer or HMO to deny a claim based upon the fact that the provider of Applied Behavioral Analysis Services does not hold a license.

The insurer shall have the right to request an updated treatment plan not more than once every six (6) months from the treating physician to review medical necessity, unless the insurer or HMO and the provider agree that a more frequent review is necessary due to emerging clinical circumstances. The cost of obtaining an updated treatment plan at the request of the insurer or HMO shall be borne by the insurer or HMO. This review does not alter the requirements and rights described in IC 27-8-29, IC 27-13-10 and IC 27-13-10.1.

It is important for consumers to review their insurance coverage. For persons covered by individual policies, insurers are required to provide the insured with a copy of their insurance contract. For persons covered by group insurance policies or HMO contracts, the insurer or HMO is required to provide a copy of the certificate or evidence of coverage. While the insurer is not required to provide each covered person with a copy of the group insurance contract it should be made available if requested.

The insurance policies and HMO contracts affected by this Bulletin are required to be filed and approved by the Department. As guidance to the companies the Department approves the following language in its entirety:

1. Pervasive Development Disorder means a neurological condition, including but not limited to Asperger's syndrome and autism, as defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association.
2. Coverage for services will be provided as prescribed by the insured's treating physician in accordance with a treatment plan.
3. Any exclusion within the policy, certificate or contract that is inconsistent with the treatment plan does not apply.
4. The benefits for Pervasive Developmental Disorder will not be subject to dollar limits, deductibles, or coinsurance provisions that are less favorable than the dollar limits, deductibles, or coinsurance provisions that apply to physical illness generally under the accident and sickness insurance policy, certificate or HMO contract.

Any form in conflict with this Bulletin should be revised and filed with the Department. Policies, certificates, contracts, endorsements, or riders already approved for use may be used until the employer contract is amended, renewed, or terminated. However, the Department requires effective with the date of this Bulletin any insurer or HMO that is interpreting its policies more restrictively than the standards of this Bulletin shall adjudicate claims consistent with the provisions of the Bulletin. The Consumer Protection Unit of the Department encourages individuals to contact the Department with any concerns over the payment of claims. Each complaint will be reviewed individually for compliance with all applicable statutes.

James Atterholt, Commissioner

DEPARTMENT OF INSURANCE
April 10, 2006
Bulletin 137
Universal Life Insurance: Minimum Reserves

This Bulletin applies to all universal life insurance policies issued on or after January 1, 2006. The minimum reserves required for universal life insurance policies issued on or after January 1, 2006, shall comply with the provisions of:

1. The National Association of Insurance Commissioners (NAIC) Universal Life Insurance Model Regulation as reflected in Appendix A-585 of the Accounting Practices and Procedures Manual published by the NAIC;
2. The requirements of 760 IAC 1-64 regarding Valuation of Life Insurance Policies; and
3. Any applicable actuarial guidelines adopted by the NAIC in regards to universal life insurance policy minimum reserves.

For policies issued before January 1, 2006, the insurer may request, subject to the approval of the Department of Insurance, to hold reserves under this Bulletin rather than those required under Bulletin 54. Written requests shall be filed with the Department's Financial Division. No changes may be implemented until the insurer receives written approval from the Department.

INDIANA DEPARTMENT OF INSURANCE
James Atterholt, Commissioner

DEPARTMENT OF STATE REVENUE
AUDIT-GRAM NUMBER IR-014
February 28, 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: Consolidated Return - Membership

Authority: IC 6-3-4-14; 45 IAC 3.1-1-111; IRC § 1502 and IRC § 1504; Treas. Reg. § 1.1502-75

IC 6-3-4-14. Consolidated returns.

(a) An affiliated group of corporations shall have the privilege of making a consolidated return... The making of a consolidated return shall be upon the condition that all corporations... consent to all of the provisions of this section including all provisions of the consolidated return regulations prescribed pursuant to Section 1502 of the Internal Revenue Code... prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent and

(b) [T]he term "affiliated group" shall mean an "affiliated group" as defined in Section 1504 of the Internal Revenue Code with the exception that the affiliated group shall not include any corporation which does not have adjusted gross income derived from sources within the state of Indiana.

[1980]

I. GENERAL STATEMENT

A group of Indiana taxpayers may file an Indiana consolidated Adjusted Gross Income Tax return under the following conditions:

A. all members must be corporations;

B. all members must be affiliated as defined in IRC § 1504;

C. all members must have Indiana Adjusted Gross Income at some time during the tax year;

D. all affiliated members must consent [FN 1] to abide by the provisions of,

1. IRC §1502 [FN 2],

2. IC 6-3-4-14, and

3. all regulations promulgated for either law; and

E. the consolidated return must be filed by the due date [FN 3].

II. INCLUSION OF AFFILIATED MEMBERS IN INDIANA CONSOLIDATED RETURN

A. Initial Consolidated Return – The initial consolidated return must include all Indiana affiliated members.

1. If an Indiana affiliated member failed to file a return in Indiana, the member will be included in an amended Indiana consolidated return.

2. If an Indiana affiliated member filed a separate return in Indiana, the member will be included in an amended Indiana consolidated return.

B. Years Subsequent to the Initial Consolidated Return Filing.

1. All affiliated members of the initial consolidated return must continue to file as members of the consolidated return, provided each continues to have Indiana income.

2. An Indiana taxpayer becoming a member of the affiliated group at any time after the group has filed its initial consolidated return will be deemed to be a member of all consolidated returns filed after such affiliation regardless of the new member's failure to have filed in Indiana or, if filed, the method of such filing.

III. PERMISSION TO FILE OR TERMINATE FILING CONSOLIDATED RETURN

A. Permission to begin filing a consolidated Indiana Adjusted Gross Income Tax return is not required, provided the initial consolidated return is filed by the due date.

B. Permission to discontinue filing a consolidated Indiana Adjusted Gross Income Tax return must be requested from the Department.

[FN 1] The filing of the Indiana consolidated return is deemed to be consent by all affiliated Indiana members.

[FN 2] Filing a consolidated Indiana return is not conditioned upon the filing a consolidated Federal return.

[FN 3] IC 6-8.1-1-4. "Due date" defined.

DEPARTMENT OF STATE REVENUE

04-970373.LOF

LETTER OF FINDINGS NUMBER: 97-0373
STATE GROSS RETAIL TAX
For Years 1993, 1994, AND 1995

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. State Gross Retail Tax — Dealer Rebates

Authority: 45 IAC 2.2-4-1(b); 45 IAC 15-5-4; IC 6-2.5-2-1; IC 6-2.5-2-2; IC § 6-8.1-5-1; Sales/Use Tax Information Bulletin #28

Taxpayer protests the proposed assessments of sales tax on rebates paid by the manufacturer to the dealer.

II. State Gross Retail Tax — Capitalized cost reductions

Authority: *Linville Olds-Cadillac, Inc. v. Indiana Department of State Revenue, Cause No. 49T10-9910-TA-202, 2004 Ind. Tax LEXIS 22*

Taxpayer protests the assessments of sales tax on capital projects.

III. State Gross Retail Tax —Projection

Authority: IC § 6-8.1-5-4

Taxpayer protests the proposed assessments based on a projected error rate.

IV. State Gross Retail Tax — Use tax

Authority: 45 IAC 2.2-3-4; IC § 6-8.1-5-4

Taxpayer protests the proposed assessments of use tax on materials used in construction.

V. State Gross Retail Tax —Loaner Fleet

Authority: 45 IAC 2.2-3-5

Taxpayer protests the proposed assessments of use tax on rental vehicles.

STATEMENT OF FACTS

Taxpayer sells new and used cars and trucks. Taxpayer also has a parts department, service department, and body shop. In addition, the dealership maintained a loaner car fleet during most of the audit periods and rented vehicles using a third-party vendor. Assessments of sales and/or use tax were made on manufacturer's payments received by the dealer, capital purchases, including materials used in construction, loaner vehicles, lease arrangements, and on a projected error rate for general purchases.

Taxpayer filed a protest and a hearing was held. After the hearing, the taxpayer and Department determined that the facts related to the protest on lease arrangements were closely related to the *Linville Olds* court case and deferred this Letter of Findings until the resolution of that case.

I. State Gross Retail Tax -- Dealer Rebates

DISCUSSION

The various manufacturers of the vehicles sold by taxpayer offer payments to either the dealer or customer on the vehicles sold. Based on the forms of these payments, gross retail tax may or may not be due on these amounts as outlined below.

Indiana imposes a sales tax on the transfer of tangible personal property in a retail transaction. The sellers of the property are required to collect the sales tax from the purchasers and remit that tax to the state. IC 6-2.5-2-1. The amount of sales tax is determined by applying the tax rate to the gross retail income received by the merchant. IC 6-2.5-2-2. "Gross retail income" is defined at IC 6-2.5-1-5(a) 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: or
>
> (2) the receipts received in a retail transaction which constitute interest, finance charges, or insurance premiums on either a promissory note or an installment sales contract.

The value of the gross retail income transferred for tangible personal property in a retail sale is defined at 45 IAC 2.2-4-1(b) as follows:

> All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to:
>
> (1) The price arrived at between purchaser and seller...

Sales/Use Tax Information Bulletin #28 issued December 1992(Suspended June 2005) includes the following explanation of the actual taxable selling price in a retail transaction.

> A manufacturer's rebate is not considered deductible for sales tax purposes. This is because the purchaser is not entitled to the rebate until the vehicle is sold. In those instances, where the purchaser retains control of determining how to utilize the rebate, the rebate remains taxable. For example, if the purchaser has the option of receiving the rebate in cash, or assigning the rebate to the dealer to be applied as a down-payment on the purchase of the car, the character of the rebate remains taxable. Therefore, the purchaser is simply agreeing in advance to use the cash rebate as part of the purchaser's consideration in buying the vehicle. However, where the purchaser has no control over the use of a manufacturer's rebate, the rebate will be considered a manufacturer's price reduction, and will be deductible for sales tax purposes and not included in the taxable selling price. For example, where a documented manufacture's rebate stipulates that the rebate must be assigned to the dealer by the purchaser, the purchaser never has control over the use of the rebate and as such, the rebate would be considered deductible for sales tax purposes.
>
> A manufacturer's price reduction is considered deductible for sales tax purposes. This is because the manufacturer is actually reducing the selling price of the vehicle. The dealer (seller) does not receive the amount of the price reduction as consideration.
>
> A dealer's price discount is also considered deductible in determining the amount on which sales tax is charged. The selling price is reduced by the dealer's price discount. The dealer (seller) does not receive the amount of the price discount as consideration for the vehicle sale.

The auditor and the general manager reviewed the list of manufacturer's payments to verify the dealership's classification of these payments. The auditor determined that a number of the entries were not correctly characterized and some of the manufacturer's payments were reclassified from "dealer's price discount" or "manufacturer's price reduction" -non-taxable- to "manufacturer's rebate" –taxable.

Taxpayer disagrees with the reclassification of these transactions to "manufacturer's rebates", but does not provide sufficient documentation to demonstrate the reclassification was incorrect. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has not established a basis for reversal of the sales tax assessment.

FINDING

Taxpayer's protest is denied.

II. State Gross Retail Tax — Capitalized cost reductions

DISCUSSION

This issue was held pending the resolution of a court case, which has now been resolved. The decision by the tax court, *Linville Olds-Cadillac, Inc. v. Indiana Department of State Revenue, Cause No. 49T10-9910-TA-202, 2004 Ind. Tax LEXIS 22*, was unpublished, but based on the Department's prior arrangement, taxpayer's protest of this issue is sustained pursuant to the court's holding in this case.

FINDING

Taxpayer's protest is sustained.

III. State Gross Retail Tax — Projection

DISCUSSION

This issue revolves around the burden of proof in an audit situation, which IC § 6-8.1-5-4 defines as:

> 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.

Subject to the guidelines above, the Department will grant credit for the applicable transactions for which valid documentation has been provided. In this instance, the taxpayer and the Department agreed to use a sample month and project an error rate based on this period. Taxpayer now argues that some of the transactions from the sample month may have been misclassified, or that further documentation related to the transactions can now be provided, thus the error rate should be accordingly reduced. Department declines to rework the error rate determination based on taxpayer's selective review of isolated transactions.

FINDING

Taxpayer's protest is denied.

IV. State Gross Retail Tax —Use tax

DISCUSSION

The audit made an adjustment for general dealership purchases that were not for resale, including purchases by a contractor for building repairs and improvements. Audit deducted the amounts where tax was paid and assessed tax on the unverified portion of the purchases. Taxpayer argues that the contractor making improvements to the property was responsible for remitting sales tax on these purchases. 45 IAC 2.2-3-4 states:

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

Taxpayer is the ultimate user of these supplies, as such, pursuant to 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.

Subject to the guidelines above, the Department granted credit where transactions for which valid documentation was provided and-as required by the above guidelines- no credit was granted for transactions for which no documentation was provided. Taxpayer cites no authority in support of its request to shift responsibility for the tax on the property it is using to a third party.

FINDING

Taxpayer's protest is denied.

V. State Gross Retail Tax — Loaner Fleet

DISCUSSION

Audit made an adjustment for their rental fleet. The rental fleet actually consisted of vehicles that were loaner vehicles which were offered to customers free of charge. Taxpayer used a third party for actual rental of cars. Audit assessed used tax based on the mileage driven. The authority for this adjustment is found in 45 IAC 2.2-3-5(b)

> The sale of any vehicle required to be licensed be the state for highway use in Indiana shall constitute selling at retail and shall be subject to the sales or use tax unless such purchaser is entitled to one or more of the exemptions as provided on form ST-108….

Taxpayer argues that since these vehicles were eventually sold and sales tax remitted, the use tax should only be assessed on the difference between a new car sales price and the price the vehicle was actually sold for. The taxpayer does not address the nearly $450,000 taxpayer claimed as depreciation for these vehicles during the audit period, nor does taxpayer provide an exemption that would apply to this taxable use of the vehicles.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02-20000378.LOF

LETTER OF FINDINGS NUMBER: 00-0378
Adjusted Gross Income Tax
For the Year 1997

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

ISSUE

I. Adjusted Gross Income Tax—Addback of state and local income taxes

Authority: Ind. Code § 6-3-1-3.5(b); *Aztar Indiana Gaming Corp. v. Indiana Dept. of State Revenue*, 806 N.E.2d 381 (Ind. Tax 2004).

Taxpayer protests the addback of Riverboat Wagering Tax for adjusted gross income tax.

II. Adjusted Gross Income Tax—Credits

Authority: Ind. Code § 6-3.1-17-1

Taxpayer protests the failure to apply tax credits that it claims eliminated its tax liability.

STATEMENT OF FACTS

Taxpayer was corporation that operated a casino in Indiana. Taxpayer was assessed additional corporate income tax based on the adding back of Riverboat Wagering Tax. Taxpayer protested the assessment on two grounds. First, Taxpayer maintained that the Riverboat Wagering Tax was not a tax "based on or measured by income." Second, Taxpayer maintained that it had an Indiana Riverboat Building Credit in excess of the proposed liabilities.

I. Adjusted Gross Income Tax—Addback of state and local income taxes

DISCUSSION

Taxpayer argues that the Riverboat Wagering Tax is not a "tax based on or measured by income" under Ind. Code § 6-3-1-3.5(b). In a published decision, the Indiana Tax Court has considered the issue of adding back the Riverboat Wagering Tax and concluded that the tax is subject to add back for corporate income tax purposes. *Aztar Indiana Gaming Corp. v. Indiana Dept. of State Revenue*, 806 N.E.2d 381 (Ind. Tax 2004).

FINDING

Taxpayer's protest is denied.

II. Adjusted Gross Income Tax—Credits

Taxpayer also protests the imposition of the tax based on an Indiana Riverboat Building Tax Credit under Ind. Code § 6-3.1-17-1 *et. seq.*, that effectively eliminated its proposed liability. Taxpayer has provided sufficient information to substantiate this contention.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420010083.SLOF

SUPPLEMENTARY LETTER OF FINDINGS: 01-0083
Use Tax
For 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Gross Retail and Use Taxes.

Authority: IC 6-2.5-3-2(a); IC 6-2.5-3-4(a); IC 6-2.5-3-7(a).

On the ground that taxpayer paid sales tax at the time he originally bought the materials, taxpayer argues that he is not subject to use tax on materials used in his mailbox business.

STATEMENT OF FACTS

Taxpayer constructs, sells, and installs mailboxes. The Department of Revenue (Department) conducted an audit review of taxpayer's business records. The audit asked taxpayer to provide records to show that he had properly determined his use tax liability. According to the audit, the taxpayer was provided 60 days during which to provide the records. According to the audit, taxpayer was given written notice that "if the requested information [is] not made available... the audit will be completed based on the best information available to the auditor." When taxpayer failed to provide the records, the audit assessed use tax based on the best available records.

Taxpayer protested. The protest was assigned to the original hearing officer. The original hearing officer contacted taxpayer's representative asking for the records to substantiate the protest. Neither taxpayer nor taxpayer's representative ever supplied the necessary records. Thereafter, the original hearing officer prepared and issued a Letter of Findings in which taxpayer's protest was denied.

On the ground that he had been denied the opportunity to substantiate his original protest, taxpayer asked for a rehearing on the matter. That rehearing was granted. Taxpayer and the taxpayer's representative met with the Hearing Officer, and this Supplementary Letter of Findings results.

DISCUSSION

Taxpayer maintains that he is not subject to use tax on materials used in carrying out his mailbox business.

Pursuant to IC 6-2.5-3-2(a), "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...." However, a use tax exemption is provided at IC 6-2.5-3-4(a) which states that, "The storage, use, and consumption of tangible personal property in Indiana is exempt from the use tax if: (1) the property was acquired in a retail transaction in Indian and the state gross retail tax has been paid on the acquisition of that property."

In determining whether a person is liable for use tax or is entitled to an exemption, Indiana law states 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 unless the person or the retail merchant can produce evidence to rebut that presumption." IC 6-2.5-3-7(a) (*Emphasis added*).

The audit quite correctly determined that taxpayer's materials were subject to use tax because taxpayer failed to rebut the statutory presumption. The original Letter of Findings also correctly found that taxpayer's materials were subject to use tax because taxpayer did nothing to rebut the statutory presumption.

Nonetheless – and after substantial delay – taxpayer has provided a representative set of invoices for 1997. Taxpayer asserts that he is also able to produce 1998 invoices. Based on the representative set of invoices, it appears that taxpayer paid sales tax on certain of the materials for which the audit assessed use tax. Based on the invoices provided, the Department is willing to defer to taxpayer's assertion that the original use tax assessment – based upon the best information then available – should be adjusted to comport with the records taxpayer now makes available. The Department will ask that a supplemental audit be conducted in order to review the available records.

The Department has allowed taxpayer extraordinary latitude in granting taxpayer's request for a rehearing on this matter. It should be noted that significant delay has resulted from taxpayer's own failure to produce the records when requested by both the original audit and by the original hearing officer. Any further delay whatsoever in providing these records at the time of the supplemental audit will fully justify a finding that taxpayer has defaulted on the opportunity herein provided. Consequently, taxpayer will have exhausted his administrative remedies without finding the remedy he seeks.

FINDING

Subject to the results of the Supplemental Audit, taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

43-20030103.LOF

LETTER OF FINDINGS NUMBER 03-0103
UNDERGROUND STORAGE TANK FEES FOR THE
REPORTING PERIOD ENDING DECEMBER 17, 2001

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

ISSUE

I. Underground Storage Tank Fees—Liability Tax Administration—Protests—Timeliness

Authority: IC 6-8.1-1-1, -1-6, -5-1(c), -6-3(a)(1) and (b) and -9-1 (2004); IC 13-23-12 (1998); *United States v. Brockamp,* 519 U.S. 347 (1997)**;** 45 IAC 15-5-2(a) (2004)

The taxpayer protests the assessment of underground storage tank (UST) fees for the reporting period in issue. The Department on its own initiative raises the question of whether the taxpayer submitted his protest of that assessment in a timely manner.

STATEMENT OF FACTS

The taxpayer is an individual whom the Department assessed unpaid UST fees for the reporting period ending December 17, 2001, among other periods. The Department's records indicate that it mailed the taxpayer a Notice of Proposed Assessment (hereinafter Form AR-80) for the protested liability on October 23, 2002. The taxpayer mailed his protest letter by certified mail, return receipt requested, on February 5, 2003 (105 days after the mailing of the AR-80) as shown by the certification date on the envelope. The taxpayer states in that letter that he was not aware, nor had this Department ever told him, that fees were due on empty USTs. The letter further states in relevant part: "I am sorry that I didn't reply sooner because I just has [sic] a Pacemaker\Diffibulater [sic] installed and am recooperating [sic]." The Department has since issued a tax warrant against the taxpayer for this liability.

DISCUSSION

UST fees assessed pursuant to IC article 13-23 are included in the definition of "listed taxes" or "taxes" under IC 6-8.1-1-1. IC chapter 13-23-12 imposes the UST fee. The owner of a UST that is not closed before July 1 of any year must pay an annual registration fee to the Department for each such UST for that year. The Department collects the UST fee as agent for the Indiana Department of Environmental Management (IDEM). IC 13-23-12-4 requires the Department to collect the UST fee and deposit specified amounts of each such fee into the underground petroleum storage tank (UPST) trust fund and into the UPST excess liability trust fund respectively created by IC chapters 13-23-6 and -7. IDEM may use the money in those funds for the purposes set out in IC 13-23-6-1 and -13-6 (as to the UPST trust fund), in IC 13-23-7-1 and-4 (as to the UPST excess liability trust fund), and the statutes to which each of those sections respectively refer.

The first sentence of IC 6-8.1-5-1(c) (2004) states: "The notice [of proposed assessment] shall state that the person has sixty (60) days from the date the notice is mailed to pay the assessment or to file a written protest." Title 45 IAC 15-5-2(a) (2004) states: "A taxpayer has sixty (60) days from the date the notice of additional tax assessment is mailed to protest the additional tax liability." The deadline to file a protest is absolute; when the General Assembly enacted IC 6-8.1-5-1(c), it did not give the Department discretion to grant any extension of time of that deadline on grounds of illness, hardship or for any other reason. "Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities." *United States v. Brockamp*, 519 U.S.347, 352 (1997).

However, a taxpayer that fails to protest, but still wants to contest the merits of any part of the assessment to the Department, may still do so. Such a taxpayer must first pay the assessment in full, including all accrued interest and any penalty, and file a claim for refund of that payment pursuant to IC 6-8.1-9-1 or any refund claim statute included in a particular listed tax law that conflicts with IC 6-8.1-9-1. *See* IC 6-8.1-1-6 (provision of a listed tax law relating to the imposing, collecting or administering of that tax controls over any conflicting provision of IC article 6-8.1). A taxpayer seeking to file a claim for refund of any listed taxes that are fees imposed by IC article 13 (Environment) must file the claim with this Department, not with IDEM.

IC 6-8.1-6-3(a)(1) and (b), read together, treat documents and writings sent to the Department by certified mail as being filed on the certification date, as authenticated by the United States Post Office. The taxpayer mailed his certified protest letter 105 days after the Department mailed the Form AR-80. The taxpayer's protest is thus untimely. Even if that protest had been timely, however, the taxpayer's ignorance or misunderstanding of the law would not have been a valid defense to the assessment. IC 13-23-12-1 does not condition liability for the UST fee on whether the UST in question is full or empty, but on whether the tank is open or closed.

The taxpayer therefore must pay the assessment and file a claim for refund if he wants to revive his right to administrative review of that assessment. The Department has not found any specific statute in IC 13-23 governing the procedure for filing a claim for refund of UST fees. IC 6-8.1-9-1 thus would govern the procedure for any claim for refund of those fees. The taxpayer must submit a copy of this Letter of Findings with any such claim he may file.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02-20030130.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 03-0130
Corporate Income Tax
For the Years 1999, 2000, 2001

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

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

ISSUES

I. Tax Administration - Penalty

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

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

STATEMENT OF FACTS

Taxpayer is a business engaged in the leasing of computer hardware and other technological equipment. Taxpayer's offices are located in another state, and Taxpayer does not maintain an office or personnel in Indiana. The property that Taxpayer leases is subject to a security interest in the state in which it is located and notification in the event it is moved to another state; however, Taxpayer does not control the location of the property with very minor exceptions. As a result of Department audit, Taxpayer was assessed gross income tax with respect to its income from leases located in Indiana.

The due date of the Taxpayer's Indiana Corporate Income Tax return for the period ending March 31, 2001 was July 16, 2001. However, final payment was not received by the Department until January 15, 2002. Therefore, the 10 percent penalty plus interest was applied to the late payment. In regards to late payments, payment is applied first to the penalty portion and then to the interest and any remainder is then applied to the base tax. This caused the tax due to be underpaid for the period resulting in additional tax due. The notice received also included a IT-2220 penalty for underpayment of estimated corporate income tax. This penalty was abated by the Department's audit review section on November 17, 2005. The taxpayer protests the remaining 10 percent penalty.

I. Tax Administration - Penalty

DISCUSSION

Taxpayer protests the imposition of the ten percent (10 percent) negligence penalty that the Department has imposed. The amount Taxpayer owed before the audit adjustments and before the imposition of the IT-2220 underpayment of estimated tax penalty was $818.47. The September 13, 2005 billing in the amount of $1,834.22 was based upon the supplemental audit adjustments but before the waiver of the IT-2220 penalty. The November 21, 2005 bill of $1,182.92 was based on the supplemental audit changes that took into account the abatement of the IT-2220 penalty.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC 6-8.1-10-2.1. The Indiana Administrative Code 45 IAC 15-11-2 further provides:

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

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

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

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

Taxpayer argues that penalty should be waived in this case. The taxpayer argues that they did not foresee the dramatic increase in either the Gross Income Tax or Supplemental Net Income Tax. The taxpayer contends that the prepayments totaling $1,673 for the tax year ending March 31, 2001 would exceed the eventual liability. The taxpayer's March 31, 2000 (prior year) tax liability amounted to $1,673 so the taxpayer states that it had paid in more than 100 percent of the prior year's tax liability as of the original due date. The taxpayer argues that the estimated payments in the amount of $1,675 represented a best faith estimate of the expected liability. The taxpayer states, "It is our opinion that the four fold increase in tax liability experienced by the taxpayer was not foreseeable at the original due date of the return for the tax year ended March 31, 2001. Therefore, the taxpayer's inability to foresee and accurately estimate its liability was not willful."

While its changes in procedures are certainly commendable, taxpayer's failure to utilize the other appropriate procedures in the first place did not meet the duty of reasonable care expected of a taxpayer. Further, even accepting taxpayer's statement of an excellent compliance history, in this instance taxpayer's operations did not meet the duty of ordinary business care expected of taxpayers.

Under IC 6-8.1-10-2.1, if the taxpayer fails to pay the full amount of tax due on the tax return on or before the due date of the return, the tax due is subject to penalty and interest. The due date of the Taxpayer's Indiana Corporate Income Tax return for the period ending March 31, 2001 was July 16, 2001. However, final payment was not received by the Department until January 15, 2002. Therefore, the 10 percent penalty plus interest was applied to the late payment.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220030170.LOF

LETTER OF FINDINGS: 03-0170
Gross Income Tax
For 1999 through 2001

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

ISSUES

I. Notice of 1999 Proposed Assessment.

Authority: IC 6-8.1-5-2; IC 6-8.1-5-2(a).

Taxpayer argues that the 1999 notice of "Proposed Assessment" was untimely on the ground that taxpayer received the 1999 notice more than three years after the later of the due date for taxpayer's 1999 return and the date on which that return was filed.

II. Rental Company – Gross Income Tax.

Authority: IC 6-2.1-2-2; U-Haul International, Inc. v. Ind. Dept. of State Revenue, 826 N.E.2d 713 (Ind. Tax Ct. 2005); U-Haul Co. of Indiana Inc., et al. v. Ind. Dept. of State Revenue, 784 N.E.2d 1078 (Ind. Tax. Ct. 2002).

Taxpayer maintains that the audit erred in assessing it with gross income tax on the Indiana rental company's share of amounts collected from the public by its Indiana rental dealers.

III. Fleet Owner – Gross Income Tax.

Authority: IC 6-2.1-2-2; IC 6-2.1-2-2(a); IC 6-8.1-3-3; IC 6-8.1-3-3(b); U-Haul International, Inc. v. Ind. Dept. of State Revenue, 826 N.E.2d 713 (Ind. Tax Ct. 2005); U-Haul Co. of Indiana Inc., et al. v. Ind. Dept. of State Revenue, 784 N.E.2d 1078 (Ind. Tax. Ct. 2002); Enterprise Leasing v. Indiana Dept. of Revenue, 779 N.E.2d 1284 (Ind. Tax Ct. 2002); 45 IAC 1.1-1-3(a); 45 IAC 1.1-2-10(a); 45 IAC 15-3-2; 45 IAC 15-3-2(d)(2)(C); Tax Policy Directive 9 (Ind. Dept. of Rev. December 1995).

Taxpayer states that the audit erred in treating the fleet owner as subject to gross income tax and assessing the fleet owner for gross income tax.

IV. Negligence Penalty.

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

Taxpayer argues that the assessment of the ten percent negligence penalty was illegal and erroneous.

STATEMENT OF FACT

Taxpayer is a company in the business of renting to the public moving equipment such as trucks, trailers, and related materiel *[sic.]*.

For the sake of clarity, "taxpayer" in this Letter of Findings refers to the umbrella organization under which the company operates its rental business. Taxpayer is composed of four groups: (1) fleet owners; (2) rental companies; (3) rental dealers; and (4) the international company. The groups are bound together by various contractual relationships.

The fleet owners are corporations, partnerships, or individuals which own and supply the rental equipment to taxpayer. Under the contracts between the fleet owners and the taxpayer, the fleet owners entrust their equipment to taxpayer in exchange for a percentage of the rental received by the rental dealers from the public. The fleet owners earn approximately 35 to 55 percent of gross receipts received from the public.

The rental companies are separate companies that merchandise and supervise the maintenance and repair of the rental equipment. The rental companies contract with the international company; the international company assigns a territory in which the rental company is responsible for establishing rental dealers. The rental companies receive a percentage of the gross income collected by the rental dealers in the rental companies' own territory. The rental companies earn approximately 10 to 30 percent of the gross receipts received from the public.

The rental dealers are the local businesses that rent the moving equipment to the public. Under the rental dealers' contract with the rental companies, the rental dealers make weekly deposits of all the rental income collected from the public. The deposits are made into an account which belongs to the international company. The rental dealers earn approximately 25 to 35 percent of gross receipts received from the public.

The international company provides clearinghouse, accounting, computer, management and various services to taxpayer. After the international company receives the rental amounts from the rental dealers, the international company distributes the contractual shares of that income to the fleet owners, the rental companies, and the rental dealers. As compensation for providing the services, the international company earns service fees from the other members. Unlike the other participants, the international company does not retain a contractually defined percentage of the rental amounts the rental dealers deposit into the account. U-Haul International, Inc. v. Indiana Dept. of State Revenue, 826 N.E.2d 714-15 (Ind. Tax Ct. 2005).

The Department of Revenue (Department) conducted an audit review of taxpayer's 1999, 2000, and 2001 tax returns and business records.

The audit found that one of the rental companies did not report as gross income the rental company's percentage share of the rental income the rental company received from Indiana customers. An adjustment was made to assess gross income tax on that amount.

The audit found that one of the fleet owners did not report as gross income the fleet owner's percentage share of the rental income attributable to the rental of vehicles in Indiana. Therefore, the audit made an adjustment to assess the fleet owner gross income tax on receipts earned from the rental of vehicles in Indiana.

Taxpayer did not agree with the adjustments and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

DISCUSSION

I. Notice of 1999 Proposed Assessment.

The Department's audit resulted in the issuance of notices of "Proposed Assessment." The notices indicated that taxpayer owed additional corporate income tax for 1999, 2000, and 2001.

As a threshold issue, taxpayer argues that the "1999 proposed assessment [is] untimely and invalid." Taxpayer states that it received "the 2000 and 2001 Notices, along with an audit report covering the years 1999, 2000, and 2001... in late February, 2003." However, taxpayer states that it "never received a "notice of Proposed Assessment for 1999 until 2005...."

IC 6-8.1-5-2 states in part that, "[T]he department may not issue a proposed assessment... more than three (3) years after the latest of the date the return is filed, or... the due date of the return...." IC 6-8.1-5-2(a). Taxpayer claims that the 1999 proposed assessment is untimely stating that "the time for issuing a proposed assessment to [taxpayer] for 1999 expired on January 15, 2003."

The notices of "Proposed Assessment" for 2000 and 2001 were issued on "1/28/2003" and "1/13/2003 respectively. Taxpayer indicates that these two notices were received together with a copy of the August 1, 2002, audit report in February 2003. Because the 1999 "Proposed Assessment" was not received at the same time, taxpayer – stating that it did not receive the 1999 notice until 2005 – maintains that the 1999 assessment is time-barred pursuant to IC 6-8.1-5-2. However, the 1999 notice plainly indicates that it was issued on "12/23/2002." Accepting taxpayer's assertion that the time for issuing the proposed 1999 expired January 15, 2003, the 1999 notice was timely issued. Although there is nothing in the written record which definitely explains why the 1999 notice was not mailed to taxpayer together with the 2000 and 2001 notices, it is not unreasonable to assume that the 1999 notice was issued earlier in order to assure that the notice was timely.

FINDING

Taxpayer's protest is respectfully denied.

II. Rental Company – Gross Income Tax.

Taxpayer states that the Indiana rental company was not subject to gross income tax on money attributable to the rental income received from Indiana customers. Taxpayer states that the rental company had no beneficial interest in this money as determined in U-Haul Co. of Indiana Inc., et al. v. Ind. Dept. of State Revenue (*U-Haul I*), 784 N.E.2d 1078 (Ind. Tax. Ct. 2002).

During the three years at issue, the state's gross income tax was imposed under IC 6-2.1-2-2. The gross income tax is levied upon the receipt of "(1) the entire taxable gross income of a taxpayer who is a resident or domiciliary of Indiana; and (2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." Id.

The Department is unable to agree with taxpayer's assertion that the Tax Court determined in *U-Haul I* that the rental company did not have a beneficial interest in the rental income. As explained in U-Haul International, Inc. v. Ind. Dept. of State Revenue (*U-Haul II*), 826 N.E.2d 713 (Ind. Tax Ct. 2005), In *U-Haul II*, the court held that the "rental companies *do* have a beneficial interest in their contractually specified percentage of the rental receipts." Id. at 717 (*Emphasis in original*). "What logically and naturally follows from [*U-Haul I*] is that each member of the U-Haul System has a beneficial interest in its own contractually specified percentage of the rental receipts." Id. The court concluded that the rental companies "[were] subject to gross income tax on that portion of the rental income in which they [had] a beneficial interest." Id. at 718.

The audit correctly assessed the Indiana rental company gross income tax on its contractually specified percentage of the receipts earned from individual rental transactions which occurred in Indiana.

FINDING

Taxpayer's protest is respectfully denied.

III. Fleet Owner – Gross Income Tax.

Taxpayer argues that the fleet owner was not subject to gross income tax because the fleet owner did not have any gross income which was "derived from activities or businesses or any other sources" within the meaning of IC 6-2.1-2-2.

In support, taxpayer cites to Enterprise Leasing v. Indiana Dept. of Revenue, 779 N.E.2d 1284 (Ind. Tax Ct. 2002). In that case, the Tax Court found that an out-of-state company did not receive Indiana source income when it rented Indiana-titled cars to its customers; therefore, the rental income was "not subject to Indiana's gross income tax." Id. at 1292.

IC 6-2.1-2-2(a) imposes the gross income tax on the receipt of "the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or domiciliary or Indiana." However in Enterprise, the Tax Court found that certain rental income received from Indiana customers was not Indiana source income for gross income tax purposes.

A. Critical Transaction:

In Enterprise, the court found that money received from renting Indiana titled cars was not Indiana source income because it was not the petitioners who decided to register and operate the cars within the state. Enterprise 779 N.E.2d at 1291. Rather, it was the decision of the individual customers to register and operate the cars in Indiana. Id. The petitioners' activities in sending the cars to its customers "did not rise to the level of 'active participation' in the 'ownership, leasing' or rental' of property in Indiana." Id. The court determined that the "critical transaction" that related to the leasing of the cars occurred at the petitioners' out-of-state location. Id. at 1230.

The Department does not find that the decision in Enterprise is dispositive of the question of whether the fleet owner's contractually specified percentage of the receipts earned from individual rental transactions, which occurred in Indiana, is subject to the gross income tax. In Enterprise, the fact that the tangible personal property happened to be located within Indiana was unrelated to the "critical transaction" which formed the basis for the petitioners' income. In taxpayer's situation, the rental income is derived from property located within this state and the "critical transaction[s]" – on which the fleet owner's income is entirely predicated – occurred entirely within the state.

Taxpayer's argument to the contrary, the analysis seems reasonably straightforward. 45 IAC 1.1-1-3(a) states that, "[A] taxpayer may establish a 'business situs' in ways including, but not limited to, the following: (6) Ownership, leasing, rental or other operation of income producing property (real or personal)." Taxpayer receives a contractually specified share of rental receipts attributable to the rental of property to Indiana customers. 45 IAC 1.1-2-10(a) provides that "rental income derived from leasing real or personal property is taxable as a service under section 5 of this rule."

As between the four constituent parties which compromise taxpayer's business system, the "critical transaction" does not arise from the contractual relationship established among those parties. The fleet owner does not earn money because it entered into an agreement with the international company; the fleet owner obtained the income here at issue because the fleet owner's vehicles were rented to Indiana customers by a local Indiana dealer pursuant to transactions which occurred entirely within Indiana. The fleet owner's proportionate share of the Indiana rental income is not an abstraction remote or distinguishable from the fleet owner's vehicles. The fleet owner's share of the Indiana receipts consists of earnings to which the fleet owner is contractually entitled and in which the fleet owner possesses a fixed and determinable beneficial interest. *See U-Haul II*, 826 N.E.2d at 717.

B. Change in Interpretation:

In addition, taxpayer states that the imposition of the gross income tax assessment on the fleet owner's percentage of the rental received from the public represents a change in the Department's interpretation of the gross income tax law prohibited under IC 6-8.1-3-3. According to taxpayer, because the Department has changed its interpretation from that set out in a 1986 Letter of Findings, the assessment of tax on the gross income received by the fleet owner is barred.

IC 6-8.1-3-3(b) states that "No change in the department's interpretation of a listed tax may take place before the date the change is: (1) adopted in a rule under this section; or (2) published in the Indiana Register under IC 4-22-7-7(a)(5), if IC 4-22-2 does not require the interpretation to be adopted as a rule; if the change would increase a taxpayer's liability for a listed tax."

The 1986 Letter of Findings to which taxpayer refers stated that, "For gross income tax purposes, [fleet owner] cannot be characterized as having taxable instate activity or business contemplated by [IC 6-2.1-2-2(a)(2)]. [Fleet owner] is one step removed from the typical nonresident lessor in that it leases to [taxpayer] which subsequently rents or leases to end customers."

Tax Policy Directive 9 (Ind. Dept. of Rev. December 1995) states that "a departmental ruling will automatically become null and void and no longer of any effect for tax years beginning after December 31 of the sixth (6^{th}) year after the year in which the ruling is issued." In addition, the Directive states that "all rulings issued by the Department prior to January 1, 1990 are hereby declared null and void and of no effect for tax years beginning after December 31, 1995." Under either provision of the 1995 Directive, the 1986 Letter of Findings on which taxpayer relies was "null and void and of no effect" at the time the 2003 audit was conducted.

Nonetheless, the Department is willing to agree that the stance taken in the 1986 Letter of Findings is at variance with the position taken by the Department's 2003 audit and in this most recent Letter of Findings. However, it is self-evident that this Letter of Findings – reflecting the position set out in the 2003 audit – will in due time be published in the Indiana Register under the requirements stipulated under IC 6-8.1-3-3(b).

The more pertinent question is whether the Department's position on the taxability of the fleet owner may be applied retroactively; can the Department's change of position, set out in a 2003 audit and in a Letter of Findings published during 2006, effect the taxability of income received during 1999, 2000, and 2001?

45 IAC 15-3-2 provides in relevant part provides as follows:

As a general rule, the revocation or modification of a ruling will *not be applied retroactively* with respect to the taxpayer to whom the ruling was originally issued or to a taxpayer whose tax liability was directly involved in such a ruling. Under circumstances where a ruling to a taxpayer is revoked with retroactive effect, the notice to such taxpayer will set forth the grounds upon which the revocation is being made and the extreme circumstance under which revocation is being applied retroactively. This retroactive revocation is decided upon a case-by-case basis taking into account all relevant facts and circumstances. The department may exercise its discretion to retroactively rescind or modify rulings in the following extreme circumstances, which are not all inclusive:

(A) There was a misstatement or omission of material facts.

(B) The facts, as developed after the ruling, were materially different from the facts on which the department based its ruling.

(C) There was a change in the applicable statute, *case law* or regulation.

(D) The taxpayer directly involved in the ruling did not act in good faith. (*Emphasis Added*)

In U-Haul Co. of Indiana Inc., et al. v. Ind. Dept. of State Revenue (*U-Haul I*), 784 N.E.2d 1078 (Ind. Tax. Ct. 2002) and U-Haul International, Inc. v. Ind. Dept. of State Revenue (*U-Haul II*), 826 N.E.2d 713 (Ind. Tax Ct. 2005), the court disagreed with the Department's position that 100 percent of the petitioner's gross income was subject to gross income tax. *U-Haul I*, 784 N.E.2d at 1084. The court stated that each member of the company had a beneficial interest in its "own contractually specified percentage of the rental receipts" and that the international company was "not contractually entitled to any of the rental receipts." *U-Haul II*, 826 N.E.2d at 717-18.

In the two U-Haul decisions, the court found that the Department had erred in its interpretation of the gross income statutes in regards to taxpayer's corporate income tax liability. Specifically, the court found that the individual component fleets owners, rental companies, and rental dealers were each liable for gross income tax on their contractually defined percentage of the rental receipts and that the international company was not liable for gross income tax on any portion of the rental receipts. Based on the two U-Haul decisions, the Department must conclude that the 2003 audit comports fully with the tax court's earlier decisions and that the 2002 and 2005 decisions constitute "a change in the applicable statute, *case law* or regulation" which justifies a retroactive application of the Department's position as set out in the 2003 audit report and in this superseding Letter of Findings. *See* 45 IAC 15-3-2(d)(2)(C).

FINDING

Taxpayer's protest is respectfully denied.

IV. Negligence Penalty.

Taxpayer argues that there is "no indication in the Audit report of any wrongdoing on the part of [the rental company] or [the fleet owner] which would justify the imposition of the proposed penalty, nor is there any factual support of any kind for the assessment of a penalty."

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...."

Given the fact that the Tax Court did not hand down the decision in *U-Haul II*, until May 2005 and the fact that the Department has changed its stance to reflect the court's decisions in both *U-Haul I* and *U-Haul II*, the Department agrees that taxpayer has made a threshold showing that taxpayer exercised reasonable care and prudence in reporting its income as it did during 1999, 2000, and 2001.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0220040007.LOF

LETTER OF FINDINGS NUMBER: 04-0007
Income Tax
For Tax Years 1996-2000

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

ISSUES

I. Adjusted Gross Income Tax—Reclassification of Income

Authority: The May Department Store Company v. Indiana Department of State Revenue, 749 N.E.2d 651 (Ind. Tax 2001); 26 CFR 1.707-3; IC 6-3-2-2; 45 IAC 3.1-1-29; 45 IAC 3.1-1-30

Taxpayer protests the reclassification of income from allocated to apportioned.

II. Tax Administration—Negligence Penalty

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

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

STATEMENT OF FACTS

Taxpayer is a member of a multinational group of petroleum industry companies. In 2000, taxpayer combined its assets in five states, none of which was Indiana, with another corporation to form a new partnership. The Department conducted an audit of the partnership and determined that the income from the sale of its business to the partnership was business income and issued proposed assessments on the income. Taxpayer protests the proposed assessments. Further facts will be supplied as required.

I. Adjusted Gross Income Tax—Reclassification of Income

In 2000, taxpayer contributed one hundred percent (100%) of its assets to a partnership which has Indiana nexus. The contributed property had no Indiana nexus. In return for the contribution, taxpayer received a percentage interest in the partnership plus cash of which a percentage was deemed to be gain on sale of assets under I.R.C. § 707-3. As a result of joining the partnership, which had Indiana nexus, taxpayer began filing Indiana returns in 2000. The Department conducted an audit and, noting that taxpayer reported the gain on sale amount as taxable income on its Federal return and that taxpayer included the gain on sale amount in the denominator of the sales factor of the Indiana apportionment formula on its Indiana return, issued proposed assessments on the Indiana-apportioned percentage of the gain on sale amount as business income.

In determining that the gain on sale amount was business income, The Department relied upon 45 IAC 3.1-1-29 in determining that the income in question was business income. 45 IAC 3.1-1-29 states:

> "Business Income" is defined as income from transactions and activity in the regular course of the taxpayer's trade or business, including income from tangible and intangible property if the acquisition, management, or disposition of the property are integral parts of the taxpayer's regular trade or business.
>
> Nonbusiness income means all income other than business income. The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, non-operating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises in from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is "business income" or "nonbusiness income" is the identification of the transactions and activity which are the elements of a particular trade or business.

Further guidance in determining business income under Indiana law is found in The May Department Store Company v. Indiana Department of State Revenue, 749 N.E.2d 651 (Ind. Tax 2001), in which the Indiana Tax Court determined that IC 6-3-1-20 provides for both a transactional test and a functional test in determining whether income is business or non-business in nature. Id. at 662-3.

In May, the court looked to 45 IAC 3.1-1-29 and 30 for guidance in determining whether income is business or business income under the transactional test. These regulations state, "the critical element in determining whether income is 'business income' or 'nonbusiness income' is the identification of the transactions and activity which are the elements of a particular trade or business." Id. at 664. 45 IAC 3.1-1-30 lists several factors in making this determination. These include the nature of the taxpayer's trade or business; substantiality of the income derived from activities and relationship of income derived from activities to overall activities; frequency, number or continuity of the activities and transactions; length of time income producing property was owned; and taxpayer's purpose in acquiring and holding the property producing income. In May, the court found that the transactional test was not met when a retailer sold a retailing division to a competitor because the taxpayer was not in the business of selling entire divisions. Id. at 664.

In this case the transaction was the sale of taxpayer's entire operation to the partnership. Taxpayer had been in the business of producing and selling petroleum products, but the final act of taxpayer's business was to sell everything it had to the partnership. Unlike the company in May, taxpayer here was not forced to sell its business. Taxpayer chose to change its business from producing and selling petroleum products to becoming a partner in a partnership. This is the exact opposite of the case in May. Here, taxpayer opted to get into the business of selling entire divisions and all other aspects of its business. The gain on the sale amount was income from this business action. As provided in May, this passes the transactional test.

The functional test focuses on the property being disposed of by the taxpayer. Id. at 664. Specifically the functional test requires examining the relationship of the property at issue with the business operations of the taxpayer. Id. at 664. In order to satisfy the functional test the property generating income must have been acquired, managed and disposed of by the taxpayer in a process integral to taxpayer's regular trade or business operations. Id. 664. The court in May defined "integral" as necessary or essential to complete the whole. Id. at 664-5. The court held that May's sale of one of its retailing division was not "necessary or essential" to May's regular trade or business because the sale was executed pursuant to a court order that benefited a competitor and not May. In essence, the court determined that because May was forced to sell the division in order to reduce its competitive advantage, the sale could not be integral to May's business operations. Therefore, the proceeds from the sale were not business income under the functional test.

In this case, taxpayer's sale of its entire operation to the partnership was necessary and essential to its regular trade or business since it abandoned its previous business of producing petroleum products and entered into the business of being a partner in a partnership. Under the definition supplied by the court in May, in this case it was integral to taxpayer's business to sell its property to the partnership and it was therefore necessary and essential to complete the whole of becoming a partner in that partnership. Consequently, under May, the gain on sale amount is business income.

The Department then determined taxpayer's adjusted gross income under IC 6-3-2-2(a), which states in relevant part:

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

(1) income from real or tangible personal property located in this state;
(2) income from doing business in this state;
(3) income from a trade or profession conducted in this state;
(4) compensation 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 of this chapter.

In the case of nonbusiness income described in subsection (g), only so much of such income as is allocated to this state under the provisions of subsections (h) through (k) shall be deemed to be derived from sources within Indiana. In the case of business income, only so much of such income as is apportioned to this state under the provision of subsection (b) shall be deemed to be derived from sources within the state of Indiana.

…

Taxpayer protests the assessments on the grounds that it had no nexus with Indiana prior to the contribution of assets and reception of the partnership interest. The relevant statute is IC 6-3-2-2(b), which states in relevant part:

Except as provided in subsection (*l*), if business income of a corporation or a nonresident person is derived from sources within the state of Indiana and from sources without the state of Indiana, then the business income derived from sources within this state shall be determined by multiplying the business income derived from sources both within and without the state of Indiana by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three (3).

…

Taxpayer believes that IC 6-3-2-2(*l*) provides the appropriate method of calculating its adjusted gross income. IC 6-3-2-2(*l*) states:

If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(1) separate accounting;
(2) the exclusion of any one (1) or more of the factors;
(3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources within the state of Indiana; or
(4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

The Department noted that taxpayer listed the gain on sale amount as nonbusiness income on its return, but also included the gain on sale amount in the denominator of the sales factor calculation. Taxpayer states that the gain on sale amount was listed on the return as nonbusiness income simply due to a lack of an appropriate column to list the income on the return. Taxpayer also states that the inclusion of the gain on sale amount in the denominator of the sales factor was inadvertent and is easily correctable.

There is no need to use an alternate calculation method for taxpayer's adjusted gross income. The Department is not allocating the gain on sale amount wholly to Indiana, since it is business income as defined in May. Business income is fairly apportioned to Indiana based on the three factor formula provided in IC 6-3-2-2(b). It is not relevant that the property sold to the partnership had no Indiana nexus, since its sale produced business income subject to apportionment. The apportionment of the gain on sale amount was proper and the Department properly imposed adjusted gross income tax on the Indiana apportioned amount of taxpayer's business income.

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Negligence Penalty

The Department issued proposed assessments and the ten percent (10%) negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC 6-8.1-10-2.1(a), which states in relevant part:

If a person:

…

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

…

the person is subject to a penalty.

The Department refers to 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 reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

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

In this case, taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC 6-8.1-10-2.1(a). Taxpayer has not established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20040094.LOF

LETTER OF FINDINGS NUMBER: 04-0094
Sales/Use Tax
Periods of 2001 Through 2002

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

ISSUES

I. Sales/Use Tax: Equipment

Authority: 45 IAC 2.2-3-20; IC 6-8.1-5-1(b); 45 IAC 15-5-3(b)(8); 45 IAC 15-11-2.

The taxpayer protests the proposed assessment of tax on equipment.

STATEMENT OF FACTS

The taxpayer runs a weekly newspaper. An administrative hearing was scheduled for January 12, 2006. Neither the taxpayer nor its representative attended, nor did they telephone to re-schedule. Taxpayer's representative later faxed a letter to the Department withdrawing from representation. A telephone hearing was then conducted with the taxpayer on January 23, 2006. More facts will be provided below as needed.

I. Sales/Use Tax: Equipment

DISCUSSION

As noted, the taxpayer runs a weekly newspaper. The items at issue the Auditor describes thusly:

The taxpayer purchased operating supplies and equipment during the audit period and failed to pay sales tax at the point of purchase or remit use tax on these taxable transactions. These purchases included computers, printers, and other equipment that was used *both* in the production of the newspaper and in the accounting for the business.

(*Emphasis added*).

The methodology the Auditor used for assessing the equipment was that "the office equipment was multiplied by the taxable percentage of 10 percent."

Taxpayer takes issue with the percentage. In a letter to the Department, the taxpayer states there "are three computer terminals used in direct production of [the] newspaper, as well as two … printers." Additionally the taxpayer states: "One of these machines, a Macintosh G4, as well as one of the printers it is connected to are used no more than 6 hours per month to generate monthly billing statements. None of the other computers is loaded with the software necessary to produce out billing."

In the correspondence the taxpayer also notes "Only one machine is involved, and less than the 10 [percent]...." The final percentage of non-production work that the taxpayer calculates for that one machine is ".0375[percent]." Taxpayer also lists in correspondence various specific items that it believes are tax exempt. During the hearing the taxpayer mentioned that a fax machine was wrongly assessed use tax, since, per the taxpayer, sales tax was paid at the time of purchase of the fax machine. No documentation was provided to that effect, and it does not seem clear from the Audit Report that use tax on the fax machine was even assessed in the audit process.

Since "accounting" would fall outside the scope of the production exemptions, regulation 45 IAC 2.2-3-20 becomes applicable, which states in part:

All purchases of tangible personal property which are delivered to the purchaser for storage, use, or consumption in the state of Indiana are subject to the use tax.

Taxpayer asserts that various items are not taxable (port hub modular, toner cartridge, etc.) but does not develop its argument to show that the items are in fact used in the production process. Likewise for the asserted taxable percentage—the taxpayer fails to develop its argument. And it is the taxpayer that bears the burden of proof under IC 6-8.1-5-1(b) and 45 IAC 15-5-3(b)(8). (It should also be noted a negligence penalty was imposed, but the taxpayer did not make any arguments regarding the penalty and is thus denied on the penalty too—again, *See* IC 6-8.1-5-1(b) regarding the taxpayer's burden of proof, and 45 IAC 15-11-2 regarding the penalty).

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20040414.LOF

LETTER OF FINDINGS NUMBER: 04-0414
Sales/Use Tax
Periods of 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 this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax: Donations

Authority: IC 6-2.5-2-1; IC 6-2.5-3-1; IC 6-2.5-3-2; 45 IAC 2.2-3-15

The taxpayer protests the assessment of tax on donated carpet.

STATEMENT OF FACTS

The taxpayer sells carpet, remnants, and flooring. A letter was mailed to the taxpayer's representative on December 20, 2005, scheduling an administrative hearing for January 17, 2006. The taxpayer did not arrive, nor did the taxpayer telephone, at the scheduled hearing time. (The taxpayer's representative also did not arrive, nor did the representative telephone, at the scheduled hearing time). This Letter of Finding is written pursuant to the information in the file. More facts will be provided as needed below.

I. Sales/Use Tax: Donations

DISCUSSION

As noted, the taxpayer is in the carpet business. At issue are donations made by the taxpayer. The Auditor states:

Taxpayer is self-assessing use tax. The taxpayer however had donations during the audit period where use tax was not self-assessed. Taxpayer was the final consumer of the donations, which include carpet and remnants.

Information Bulletin #40 states that "Tangible personal property … that is given away as a gift … is subject to either sales or use tax. The person or organization liable for the tax is the person who gives the property away and not the person who receives the prize or gift." Information Bulletin #40 further states, "Anyone purchasing tangible personal property to be given as a gift or prize should pay sales tax for the property at the time of purchase."

In a letter to the Department, the taxpayer states that "Although [the taxpayer is] paying the assessment" that the taxpayer is "still protesting the audit findings." The taxpayer in that correspondence then argues: (1) that the Information Bulletin cannot be used as a legal basis by the Department; and (2) that 45 IAC 2.2-5-55 makes a not-for-profit organization exempt. Regarding the taxpayer's first contention, Information Bulletins are indeed for "non-technical assistance to the general public." They provide assistance on frequently encountered issues. Information Bulletins do have a basis in the law—as Information Bulletin #40 makes clear it is derived from IC 6-2.5-2-1, IC 6-2.5-3-1, and IC 6-2.5-3-2.

IC 6-2.5-2-1 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.

And IC 6-2.5-3-1 states in part:

For purposes of this chapter:

(a) "Use" means the exercise of any right or power of ownership over tangible personal property.

(b) "Storage" means the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana.

(c) "A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property or services for use, storage, or consumption in Indiana and who:

(1) maintains 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 the retail merchant or through a representative, agent, or subsidiary….

And finally IC 6-2.5-3-2 states in part:

(a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Regarding 45 IAC 2.2-5-55 (as an earlier piece of correspondence to the taxpayer noted) applies to "Sales to a qualified not-for-profit," not donations. Additionally, 45 IAC 2.2-5-55 applies to the not-for-profit itself. What is at issue is whether the *taxpayer* owes the tax. 45 IAC 2.2-3-15 is the applicable regulation:

If any person who issues an exemption certificate in respect to the state gross retail tax or use tax and thereafter makes any use of the tangible personal property covered by such certificate, or in any way consumes, stores, or sells such tangible personal property, where such use, consumption, storage or sale is in a manner which is not permitted by such exemption, such use, consumption, or storage shall become subject to the use tax (or such sale shall become subject to the gross retail tax), and such person shall become liable for the tax or gross retail tax due thereon.

The taxpayer is a retail merchant that acquired property without paying sales tax. The taxpayer did not self-assess use tax on the property. The taxpayer then donated the property. Thus the taxpayer is liable for the tax. The taxpayer was also assessed a negligence penalty. The taxpayer did not develop any arguments regarding the penalty, and is thus denied on that issue as well.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20050017.LOF

LETTER OF FINDINGS NUMBER: 05-0017
SALES/USE TAX
Periods of 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 this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax: Overpayment of Tax

Authority: Sales Tax Information Bulletin #60 (April 2004); IC 6-2.5-6-14.1

The taxpayer protests and requests a refund on tax related to lump sum contracts.

STATEMENT OF FACTS

The taxpayer sells, installs, monitors and services electronic equipment that includes alarm systems. During the course of an audit by the Department, taxpayer concluded it had overpaid sales tax on contracts. The Audit Report did not offset the eventual assessment by the amount that the taxpayer calculated it had overpaid. Thus the taxpayer protested. More facts will be provided as needed below.

I. Sales/Use Tax: Overpayment of Tax

DISCUSSION

The taxpayer states that it is "an installer of alarm systems including fire, access control, and burglar…." The taxpayer states:

> During the course of the audit it was discovered that alarm installation is considered improvement to realty in accordance with Information Bulletin #60 dated April 2004.
>
> And further:
>
> [Taxpayer] has been paying Sales Tax on the entire amount of all its Lump-sum contracts pertaining to alarm installations (which included material markup and labor) per instructions given from a previous auditor. However due to the recent discovery that alarm installation is considered improvement to real property and not tangible personal property, [Taxpayer] has requested a refund equal to the difference between the tax paid during the audit period … calculated on the entire lump-sum amount of its contracts, and the correct amount of tax that should have been paid based on the material cost of those contracts.

The taxpayer cites Sales Tax Information Bulletin #60 (April 2004). Information Bulletin #60 states a lump sum contract means (in pertinent part):

> [A] contract to incorporate construction materials into real estate with the charge for labor and materials being quoted as one price. The contractor may subsequently furnish a breakdown of the charges for labor and materials without changing the nature of the lump sum contract. For example, a typical lump sum contract provides that the contractor will build a structure for a total stated price such as $40,000. A lump sum contractor generally must pay sales tax to the vendor who sells the contractor construction materials.

In somewhat contrast to a lump sum contract, Information Bulletin #60 also describes a "time and materials contract." A time and materials contract is one where "the charge for the labor and materials" is "separately stated and the final contract price being dependent on the cost of the materials and the amount of labor it actually takes to the complete the contract." Information Bulletin #60 also defines "improvement to real estate," which in the Examples Section of part "E" includes the installation of "water heaters, water softeners, *alarms*, furnaces, …." (*Emphasis added*).

Even if, *arguendo*, the Department accepts the taxpayer's argument that sales tax was overpaid, it was not the taxpayer that overpaid it. With regards to sales tax, the taxpayer is a collection agent for the state, remitting the sales tax that its customers paid. Any overpayment was by the taxpayer's *customers*. The applicable statute for a refund involving a retail merchant is IC 6-2.5-6-14.1, which states in part that a "retail merchant is not entitled to a refund of state gross retail or use taxes unless the retail merchant refunds those taxes to the person from whom they were collected." The taxpayer has not shown that it refunded the purported overpayment of tax to its customers.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420050035.LOF

LETTER OF FINDINGS NUMBER: 05-0035
Sales and Use Tax
For the Tax 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. Sales Tax –Projection

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

The taxpayer protests the sales projection for the 2003 tax year.

II. Sales Tax-Workshops and Seminars

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

The taxpayer protests the assessment of sales tax on receipts for the provision of workshops and seminars.

III. Sales Tax-Sales to Exempt Organizations

Authority: IC 6-2.5-2-1(a), IC 6-2.5-8-8, 45 IAC 2.2-8-12

The taxpayer protests the assessment of sales tax on equipment sold to exempt organizations.

IV. Sales Tax-Calculation of Sales Tax

Authority: IC 6-2.5-2-2, IC 6-2.5-2-5(a).

The taxpayer protests the method of calculating sales tax in some situations.

V. Use Tax-Imposition

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

The taxpayer protests a portion of the imposition of the use tax.

STATEMENT OF FACTS

The taxpayer was a corporation that conducted various workshops and seminars. It also sold and serviced computer systems. There were two principals in the corporation. One principal handled the financial affairs of the corporation and handled the sales and servicing of computers. The other principal conducted the workshops and seminars. After a routine audit, the Indiana Department of Revenue (department) assessed additional sales and use tax, interest, and penalty against the taxpayer for the years 2001-2003. When the taxpayer corporation was dissolved in 2004, the audit assessments were still unsatisfied. The former vice president protested the sales tax assessments. He agreed that he was responsible for the remittance of the sales taxes but protested the amount of the sales taxes due. A hearing was held with the vice president and this Letter of Findings results.

I. Sales Tax –Projection

DISCUSSION

At the time of the audit, the taxpayer did not produce adequate documentation for the auditor to review and determine the appropriate sales tax liability for the tax year 2003. Therefore, the department's auditor projected taxable sales by taking the sales from 2001 and 2002 and divided them by the year's gross receipts to determine the taxable amount. These percentages were averaged to arrive at 18.04 per cent. This percentage was then applied to the gross receipts for 2003 to determine the sales tax due for 2003. The taxpayer never signed the projection agreement.

The taxpayer protested the use of this projection to determine the 2003 sales tax liability. The taxpayer contended that the corporation's business practices changed dramatically at the end of 2002 when the principal, who specialized in computer sales and service, left the corporation. After that time very few sales of computer equipment were made. Rather the taxpayer corporation's receipts came almost entirely from the training seminars it conducted. The taxpayer also provided financial documentation to substantiate its contentions concerning the source of the corporation's 2003 income.

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). The department has the authority to use methods considered necessary to determine a taxpayer's proper tax liability. IC 6-8.1-4-2. One of the methods often and appropriately used when taxpayers do not provide adequate records of their transactions to allow the audit division to review them and determine the proper liability based upon those records is the projection method as was done in this case. However, the taxpayer has produced substantial evidence indicating that the projection agreement, which the taxpayer never agreed to, did not properly reflect the corporation's actual sales tax liability. The documentation presented by the taxpayer at the hearing allows the department to determine the proper tax liability based upon the actual sales.

FINDING

The taxpayer's protest to the use of the projection method to determine the 2003 sales tax liability is sustained. The proper liability is to be determined in a supplemental audit using the financial documentation provided at the hearing.

II. Sales Tax-Workshops and Seminars

DISCUSSION

The taxpayer conducted workshops and seminars. These conferences were on subjects such as human services and not-for-profit corporate operations. Some of these seminars were designed to qualify participants for continuing education credits. The seminars typically consisted of speakers, small group workshops, training, networking, and distribution of printed materials.

IC 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. Transactions where a merchant in the ordinary course of his business sells tangible personal property to a customer are subject to the sales tax. IC 6-2.5-4-1(b). There is no sales tax imposed on services unless the provision of the service is specifically defined by statute as taxable in IC 6-2.5-4.

The taxpayer's workshops and seminars constitute the provision of services not subject to the sales tax.

FINDING

The taxpayer's protest to the imposition of sales tax on receipts from the provision of workshops and seminars is sustained.

III. Sales Tax-Sales to Exempt Organizations

DISCUSSION

During the first two years of the audit, the sales of computers and computer equipment constituted a major portion of the corporation's business. Generally the sale of computers and computer equipment in the regular course of a taxpayer's business is subject to sales tax. IC 6-2.5-2-1(a). There are, however, certain statutory exemptions from the sales tax. The taxpayer contends that many of its sales fell into one of the statutory exemptions from sales tax because the purchasers were not-for-profit organizations.

IC 6-2.5-8-8 provides for exemption certificates from sales tax in pertinent part as follows:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

45 IAC 2.2-8-12(d) clarifies the law concerning exemption certificates in pertinent part as follows:

Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof.

Pursuant to the statute and explanatory regulation, the production of a valid exemption certificate exempts the merchant from the duty of collecting and remitting sales tax. Without a valid exemption certificate, the burden shifts back to the merchant to prove that the sales were not actually subject to sales tax. The taxpayer provided valid exemption certificates for many of the sales upon which the department assessed sales tax. The taxpayer had no duty to collect and remit sales tax on these leases.

The taxpayer had several customers who did not provide valid exemption certificates. Therefore, the taxpayer has the burden of proving that the sales to these customers were exempt from the sales tax. The taxpayer did not provide adequate documentation to sustain this burden.

FINDING

The taxpayer's protest to the imposition of sales tax on sales made to the organizations that provided exemption certificates is sustained. The remainder of the taxpayer's protest is denied.

IV. Sales Tax-Calculation of Sales Tax

DISCUSSION

The department assessed sales tax on the book entries of the amount of income collected on sales of computers and computer parts. The taxpayer alleged that in many instances, sales tax was actually collected from the purchasers and not remitted to the state. In those cases, assessing tax on the total receipts from the sale would actually be assessing sales tax on the sales tax collected rather than just on the sale price of the product.

The sales tax is to be imposed on the gross retail income received by the merchant in the sale of tangible personal property. IC 6-2.5-2-2.

"Gross retail income" is defined at IC 6-2.5-2-5(a) as follows:

"[G]ross retail income" means the total gross receipts, of 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,

Sales taxes collected from customers are not part of the gross receipts for the computers and computer equipment. The amount collected for sales tax cannot be included in the total price of the product.

The taxpayer produced invoices indicating that sales tax was collected on many of the sales, thus sustaining its burden of proving that the department in some instances incorrectly assessed sales tax on sales taxes collected from customers.

FINDING

The taxpayer's protest to the sales tax charged on sales taxes collected from customers is sustained subject to audit verification.

V. Use Tax-Imposition

DISCUSSION

Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana. IC 6-2.5-3-2 (a). The taxpayer protested a portion of the use tax imposed. The taxpayer contended that one invoice on which use tax was imposed was actually for a loan rather than the purchase of tangible personal property to be used by the business. The taxpayer did not provide any documentation to substantiate this claim. The taxpayer did not sustain its burden of proving that the use tax was improperly imposed.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20050076P

LETTER OF FINDINGS NUMBER 05-0076P
TAX ADMINISTRATION—NEGLIGENCE PENALTIES FOR THE USE TAX
REPORTING PERIODS COVERING CALENDAR YEARS 2001-02

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—Audit Deficiency (Use Tax)

Authority: IC §§ 6-2.5-3-4(a)(1) and -5 (1998), 6-8.1-1-1, -5-1(b), -10-2.1 and 10-7 (2004); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Laptops Etc. Corp. v. Dist. of Columbia (In re Laptops Etc. Corp.)*, 164 B.R. 506 (Bankr. D. Md. 1993); *Ind. Dep't of State Revenue v. Trump Ind. Inc.*, 814 N.E.2d 1017 (Ind. 2004); *State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M.*, 765 N.E.2d 1257 (Ind. 2002); *Morton Bldgs., Inc. v. Ind. Dep't of State Revenue (Morton Bldgs. VII)*, 819 N.E.2d 913 (Ind. Tax Ct. 2004), *review denied* 831 N.E.2d 744 (Ind. 2005) (table); *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018 (Ind. Tax Ct. 1999); *USAir, Inc. v. Ind. Dep't of State Revenue* (*USAir II*), 623 N.E.2d 466 (Ind. Tax Ct. 1993); *Morton Bldgs., Inc. v. Comm'r of Revenue (Morton Bldgs. V)*, 683 N.E.2d 720 (Mass. App. Ct. 1997); *Olin Corp. v. Dir. of Revenue*, 945 S.W.2d 442 (Mo. 1997) (*en banc*); *House of Lloyd, Inc. v. Dir. of Revenue*, 884 S.W.2d 271 (Mo. 1994) (*en banc*); *Great Am. Airways v. Nev. State Tax Comm'n*, 705 P.2d 654 (Nev. 1985); *Datascope Corp. v. Tax Appeals Trib.*, 608 N.Y.S.2d 562 (App. Div. 1994); 45 IAC §§ 2.2-3-4 (2001) and 15-11-2(b) and (c) (2004); 68 Am. Jur. 2d *Sales and Use Taxes* § 168 (2004)

The taxpayer protests the proposed assessment of negligence penalties for its incurring an audit deficiency of use tax.

STATEMENT OF FACTS

The taxpayer is a publicly traded corporation that operates a chain of restaurants. At present it has locations in the District of Columbia and 29 states, including one restaurant in Indiana, according to the Locations webpage of the taxpayer's website. It is headquartered, and was organized in 1982, in another state, but the Indiana Secretary of State granted the taxpayer authority to conduct business here in late October of 1999. The taxpayer opened its Indiana restaurant in 2000 and began filing gross retail (sales)/use tax returns (Form ST-103) with this Department beginning with the June 2000 reporting period.

The Audit Division of this Department conducted a field audit of the taxpayer's liability for state gross retail (sales), state use and county food and beverage taxes for calendar years 2001-03 (hereinafter "the audit period"). The auditor increased the taxpayer's use tax liability for calendar years 2001-02. He arrived at the adjustments giving rise to that increase by conducting a census audit of the taxpayer's capital asset transactions and a sample audit of its other taxable purchases. The latter category, which is in issue in this protest, consisted of purchases of kitchen, dining room and bar utensils, china and glassware, and various supplies (hereinafter collectively "smallware"). All of the assessed smallware was bought from one vendor that did not collect sales tax from the taxpayer. The audit Summary does not indicate that the taxpayer's Indiana restaurant had any other suppliers of these kinds of items during the audit period.

The use tax audit resulted in proposed assessments totaling in the high four-figure range for the two adjusted years. The auditor cited in the Summary to 45 IAC § 2.2-3-4 (2001) (current version at *id.* (2004)) as authority for the assessments. The auditor also proposed, and the Audit Division approved, including a negligence penalty in the Notices of Proposed Assessment for both years. The taxpayer paid the parts of the assessments equal to the base tax and accrued interest and timely filed a written protest, but only of the negligence penalties. The Department will provide additional facts as needed.

DISCUSSION

A. APPLICABLE PENALTY LAW

IC § 6-8.1-10-2.1 (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 that the Department administers. IC § 6-8.1-10-2.1(a)(3) states 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.* Title 45 IAC § 15-11-2(b) (2004) defines "negligence" in relevant part as follows:

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

Id. (Emphasis added.) "[L]isted tax laws" refers to the definition of the term "listed taxes" found in IC § 6-8.1-1-1 (2004). The listed taxes are all of the tax laws for which the General Assembly has explicitly made the Department responsible. They include the Gross Retail and Use Tax Act of 1963, IC article 6-2.5 (1998) (current version at *id.* (2004)) ("GRUTA").

"If a person subject to the penalty imposed under this section [IC § 6-8.1-10-2.1] can show that the failure to…pay the deficiency determined by the department was *due to reasonable cause* and not due to willful neglect, the department shall waive the penalty." IC § 6-8.1-10-2.1(d) (emphasis added.). The implementing regulation restates this requirement as requiring the taxpayer to show that the failure to discharge its tax duties "was due to reasonable cause and not due to negligence." 45 IAC § 15-11-2(c). This subsection of the regulation goes on to state:

> In order to establish reasonable cause, the taxpayer must demonstrate that it exercised *ordinary business care and prudence* in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
>
> …
>
> (2) judicial precedents set by Indiana courts; [and]
>
> (3) judicial precedents established in jurisdictions outside Indiana[.]
>
> …
>
> Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Id. (Emphasis added.) The taxpayer "must make an affirmative showing of all facts alleged as a reasonable cause for [its] failure to … pay the deficiency[.]" IC § 6-8.1-10-2.1(e). The evidentiary showing the taxpayer must make under IC § 6-8.1-10-2.1(d) and (e) and 45 IAC § 15-11-2(c) is consistent with IC § 6-8.1-5-1(b), which places the burden of proof in all protests on the person against whom a proposed assessment is made to prove that it is wrong.

IC § 6-8.1-10-7 imposes the only other limits, monetary ones, on the Department's authority to assess and enforce a penalty under IC § 6-8.1-10-2.1. That statute provides:

Notwithstanding the various penalty provisions of [IC] chapter [6-8.1-10], the maximum total penalty that may be assessed against a person under sections 2.1 through 5 of this chapter [i.e., IC §§ 6-8.1-10-2.1 to -5, which all use percentage formulas to calculate the respective penalties they impose] is one hundred percent (100%) of the unpaid tax and *the minimum penalty, if any, that may be assessed under those sections is five dollars ($ 5).*

Id. (Emphasis added).

B. TAXPAYER'S ARGUMENT

The taxpayer argues that the purchases giving rise to the deficiency were from only one vendor that did not collect sales tax from the taxpayer and that those purchases represented only a small percentage of its total purchases for the audit period. The taxpayer is essentially contending that the Department should waive the negligence penalties because the percentage of purchases on which it failed to pay use tax is, in the taxpayer's view, *de minimis*.

C. ANALYSIS

As noted at the end of Subpart A, IC § 6-8.1-10-7 sets the maximum and minimum amounts of percentage-based penalties, including the negligence penalty, the Department may assess; the minimum is five dollars ($5). However, once the Department has assessed a negligence penalty over that minimum, as it did here, IC § 6-8.1-10-2.1(d) and (e) govern the Department's ability to waive that penalty. There is nothing in either of those subsections that even authorizes the Department to waive a negligence penalty on the ground that the amount of unpaid tax is *de minimis*, much less anything setting out an amount, or a formula to determine an amount, of unpaid tax that the Department could treat as being *de minimis*. Nor does IC § 6-8.1-5-1(a), the subsection requiring the Department to make a proposed assessment of tax it reasonably believes was not properly reported, set any minimum figure of unpaid tax below which the Department is excused from doing so. Had the General Assembly wanted to set a floor amount of unpaid tax below which it would deem the taxpayer not liable for any such tax as a matter of law (as distinguished from granting the Department administrative discretion to make such a determination), it easily could have said so.

The only ground on which IC § 6-8.1-10-2.1(d) requires the Department to waive a negligence penalty, once assessed, is "reasonable cause[.]" *Id.* The legislature's use of this term necessarily implies that the determinative factor for the Department in deciding whether to waive a negligence penalty is the cause of, not the amount of unpaid tax resulting from, the compliance failure in question. The only material reference to a number concerning the negligence penalties IC § 6-8.1-10-2.1(a) imposes is to the amount of unpaid, underpaid, unreported or underreported taxes. The only use for that figure that IC § 6-8.1-10-2.1 mentions is to compute the negligence penalty; subsection (b) uses that amount as the multiplicand to which the Department applies the ten percent multiplier to determine the amount of the subsection (a) penalty. *See* IC § 6-8.1-10-2.1(b) (setting out the computation formulae). The size of this multiplicand, standing alone, is irrelevant to answering the questions of why and how it came into being, and more precisely to answering the question of whether or not the failure out of which it arose was due to the taxpayer's negligence.

The taxpayer has not made any alternative argument, much less submitted any evidence in support of such an argument, as to why its "failure to…pay the [part of the] deficiency [on taxable purchases] determined by the department was due to reasonable cause and not due to willful neglect[.]" IC § 6-8.1-10-2.1(d). Nor has the taxpayer made any argument as to why it had reasonable cause to incur the part of the deficiency attributable to its capital asset purchases. Indiana law is settled that this state's taxation hearing officers, and by extension the state-level taxing authorities of which they are agents, "do not have the duty to make a taxpayer's case." *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1024 (Ind. Tax Ct. 1999), *cited with approval in State Bd.*

of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M., 765 N.E.2d 1257, 1264 (Ind. 2002). The Tax Court stated its rationale for this rule later in *Hoogenboom-Nofziger* as follows:

> [T]o allow [a taxpayer] to prevail after it made such a cursory showing at the administrative level would result in a tremendous workload increase for [the Department and] the State Board [now the Indiana Board of Tax Review], … administrative agenc[ies] that already bear[ ] … difficult burden[s] in administering this State's [listed and] property tax system[s]. If taxpayers could make a de minimis showing and then force [the Department or] the State Board to support its decisions with detailed factual findings, the [Indiana taxing authorities] would be overwhelmed with cases such as this one. This would be patently unfair to other taxpayers who do make detailed presentations to the [taxing authorities] because resolution of their appeals would necessarily be delayed.

715 N.E.2d at 1024-25. The Department therefore summarily denies the taxpayer's protest to the extent that the negligence penalties derive from the parts of its use tax deficiency for each year assessed on taxable capital asset transactions. The only issue left is thus whether, without regard to the alleged *de minimis* character of the taxpayer's deficiency, the taxpayer had reasonable cause for incurring the parts of that deficiency assessed on its other taxable purchases. The Department will base its finding on this question solely on relevant information in the audit file, its other records on the taxpayer, the public domain (including other official records), any reasonable inferences from that information, and any applicable authorities that cursory research revealed.

The Department notes that at this writing the taxpayer has been in business for over 23 years and, as previously noted, has restaurants in 29 other state-level taxing jurisdictions nationwide. It is reasonable to infer that the taxpayer would not have survived, let alone have built up its business to its present size, had the taxpayer crippled itself by repeatedly incurring substantial tax deficiencies. It is thus also reasonable to infer that by the time the taxpayer started doing business in Indiana in 1999-2000, it had learned the nationwide general legal view as to the place and role of the use tax in state and local tax systems and the circumstance under which liability for that tax accrues to the jurisdiction in which the property becomes located. As pointedly expressed in 1997 by the Appeals Court of Massachusetts, where the taxpayer has done business since 1995, "*[t]he use tax* is complementary to the sales tax and *bites when the sales tax does not.*" *Morton Bldgs., Inc. v. Comm'r of Revenue (Morton Bldgs. V)*, 683 N.E.2d 720, 722 (Mass. App. Ct. 1997) (emphases added), *paraphrased and followed in Morton Bldgs., Inc. v. Ind. Dep't of State Revenue (Morton Bldgs. VII)*, 819 N.E.2d 913, 915 (Ind. Tax Ct. 2004), *review denied* 831 N.E.2d 744 (Ind. 2005) (table). In other words, the taxpayer should have learned by the time it started doing business in Indiana that if it did not pay sales tax on a non-exempt purchase of tangible personal property later placed in a jurisdiction that had sales and use taxes, the taxpayer would owe that jurisdiction use tax.

This rule follows from the well-settled general law in this country on the purpose and function of a use tax. "It [has long been] one of the well-known functions of the integrated use and sales tax to remove the buyers' temptation to place their orders in other states in the effort *to escape payment of the tax on local sales*." *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (internal quotation marks omitted) (emphasis added). In addition to the United States Supreme Court, at least ten courts sitting in jurisdictions other than Indiana have reported opinions discussing this subject and taking the same view. Their consensus, summarized in a secondary source, is that "[t]he use tax is correlative of, and is complementary and supplemental to, the sales tax, *one of its principal purposes being to prevent the evasion of the sales tax.*" 68 Am. Jur. 2d *Sales and Use Taxes* § 168 (2004) (footnote omitted) (emphasis added). Four of the opinions this last source cites, *id.* n.96, like *Morton Buildings V*, interpreted the use tax laws of other jurisdictions where the taxpayer did business, and were issued, before the taxpayer began doing business in Indiana in 1999-2000. *Laptops Etc. Corp. v. Dist. of Columbia (In re Laptops Etc. Corp.)*, 164 B.R. 506, 517 (Bankr. D. Md. 1993) (sustaining debtor-in-possession's objection to District of Columbia's use tax proof of claim and discussing the general distinction and relationship between sales and use taxes); *Great Am. Airways v. Nev. State Tax Comm'n*, 705 P.2d 654, 657 (Nev. 1985), and *Datascope Corp. v. Tax Appeals Trib.*, 608 N.Y.S.2d 562, 564 (App. Div. 1994). *See also Olin Corp. v. Dir. of Revenue*, 945 S.W.2d 442, 443 (Mo. 1997) (*en banc*) ("Missouri sales and use taxes are complementary tax schemes that 'are designed to assure that purchases of tangible personal property for valuable consideration by a Missouri purchaser receive identical tax treatment no matter what the geographic location of the seller[,]' (quoting *House of Lloyd, Inc. v. Dir. of Revenue*, 884 S.W.2d 271, 273 (Mo. 1994) (*en banc*))). There was thus ample non-Indiana authority giving the taxpayer constructive notice it must pay use tax to any jurisdiction with sales and use taxes on any non-exempt tangible personal property placed there if no sales tax was paid when purchased.

Morton Buildings VII, cited above, makes it clear that Indiana is in the judicial mainstream regarding the function and role of the use tax. The Indiana Supreme Court settled the law and removed any doubt that might have lingered on this point less than three months before the Indiana Tax Court issued *Morton Buildings VII. See Ind. Dep't of State Revenue v. Trump Ind. Inc.*, 814 N.E.2d 1017, 1019 (Ind. 2004). Admittedly, neither opinion was issued until after the close of the taxpayer's audit period. However, it did have the benefit of the first reported Indiana opinion, issued well before that period began, that made the same point:

> Like most states, Indiana has complementary sales and use taxes. *See* IND. CODE 6-2.5-3-4(a)[(1)] [(1988) (audit period and current versions at *id.* (1998) and (2004), respectively) (exempting the storage, use and consumption of tangible personal property in Indiana from use tax if Indiana sales tax was paid when that property was acquired)]. … *The complementary formulation exists to ensure non-exempt retail transactions that escape sales tax liability are nonetheless taxed.*

USAir, Inc. v. Ind. Dep't of State Revenue (*USAir II*), 623 N.E.2d 466, 468-69 (Ind. Tax Ct. 1993) (citation omitted) (emphasis added), citing, among other authorities, *Great American Airways*, above, 705 P.2d at 657-58 n.5. Title 45 IAC § 2.2-3-4, which was in effect when the Tax Court issued *USAir II* and on which the present taxpayer's auditor relied, is to the same effect. "Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase." *Id. But cf.* IC § 6-2.5-3-5 (1998) (current version at *id.* (2004)) (granting a credit against use tax for any sales, purchase or use tax paid to another state-level taxing jurisdiction when the tangible personal property was acquired).

The rule that a taxpayer must pay use tax if it did not pay sales tax on a non-exempt transaction thus was and is no different in Indiana than in any other jurisdiction with sales and use taxes in which the taxpayer had done business. It was incumbent upon the taxpayer, before starting business in this state, to become familiar with the Indiana use tax authorities then in effect, of which it was and is held to have constructive knowledge in any case. *See* 45 IAC § 15-11-2(b) ("Ignorance of the listed tax laws, rules and/or regulations is treated as negligence."). Since, as the foregoing discussion shows, there were only a few such authorities, it should not have been very burdensome for the taxpayer to research them.

However, even if it did not do so, given the taxpayer's past experience complying with the use tax laws of other jurisdictions where it had operated, it should have known it would probably be liable for use tax if it did not pay sales tax to its Indiana restaurant's vendors. It is all but impossible for the Department to believe the taxpayer did not actually know of, or had not paid use tax elsewhere pursuant to, this general rule of purchaser liability before the audit period. As mentioned earlier, the taxpayer's business would not have lasted as long or become as big and geographically wide-ranging as it has if the taxpayer repeatedly had been assessed substantial tax deficiencies. In particular, it is unlikely that the untaxed transactions in issue here were the first of their kind in the taxpayer's history, given the duration and size of its nationwide business.

The taxpayer purchased smallware for its only Indiana restaurant from a vendor that, for all that appears in the Summary (the only evidence the Department has, since the taxpayer submitted none), was the only such vendor that restaurant had during calendar years 2000-01. That vendor failed to collect and remit sales taxes on those transactions. It is no defense to the proposed negligence penalty assessments to say, as the taxpayer implies in its protest letter, that the vendor should have done so. The vendor's failure to collect those taxes should have been a red flag alerting the taxpayer to self-assess, report and remit use tax on those purchases. The taxpayer's legal liabilities for those taxes should have been clear. The taxpayer nevertheless failed to recognize, report and pay those liabilities, thereby incurring the present audit deficiencies. It is highly improbable (although not impossible), that the taxpayer's failures were due to ignorance of Indiana use tax law. More probably, they were due to carelessness. Either way, however, those failures constituted "negligence" as defined in 45 IAC § 15-11-2(b). They are not evidence of an "exercise[ ] [of] ordinary business care and prudence[,]" 45 IAC § 15-11-2(b), and therefore are not "reasonable cause" under IC 6-8.1-10-2.1(d) and (e) to waive the negligence penalties for the taxpayer's incurring those deficiencies.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20050101P.LOF

LETTER OF FINDINGS NUMBER: 05-0101P
CORPORATE INCOME TAX
For Years 1999 AND 2000

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

ISSUES

I. State Gross Retail Tax —Penalty Assessment

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

Taxpayer protests the proposed assessments of penalty on an assessment.

STATEMENT OF FACTS

Taxpayer is a group of subsidiaries of a foreign corporation doing business in Indiana. After an initial audit of the Company's unitary filings, the Department assessed additional income tax. Taxpayer protested the imposition of penalty.

I. State Income Tax —Penalty Assessment

DISCUSSION

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code further provides in 45 IAC 15-11-2:

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

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

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

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

Taxpayer argues that the penalty was inappropriate based on taxpayer's overall compliance and the taxpayer's reliance on applicable regulations as to the classification of gross income for high rate gross income tax assessments. Standing alone neither of the taxpayer's arguments are dispositive but they are factors which are indicative of the taxpayer's reasonable care, caution, or diligence.

FINDING

Taxpayer protest sustained.

DEPARTMENT OF STATE REVENUE

04-20050163P.LOF

LETTER OF FINDINGS NUMBER 05-0163P
TAX ADMINISTRATION—NEGLIGENCE PENALTIES FOR THE USE TAX REPORTING PERIODS COVERING CALENDAR YEARS 2001-03

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—Audit Deficiency (Use Tax)

Authority: IC §§ 6-2.5-5-3(b) (1998), 6-8.1-1-1, -5-1(b), -10-2.1 and 10-7 (2004); *State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M.,* 765 N.E.2d 1257 (Ind. 2002); *Ind. Dep't of State Revenue v. Cave Stone, Inc.,* 457 N.E.2d 520 (Ind. 1983); *General Motors Corp. v. Ind. Dep't of State Revenue,* 578 N.E.2d 399 (Ind. Tax Ct. 1991), *aff'd* 599 N.E.2d 588 (Ind. 1992); *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs,* 715 N.E.2d 1018 (Ind. Tax Ct. 1999); 45 IAC § 2.2-5-8 (2001) and 15-11-2(b) and (c) (2004)

The taxpayer protests the proposed assessment of negligence penalties for its incurring an audit deficiency of use tax.

STATEMENT OF FACTS

The taxpayer manufactures silicone pellets it supplies to the automotive and appliance industries. It is a foreign corporation, chartered in Delaware and headquartered in a state other than Delaware or Indiana. The Secretary of State authorized the taxpayer to do business in Indiana in December 1986, and it began filing gross retail (sales)/use tax returns (Form ST-103) with this Department in February 1987. During calendar years 2001-03 (hereinafter "the audit period") the taxpayer had one Indiana plant.

The Department conducted a field audit of the taxpayer's sales and use tax liability incurred in operating its Indiana plant during the audit period. The auditors did not adjust the taxpayer's sales tax liability. However, they did make several adjustments increasing its use tax liability after discovering transactions on which the taxpayer had not paid sales tax. The auditors conducted a sample audit of several categories of expensed purchases they discussed in the Audit Summary under the broad overall heading of "Non-manufacturing Equipment and Supplies." Under this heading the auditors increased the taxpayer's use tax liability on expensed purchases of office equipment and supplies and maintenance tools used on production equipment. The auditors also assessed use tax on fifty (50) percent of the purchase prices of the forklifts and the items used to repair them the taxpayer bought during the audit period. They made this adjustment based on a time study the taxpayer had conducted that showed that it used the forklifts fifty (50) percent of the time in, and fifty (50) percent of the time outside, the production process.

The use tax audit resulted in proposed assessments totaling in the low five-figure range for the audit period. The auditors also proposed, and the Audit Division approved, including a negligence penalty in the Notices of Proposed Assessment for each year of the audit period. The taxpayer paid the parts of the assessments equal to the base tax and accrued interest and timely filed a written protest, but only of the negligence penalties. The Department will provide additional facts as needed.

DISCUSSION

A. APPLICABLE PENALTY LAW

IC § 6-8.1-10-2.1 (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 that the Department administers. IC § 6-8.1-10-2.1(a)(3) states 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.* Title 45 IAC § 15-11-2(b) (2004) defines "negligence" in relevant part as follows:

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

Id. (Emphasis added.) "[L]isted tax laws" refers to the definition of the term "listed taxes" found in IC § 6-8.1-1-1 (2004). The listed taxes are all of the tax laws for which the General Assembly has explicitly made the Department responsible. They include the Gross Retail and Use Tax Act of 1963, IC article 6-2.5 (1998) (current version at *id.* (2004)) ("GRUTA").

"If a person subject to the penalty imposed under this section [IC § 6-8.1-10-2.1] can show that the failure to…pay the deficiency determined by the department was *due to reasonable cause* and not due to willful neglect, the department shall waive the penalty." IC § 6-8.1-10-2.1(d) (emphasis added.). The implementing regulation restates this requirement as requiring the taxpayer to show that the failure to discharge its tax duties "was due to reasonable cause and not due to negligence." 45 IAC § 15-11-2(c). This subsection of the regulation goes on to state:

> In order to establish reasonable cause, the taxpayer must demonstrate that it exercised *ordinary business care and prudence* in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
>
> …
>
> (2) judicial precedents set by Indiana courts[.]

Id. (Emphasis added.) The taxpayer "must make an affirmative showing of all facts alleged as a reasonable cause for [its] failure to … pay the deficiency[.]" IC § 6-8.1-10-2.1(e). The evidentiary showing the taxpayer must make under IC § 6-8.1-10-2.1(d) and (e) and 45 IAC § 15-11-2(c) is consistent with IC § 6-8.1-5-1(b), which places the burden of proof in all protests on the person against whom a proposed assessment is made to prove that it is wrong.

IC § 6-8.1-10-7 imposes the only other limits, monetary ones, on the Department's authority to assess and enforce a penalty under IC § 6-8.1-10-2.1. That statute provides:

> Notwithstanding the various penalty provisions of [IC] chapter [6-8.1-10], the maximum total penalty that may be assessed against a person under sections 2.1 through 5 of this chapter [i.e., IC §§ 6-8.1-10-2.1 to -5, which all use percentage formulas to calculate the respective penalties they impose] is one hundred percent (100%) of the unpaid tax and *the minimum penalty, if any, that may be assessed under those sections is five dollars ($ 5).*

Id. (Emphasis added).

B. TAXPAYER'S ARGUMENT

The taxpayer argues that the purchases giving rise to the deficiency represented only a small percentage of its total purchases for the audit period. The taxpayer is essentially contending that the Department should waive the negligence penalties because the percentage of purchases on which it failed to pay use tax is, in the taxpayer's view, *de minimis*.

C. ANALYSIS

As noted at the end of Subpart A, IC § 6-8.1-10-7 sets the maximum and minimum amounts of percentage-based penalties, including the negligence penalty, the Department may assess; the minimum is five dollars ($5). However, once the Department has assessed a negligence penalty over that minimum, as it did here, IC § 6-8.1-10-2.1(d) or (e) govern the Department's ability to waive that penalty. There is nothing in either of those subsections that even authorizes the Department to waive a negligence penalty on the ground that the amount of unpaid tax is *de minimis*, much less anything setting out an amount, or a formula to determine an amount, of unpaid tax that the Department could treat as being *de minimis*. Nor does IC § 6-8.1-5-1(a), the subsection requiring the Department to make a proposed assessment of tax it reasonably believes was not properly reported, set any minimum figure of unpaid tax below which the Department is excused from doing so. Had the General Assembly wanted to set a floor amount of unpaid tax below which it would deem the taxpayer not liable for any such tax as a matter of law, it easily could have said so.

The only ground on which IC § 6-8.1-10-2.1(d) requires the Department to waive a negligence penalty, once assessed, is "reasonable cause[.]" *Id.* The legislature's use of this term necessarily implies that the determinative factor for the Department in deciding whether to waive a negligence penalty is the cause of, not the amount of unpaid tax resulting from, the compliance failure in question. The only material reference to a number concerning the negligence penalties IC § 6-8.1-10-2.1(a) imposes is to the amount of unpaid, underpaid, unreported or underreported taxes. The only use for that figure that IC § 6-8.1-10-2.1 mentions is to compute the negligence penalty; subsection (b) uses that amount as the multiplicand to which the Department applies the ten percent multiplier to determine the amount of the subsection (a) penalty. *See* IC § 6-8.1-10-2.1(b) (setting out the computation formulae). The size of this multiplicand, standing alone, is irrelevant to answering the questions of why and how it came into being, and more precisely to answering the question of whether or not the failure out of which it arose was due to the taxpayer's negligence.

The taxpayer has not made any alternative argument, much less submitted any evidence in support of such an argument, as to why its "failure to…pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect[.]" IC § 6-8.1-10-2.1(d). Indiana law is settled that this state's taxation hearing officers, and by extension the state-level taxing authorities of which they are agents, "do not have the duty to make a taxpayer's case." *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1024 (Ind. Tax Ct. 1999), *cited with approval in State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M.*, 765 N.E.2d 1257, 1264 (Ind. 2002). The Tax Court stated its rationale for this rule later in *Hoogenboom-Nofziger* as follows:

> [T]o allow [a taxpayer] to prevail after it made such a cursory showing at the administrative level would result in a tremendous workload increase for [the Department and] the State Board [now the Indiana Board of Tax Review],…administrative agenc[ies] that already bear[ ]…difficult burden[s] in administering this State's [listed and] property tax system[s]. If taxpayers could make a de minimis showing and then force [the Department or] the State Board to support its decisions with detailed factual findings, the [Indiana taxing authorities] would be overwhelmed with cases such as this one. This would be patently unfair to other taxpayers who do make detailed presentations to the [taxing authorities] because resolution of their appeals would necessarily be delayed.

715 N.E.2d at 1024-25. The Department will therefore base its determination of the presence or absence of reasonable cause for the taxpayer's incurring its use tax deficiency solely on the evidence and information in the audit file.

In its protest letter the taxpayer alleged it had consumed or otherwise used items (e.g., labels for intermediates, thermal ribbons and strapping tools) in certain categories of expensed purchases in its manufacturing process. The taxpayer further stated that for this reason, it had been under the impression that purchases in those categories had been tax-exempt. However, the taxpayer has not protested the substantive assessments of base use tax on those purchase categories.

As it turned out, the taxpayer made one or more mistakes of fact regarding the scope of its production process, and by extension one or more mistakes of law as to the extent it was entitled to treat its expensed purchases as being for exempt uses in that process. The auditors made all of the adjustments under the heading "Non-manufacturing Equipment and Supplies" under the authority of 45 IAC § 2.2-5-8, the regulation that interprets and implements IC § 6-2.5-5-3(b). This latter subsection of GRUTA exempts from sales and use tax "manufacturing machinery, tools, and equipment…if…acquire[d]…for direct use in the direct production…of other tangible personal property." *Id.*

The taxpayer has been doing business in Indiana continuously for over 19 years and has been subject to GRUTA for all of those years. The General Assembly enacted IC § 6-2.5-5-3 as part of its recodifications of GRUTA in 1980. The Department promulgated 45 IAC article 2.2, including 45 IAC § 2.2-5-8, on December 1, 1982. LSA Doc. #82-86(F), 6 I.R. 8 (Jan. 1, 1983) (codified as amended at *id.* (2001)) (current version at *id.* (2004)). Both the statute and the regulation thus have been in effect for the entire time since the taxpayer began doing business in this state in late 1986 and began filing sales and use tax returns in early 1987. The taxpayer is charged with constructive knowledge of both of these authorities and of the judicial opinions of the Indiana courts interpreting this exemption. *E.g.*, *Ind. Dep't of State Revenue v. Cave Stone, Inc.,* 457 N.E.2d 520 (Ind. 1983) and *General Motors Corp. v. Ind. Dep't of State Revenue,* 578 N.E.2d 399, 401-05 (Ind. Tax Ct. 1991), *aff'd* 599 N.E.2d 588, 588-89 (Ind. 1992). It should have been well aware by the years of the audit period of both the scope of its production process and whether and to what extent these authorities would permit it to exempt manufacturing machinery, tools and equipment as being used in that process. However, if it was in any doubt and needed guidance, it could have referred to, or obtained competent professional advice on, these authorities.

The taxpayer did not know about, knew about but misunderstood and misapplied, or ignored the law governing this exemption. The Department infers this lack of "ordinary business care and prudence," 45 IAC § 15-11-2(c), from three facts. First, the taxpayer was in fact aware of the scope of its production process, as evidenced by the study it conducted of its exempt and taxable percentages of use of its forklifts and the items it bought to repair them. Second, notwithstanding this awareness, the taxpayer incurred a use tax audit deficiency, part of which was on its expensed purchases. Third and last, the taxpayer failed to protest this part of the total deficiency on substantive grounds. The taxpayer thereby has tacitly admitted that it did not apply, or incorrectly applied, these authorities in failing to self-assess and remit use tax on the non-exempt part of its expensed purchases during the audit period.

The Department therefore finds that the audit adjustments to those purchases summarized in the Statement of Facts did not occur despite the exercise of "ordinary business care and prudence[,]" *id.*, and thus were not "due to reasonable cause[.]" IC § 6-8.1-10-2.1(d). Rather, they are evidence of either "carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code [and] department regulations[,]" "[i]gnorance of the listed tax laws, rules and/or regulations[,]" or both. 45 IAC

§ 15-11-2(b). As such, the foregoing failures constituted "negligence" as 45 IAC § 15-11-2(b) defines that word. Accordingly, the Department further finds that the taxpayer was negligent and the Audit Division properly proposed assessing the negligence penalties.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02-20050175.LOF

LETTER OF FINDINGS NUMBER: 05-0175
Adjusted Gross Income Tax
For the Year 1998-2001

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. Adjusted Gross Income Tax—Unitary Filing

Authority: Ind. Code § 6-3-2-2; Ind. Code § 6-3-2-2.4; I.R.C. § 243

Taxpayer protests the forced combination of it and seven subsidiaries.

II. Adjusted Gross Income Tax—Apportionment Factors

Authority: 45 IAC 3.1-1-51, 45 IAC 3.1-1-52, 45 IAC 3.1-1-153

Taxpayer protests the elimination of sales between a partnership and a corporation that were included on a unitary tax return, when the corporation to whom the partnership's sales were made did not directly own any interest in the partnership.

III. Tax Administration—Application of payments

Authority: Ind. Code § 6-8.1-3-17; Ind. Code § 6-8.1-8-1.5

Taxpayer made a payment under amnesty but did not withdraw its protest of tax due.

IV. Tax Administration—Negligence Penalty

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

Taxpayer protests the assessment of a negligence penalty.

STATEMENT OF FACTS

Taxpayer is the parent corporation of a group of companies that manufacture and sell various electronic transaction systems. On a separate company basis, Taxpayer is the only company that has any Indiana payroll, property or sales.

During 1999, Taxpayer divided its manufacturing operations into two subsidiaries, Sub M and Sub S, which handled the manufacturing of Taxpayer's systems. After the division, Sub S manufactured the systems in question and transferred the systems to Sub M. Finished goods were transferred from Sub M to Sub P, a partnership. Sub P, which was owned partly by Sub H and Sub SH, owned all intangible relating to the manufacturing and marketing process. Sub P in turn transfers the property to Taxpayer.

In addition, three other subsidiaries, Sub F, Sub IC, and Sub IM manage Taxpayer's financial assets. During the years in question, Taxpayer filed a separate Indiana return. However, a Department audit concluded that Taxpayer and various subsidiaries should have filed a unitary return. As a result, the Department assessed additional tax, interest and a negligence penalty. Taxpayer filed a protest, and a hearing was held.

Taxpayer was assessed roughly $550,000 of additional tax as a result of the assessment, including the assessment of taxes that had been previously refunded. During Indiana Tax Amnesty, Taxpayer paid approximately $82,000 of tax that it conceded was properly assessed. However, Taxpayer maintained its right to protest notwithstanding the payment and did not otherwise reach a settlement agreement during the amnesty period.

I. Adjusted Gross Income Tax—Unitary Filing

DISCUSSION

First, Taxpayer protests the assessment with respect to several manufacturing subsidiaries. Taxpayer concedes that it and the manufacturing subsidiaries were unitary; however, Taxpayer maintains that the Department must show a failure to fairly reflect income from Indiana sources under the methods provided under Ind. Code § 6-3-2-2(l) prior to an attempt to force unitary filing; in effect, forced unitary filing is a last resort. Taxpayer argues that its deductions for payments between entities were determined on an arms-length basis. Taxpayer has conceded that certain payments were not made in accordance with the agreement and conceded at least that portion of the liability.

Taxpayer, as a separate entity and as the company associated with its machines, lost roughly $25,000,000 during the four years in question, without any decrease in its sales to third parties; however, the group of companies had income $500,000,000. The group as a whole had over $1,000,000,000 of payroll and $2,000,000,000 over the period. Taxpayer had roughly 80 percent of the overall property and 90 percent of the payroll of the entire group for the years in question; Sub M and Sub S had virtually the entire balance of property, while the other entities had a combined $1,000 of property and $6,100 of payroll for the entire period. The only sales by entities other than Taxpayer consisted of sales within Taxpayer's chain of companies, or passive or "other" income. Here, based on the individual return versus the return for the entire entity, Taxpayer sought to shield virtually all of the income of the entire entity from the scope of Indiana's taxation. This represents a failure to fairly reflect all income of Taxpayer's unitary business. Taxpayer's Indiana income is not that of an isolated entity, with various other entities; it is the income of the entire entity, each an interrelated part of Taxpayer.

Other remedial measures are available to the Department, such as the disallowance of deductions between entities or other methods. The use of these methods depends on the facts and circumstances of each individual case. In this case, Taxpayer seeks to add back deductions claimed pursuant to a transfer-pricing study for expenses between Taxpayer and its miscellaneous subsidiaries. Sub S incurred $6,000 in costs to manufacture a machine. Sub M bought the machine for $7,000, and added a few improvements. Sub P paid $8,000 for the finished machine. Taxpayer paid $9,000 for the machine, and sold the machine for $10,000. Here, the net effect of manufacturing a machine and receiving a $4,000 profit became one of Taxpayer, Sub S, Sub M and Sub P all getting $1,000 profit. Sub P's profit was further divided between two entities, each of which had zero property, payroll, or sales (other than passive or "other" income) as independent entities. Effectively, this left $1,000 subject to taxation, rather than the $4,000 that Taxpayer actually realized from the transaction.

The relationship between Sub F, Sub IC, Sub IM and Taxpayer works like this:

Taxpayer enters into a sale on credit, resulting in a receivable.

Sub F purchases the receivable at face value, plus a factoring commission equal to prime rate plus three percent.

Sub F then seeks to collect on the receivable. If a portion of the receivable is not collected by the expected maturity date, Taxpayer repurchases the receivables at face value less payments and expenses incurred by Sub F.

Sub IC owns Sub F. Sub IC manages Taxpayer's intangible assets and distributes income from those investments. Any administrative functions are performed by Taxpayer's employees, with expenses paid by Sub IM.

Sub IM performs management functions for Sub IC and Sub F. These functions are actually performed by Taxpayer's employees, with expenses paid by Sub IM.

For instance, a customer incurred a $10,000 receivable with Taxpayer, payable at 10.5 percent annual interest over three years. Prime rate was 7.5 percent. As a result, Taxpayer sold the receivable to Sub F for $11,050. In order to retire the debt, payments of $323 were made for the duration of the receivable. This resulted in a profit of $1,628 on the transaction. Of this, only $1,050 was realized by Taxpayer. The other $578 was realized by Sub F.

However, if the customer failed to make the first payment on the agreement, Sub F would then sell the receivable back to Taxpayer at the end of three years for $424 (the face value of the loan), plus expenses of Sub F. Sub F realized a gain of at least $679 ($255 collected above its $11,050 purchase price of the receivable, and $424 of face value). Taxpayer then collects the $424. Taxpayer's gain was only $1,050. In effect, Taxpayer was able to realize a fixed gain from every sale, and any excess income on receivables was siphoned to Sub F. If the debt becomes uncollectible, Sub F's losses were limited to its "factoring commission" (i.e., $1,050 in the example given), while Taxpayer still retained much of the benefit of any losses. In sum, Taxpayer and Sub F engaged in a transaction that resulted in little more than a shifting of income from Taxpayer to Sub F. Further, the only way to take into account the value of the receivable to Taxpayer is to combine the entities; any other approach serves to permit arbitrary shifting of income illustrated by the example provided.

With respect to Sub IC and Sub IM, these companies were little more than paper entities. The only difference is that the income was insolated into entities without any real substance or tax liability (per the Department's audit report) and permitting Taxpayer to reduce its income artificially. The recipient company (Sub IC or Sub IM) was then able to draw interest and/or third-party dividends on the segregated income, which could then never be touched by Indiana on a separate company basis. Further, when the recipient paid dividends back to Taxpayer for the day-to-day use in Taxpayer's business, Taxpayer would be able to claim a full deduction of the dividends under I.R.C. § 243(b)(1) and thus never be taxed. Other approaches that could be taken to account for Taxpayer's income simply do not take into account the income earned for Taxpayer's operations by Sub IC and Sub IM.

In short, the remedial steps under Ind. Code § 6-3-2-2(*l*) other than forced combination do not fully account for Taxpayer's income from its overall operations. In this particular instance, the combination of legally separate but functionally interdependent identities--a unitary return--is the appropriate remedy.

Taxpayer also protests the inclusion of certain entities in Taxpayer's unitary group. Taxpayer asserts that a laundry list of other companies should have been included on the unitary return, rather than the entities that the Department determined to be part of the return.

This argument has two problems. One, Taxpayer has not provided any information concerning whether the entities were unitary or how the inclusion of various entities would more fairly reflect its Indiana income than the Department's method. Second, a number of the entities appear to be foreign corporations or foreign operating corporations as determined under Ind. Code § 6-3-2-2.4. Taxpayer can make an election to include those entities if it files a request to include those entities with the Department no more than thirty (30) days after the close of Taxpayer's taxable year. Ind. Code § 6-3-2-2(q). Taxpayer did not do this. Under Ind. Code § 6-3-2-2(*o*), the Department is precluded from requiring inclusion of the foreign corporations or foreign operating corporations. Accordingly, Taxpayer's protest is denied.

FINDING

Taxpayer's protest is denied.

II. Adjusted Gross Income Tax—Apportionment Factors

DISCUSSION

Taxpayer further argues that, if Taxpayer was required to file a combined return with its various subsidiaries, the Department erroneously eliminated sales between Taxpayer and Sub P. Taxpayer argues that only the sales between a unitary partnership and its corporate partners should be eliminated; therefore, only the sales between Sub P and Sub P's partners, Sub H and Sub SH, should be eliminated.

Taxpayer cites to 45 IAC 3.1-1-153(b)(2), which states:

Intercompany sales between the corporate partner and the partnership shall be eliminated from the corporate partner's sales factor as follows:

(A) Sales by the corporate partner to the partnership to the extent of the corporate partner's interest in the partnership.

(B) Sales by the partnership to the corporate partner not to exceed the corporate partner's interest in all partnership sales.

While 45 IAC 3.1-1-51 and -52 provide for elimination of sales between members of an affiliated group filing consolidated returns, both the statutes and regulations are silent in terms of members of a unitary group that are not partners in a corporate partnership. That stated, the logic behind the elimination of sales between affiliated companies—double counting of the same sale on the return of the same taxpayer (via combination)—is exactly the same in this case. Thus, notwithstanding the language of 45 IAC 3.1-1-153 dealing with corporate partners, the elimination of sales between Taxpayer and Sub P was proper.

FINDING

Taxpayer's protest is denied.

III. Tax Administration—Application of payments

DISCUSSION

Taxpayer also presented a situation that arose after the Department's administrative hearing. Taxpayer had a net assessment of roughly $550,000 of base tax. However, Taxpayer's position was that it owed only a base tax of $82,000. Prior to the November 15, 2005, expiration of the amnesty period under Ind. Code § 6-8.1-3-17(c), Taxpayer paid $82,000; however, Taxpayer did not withdraw its protest of the tax due.

Under the provisions of Indiana Tax Amnesty, taxpayers were given the opportunity to pay their base tax liability as determined by the Department without any penalties or interest that may have been otherwise due. In exchange for the payment, the taxpayers agreed to withdraw and/or forego any rights to refunds, appeals, or administrative protests for the taxes paid.

Even if Taxpayer's position on unitary filing is sustained, Taxpayer's payment cannot be considered a payment subject to the special provisions of the amnesty program because Taxpayer did not waive its continued protest. Accordingly, the payment should be applied in the normal manner under Ind. Code § 6-8.1-8-1.5, without any waiver of penalties and/or interest provided under amnesty.

FINDING

Taxpayer's protest is denied.

IV. Tax Administration—Negligence Penalty

DISCUSSION

The Department may impose a ten percent negligence penalty. Ind. Code 6-8.1-10-2.1 and 45 IAC 15-11-2. Taxpayer's failure to pay taxes as determined by Department audit will result in a negligence penalty. Ind. Code 6-8.1-10-2.1(a)(3). 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*.

With respect to the penalty, Taxpayer has not provided sufficient information to permit penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420050201.LOF

LETTER OF FINDINGS NUMBER 05-0201
RESPONSIBLE OFFICER
SALES TAX AND WITHHOLDING TAX
For Tax Period 1993

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

I. Sales and Withholding Tax -Responsible Officer Liability

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

The taxpayer protests the assessment of corporate sales and withholding taxes against him as a responsible officer.

STATEMENT OF FACTS

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

I. 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(g), 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 produced adequate documentation that he had no duty to collect and remit sales and withholding taxes to the state. Therefore, he is not personally responsible for the payment of the corporate sales and withholding taxes.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

01-20050208.LOF

LETTER OF FINDINGS NUMBERS: 05-0208

Personal Income Tax

For the Years 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—Best information available

Authority: Ind. Code § 6-8.1-5-1

Taxpayer protests the imposition income tax for the years in question.

STATEMENT OF FACTS

Taxpayers are a married couple. From 2001 to 2003, Taxpayers did not file Indiana tax returns. The Department conducted an audit for the years in question, and assessed tax, penalties and interest on the income determined by a best information available method. Taxpayer protested the assessment.

On January 13, 2006, the Department sent a letter to Taxpayer scheduling a hearing for February 7, 2006. Taxpayer called the Department on January 17, 2006, with respect to certain matters regarding the hearing. The Department called Taxpayer on January 19, 2006, to indicate that Taxpayer should provide additional information that may permit the Department to grant a short delay in the hearing date. Taxpayer neither furnished the information that would have permitted the delay nor contacted the Department after January 19, 2006. At the scheduled time and date of the hearing, Taxpayer neither appeared at the designated location of the hearing nor called the hearing officer at that time. Accordingly, this letter of findings is being written based on the information in the file.

I. Tax Administration—Best information available

DISCUSSION

Taxpayer argues several assumptions made by the auditor were incorrect. Assessments by the Department are presumed correct, and the burden of showing the incorrectness of any assessment rests with the taxpayer. Ind. Code § 6-8.1-5-1(a).

Taxpayers' protest listed a variety of contentions. Taxpayers provided little other than conclusory statements without supporting documentation. Accordingly, Taxpayer has not provided sufficient evidence to conclude that the Department's assessment was incorrect.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20050215.LOF

LETTER OF FINDINGS NUMBER: 05-0215
Sales/Use Tax
Periods of 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 this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales/Use Tax: Equipment

Authority: 45 IAC 2.2-5-8; IC 6-8.1-5-1(b); 45 IAC 15-11-2; IC 6-8.1-10-1(e)

The taxpayer protests the proposed assessment of tax on an auto loader.

STATEMENT OF FACTS

The taxpayer manufactures glass/ceramic panels for kitchen appliances, which are in turn sold to appliance manufacturers. More facts will be provided below as needed.

I. Sales/Use Tax: Equipment

DISCUSSION

As noted, the taxpayer protests the proposed assessment of tax on an auto loader (referred to by the taxpayer as a "[r]obotic loader"). The Auditor found the following:

> The review of capital assets revealed taxable purchases on which no sales or use tax has been paid. Additional taxable purchases include an auto loading system, equipment rental and a lathe. The auto loader loads raw materials, glass, onto the production line. No change has occurred to the raw materials prior to being loaded onto the line. As such the auto loader equipment is preproduction and not entitled to the manufacturing exemption.

45 IAC 2.2-5-8(a) states that "In general, all purchases of tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property are taxable." However, 45 IAC 2.2-5-8(b) notes:

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

As 45 IAC 2.2-5-8(c) makes clear, the equipment must "have an immediate effect on the article being produced."

The Auditor argues that the auto loader is pre-production, and thus does not come within the ambit of the manufacturing exemptions. 45 IAC 2.2-5-8(d) deals with "preproduction" and states in relevant part:

> "Direct use in the production process" begins at the point of the first operation or activity constituting part of the integrated production process….

Property, per 45 IAC 2.2-5-8(f), "used for moving raw materials to the plant prior to their entrance into the production process is taxable."

The taxpayer states the following:

> We are using robotics to lift raw material onto the production line to start production/processing of the product.

And also:

> The start of our integrated production process is with the robots lifting the raw material onto the production line.

And in follow-up correspondence, the taxpayer states, in part:

> 1. Raw materials—Glass is stored in the raw glass storage/warehouse area. The forklift truck brings the glass to the production area. The cutting operator will prepare the raw glass boxes to be loaded into the Reis Robotic loader.

2. Cut set up piece—This is the start of the cut and edge operation. Glass is taken out of the box by the Reis Robotic loader and placed on the conveyor. The conveyor takes the glass to the CNC cutter. At this point the glass is cut to a specific size and placed on the CNC edger. …

The question is whether or not the auto loader (robotic loader) is the first step in the production process for the taxpayer or is it pre-production. The taxpayer itself seems to characterize the auto loader as pre-production when it states "We are using robotics to lift raw material onto the production line to *start* production/processing of the product." (*Emphasis added*). 45 IAC 2.2-5-8(c) states in part:

(4) Because of the lack of an essential and integral relationship with the integrated production system in Example (1), the following types of equipment are not exempt:

….

(G) Equipment used to remove raw material from storage prior to introduction into the production process or to move finished products from the last step of production.

Taking raw materials—glass in this case—out of a box, to be loaded on to the conveyor system, is pre-production. The auto loader does not have an immediate effect on the glass.

Lastly, in correspondence, the taxpayer included penalty and interest in its requested adjustments. Under IC 6-8.1-5-1(b) the taxpayer bears the burden of proof. The taxpayer did not develop any arguments regarding the penalty and interest, and is thus denied on the penalty and interest too—*See* 45 IAC 15-11-2 regarding the penalty, and IC 6-8.1-10-1(e) regarding the interest.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01-20050275.LOF

LETTER OF FINDINGS NUMBER: 05-0275
Individual Income Tax
For the Years 1998-1999

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

ISSUES

I. Individual Income Tax – Income of S Corporation shareholders

Authority: Ind. Code § 6-8.1-3-17

Taxpayer protests the assessment of adjusted gross income tax based on its interest as a shareholder in an S Corporation.

STATEMENT OF FACTS

Taxpayer is an individual who was assessed income tax on income derived as a shareholder in an S Corporation. Taxpayer filed a protest of the tax. During Indiana Tax Amnesty, Taxpayer paid the taxes assessed.

I. Individual Income Tax – Income of S Corporation shareholders

DISCUSSION

Taxpayer argued that the assessment of additional income tax was erroneous. Taxpayer paid the base tax liability in question between September 15, 2005, and November 15, 2005. By opting into the Indiana Tax Amnesty program and paying the base tax liability during the amnesty period, Taxpayer has withdrawn its protest of base tax, and has agreed to forego any rights to refund, further protest, or appeal of the tax liability. Accordingly, Taxpayer's protest of base tax is denied, and interest and penalties are waived per Ind. Code § 6-8.1-3-17(c).

FINDING

Taxpayer's protest is sustained in part and denied in part.

DEPARTMENT OF STATE REVENUE

04-20050325.LOF

LETTER OF FINDINGS NUMBER: 05-0325
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—Helicopter Purchase

Authority: IC 6-2.5-5-8; IC 6-2.5-5-27; 45 IAC 2.2-5-15; Black's Law Dictionary (6th ed. 1990)

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

STATEMENT OF FACTS

Taxpayer is a limited liability company, wholly-owned by a single individual, which purchased a helicopter but did not pay sales tax on the purchase. Taxpayer claimed that the purchase was exempt from sales tax because the helicopter 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 helicopter and determined that there was insufficient evidence to support the claim of rental or leasing as the use of the helicopter. 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 helicopter. Taxpayer protests the assessment. Further facts will be supplied as required.

I. Sales and Use—Helicopter Purchase

DISCUSSION

Taxpayer purchased a helicopter and claimed a sales tax exemption on the purchase price. The Department determined that taxpayer did not qualify for the exemption and issued a proposed assessment on the purchase of the helicopter. Taxpayer protests the denial of the claim for exemption.

The exemption is explained in 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 is leasing the helicopter in the regular course of its business and so qualifies for the exemption. Taxpayer refers to the agreement it signed along with another party to lease the helicopter. The lessee was the same business which sold the helicopter to taxpayer. Taxpayer states that the lease is evidence that it purchased the helicopter for the purpose of leasing it to others.

The Department notes that the lease agreement is dated April 16, 2004, while the helicopter was not delivered to taxpayer until November 2004. Even then, the first leasing activity by the lessee under the leasing agreement signed in April 2004 did not take place until May 2005. 45 IAC 2.2-5-15(C)(2) states that the purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular courser of its business. The lack of any leasing activity for over a year under this lease shows that this lease does not satisfy the requirements of 45 IAC 2.2-5-15(c)(2). This lease does not support taxpayer's position that it was in the business of renting or leasing the helicopter.

Next, taxpayer refers to several instances when it rented the aircraft to the individual who owns taxpayer. Taxpayer explains that the member would transport customers for an hourly rate. No rental or leasing agreements or any other materials establishing that the pilot/owner of taxpayer was in the business of public transportation were provided in support of this position. Taxpayer believes that this qualifies as renting or leasing for purposes of the rental exemption. Taxpayer has not provided any leasing or rental agreements between taxpayer and taxpayer's owner (the pilot) establishing the rate and terms of rental or leasing. Taxpayer did not remit sales tax on the rental activity it had with the individual who owns taxpayer.

Taxpayer believes that the pilot was involved in public transportation and therefore was exempt from sales tax on the rental activity. The public transportation exemption is found at 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.

The individual who owns the taxpayer and pilots the helicopter is licensed under Part 91 of the Federal Aviation Administration's (FAA) regulations. Pilots licensed for public transportation are licensed under Part 135. Taxpayer states that the pilot in question was working towards his Part 135 certification. Since the pilot did not hold a public transportation license from the FAA, he did not qualify for the public transportation exemption in IC 6-2.5-27.

Since the use of the helicopter by the pilot/owner of taxpayer did not qualify for the public transportation exemption, sales tax should have been collected on the pilot's use of the helicopter. Black's Law Dictionary, defines an arms-length transaction as:

> Said of a transaction negotiated by unrelated parties, each acting in his or her own self interest; the basis for a fair market value determination. A transaction in good faith in the ordinary course of business by parties with independent interests. Commonly applied in areas of taxation when there are dealings between related corporations, *e.g.* parent and subsidiary.
>
> …
>
> Black's Law Dictionary, 109 (6th ed. 1990)

Since sales tax was not collected on the pilot's use of the helicopter, and no leasing or rental agreements between taxpayer and its owner were signed, these uses of the helicopter by the same individual who owns taxpayer do not rise to the level of arms-length transactions. Since these were not arms-length transactions, the pilot/taxpayer owner's use of the helicopter constitutes use of the helicopter by the purchaser. 45 IAC 2.2-5-15(C)(1) explains that the rental/leasing exemption does not apply if the purchaser uses the property. Here, the owner used the property and does not qualify for the exemption.

Alternately, in its protest correspondence with the Department, taxpayer claims that it was itself involved in public transportation, via the leasing of the helicopter to its sole member/owner who then flew his own paying customers. This was not public transportation on the part of the taxpayer. Even when viewed in the light most favorable to taxpayer's argument, taxpayer was renting the helicopter to an individual. It was not transporting anyone. Rather, it was renting the helicopter to someone who claims to transport others. The Department has not received any documentation to suggest that taxpayer is in the business of public transportation. As previously explained, IC 6-2.5-5-27 provides that 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. Here, the person which acquired the property (taxpayer) did not provide public transportation, therefore it does not qualify for the public transportation exemption.

Taxpayer objects that it obtained a Revenue Ruling from the Department which approved of taxpayer's arrangement and that this ruling prohibits the Department from now charging tax on the purchase of the helicopter. Taxpayer states that the ruling specifically approved of the leasing to either Part 91 or Part 135 operators. This is not what the ruling states. The ruling has a "Statement of Facts" which explains the background of the situation. In this section, the ruling explains that taxpayer's leasing agreement contains language stating that the lessee must comply with Part 91 and/or Part 135. The Department's actual ruling on this issue states in its entirety:

> The Department rules that the taxpayer's purchase of the helicopter for the purpose of leasing is exempt from sales/use tax under I.C. 6-2.5-5-8, which exempts property acquired for resale, rental, or leasing in the course of one's business, providing that such helicopter was purchased in the regular course of the taxpayer's business and the form of the helicopter was not altered.

The Department did not endorse taxpayer's inclusion of Part 91 as use in public transportation. The ruling merely states that taxpayer's purchase is exempt providing that the circumstances satisfy the requirements. As previously explained, the circumstances do not qualify for the leasing exemption.

The second issue in the ruling explains the Department's decision regarding the lessee in the lease agreement. The Department ruled that the lessee's activities would qualify for the public transportation exemption if it was predominantly engaged in public transportation. As previously explained, the lessee did not lease the helicopter for over a year from the date the agreement was signed, and so the leasing agreement does not support taxpayer's claim for exemption on those grounds. Whether or not the lessee in the agreement was engaged in public transportation but this is ultimately irrelevant since the lessee did not use the helicopter at issue for public transportation for over a year. The ruling did not address the use of the helicopter by the individual who owned taxpayer.

In conclusion, the lease taxpayer had with its lessee does not support taxpayer's claim for exemption. The total lack of leasing activity under that lease for over a year clearly does not qualify for the exemption found in 45 IAC 2.2-5-15. The activity which did take place did not qualify for the public transportation exemption due to the fact that the pilot did not hold the necessary license from the FAA, and sales tax should have been collected on that activity. The use of the helicopter by the same individual who owns taxpayer was not performed at arm's length and therefore constitutes use of the property by the purchaser, which disqualifies the purchase from eligibility for the exemption found in 45 IAC 2.2-5-15. The Revenue Ruling taxpayer received from the Department only states that the purchase would qualify for the exemption found in IC 6-2.5-5-8 if the proper conditions were met. The proper conditions were not met.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01-20050349.LOF

LETTER OF FINDINGS NUMBER: 05-0349
Individual Income Tax
For the Years 1998-1999

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

ISSUES

I. Individual Income Tax – Income of S Corporation shareholders

Authority: Ind. Code § 6-8.1-3-17

Taxpayer protests the assessment of adjusted gross income tax based on its interest as a shareholder in an S Corporation.

STATEMENT OF FACTS

Taxpayer is an individual who was assessed income tax on income derived as a shareholder in an S Corporation. Taxpayer filed a protest of the tax. During Indiana Tax Amnesty, Taxpayer paid the taxes assessed.

I. Individual Income Tax – Income of S Corporation shareholders

DISCUSSION

Taxpayer argued that the assessment of additional income tax was erroneous. Taxpayer paid the base tax liability in question between September 15, 2005, and November 15, 2005. By opting into the Indiana Tax Amnesty program and paying the base tax liability during the amnesty period, Taxpayer has withdrawn its protest of base tax, and has agreed to forego any rights to refund, further protest, or appeal of the tax liability. Accordingly, Taxpayer's protest of base tax is denied, and interest and penalties are waived per Ind. Code § 6-8.1-3-17(c).

FINDING

Taxpayer's protest is sustained in part and denied in part.

DEPARTMENT OF STATE REVENUE

01-20050350.LOF

LETTER OF FINDINGS NUMBER: 05-0350
Individual Income Tax
For the Years 1998-1999

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

ISSUES

I. Individual Income Tax – Income of S Corporation shareholders

Authority: Ind. Code § 6-8.1-3-17

Taxpayer protests the assessment of adjusted gross income tax based on its interest as a shareholder in an S Corporation.

STATEMENT OF FACTS

Taxpayer is an individual who was assessed income tax on income derived as a shareholder in an S Corporation. Taxpayer filed a protest of the tax. During Indiana Tax Amnesty, Taxpayer paid the taxes assessed.

I. Individual Income Tax – Income of S Corporation shareholders

DISCUSSION

Taxpayer argued that the assessment of additional income tax was erroneous. Taxpayer paid the base tax liability in question between September 15, 2005, and November 15, 2005. By opting into the Indiana Tax Amnesty program and paying the base tax liability during the amnesty period, Taxpayer has withdrawn its protest of base tax, and has agreed to forego any rights to refund, further protest, or appeal of the tax liability. Accordingly, Taxpayer's protest of base tax is denied, and interest and penalties are waived per Ind. Code § 6-8.1-3-17(c).

FINDING

Taxpayer's protest is sustained in part and denied in part.

DEPARTMENT OF STATE REVENUE

01-20050351.LOF

LETTER OF FINDINGS NUMBER: 05-0351
Individual Income Tax
For the Years 1998-1999

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

ISSUES

I. Individual Income Tax – Income of S Corporation shareholders

Authority: Ind. Code § 6-8.1-3-17

Taxpayer protests the assessment of adjusted gross income tax based on its interest as a shareholder in an S Corporation.

STATEMENT OF FACTS

Taxpayer is an individual who was assessed income tax on income derived as a shareholder in an S Corporation. Taxpayer filed a protest of the tax. During Indiana Tax Amnesty, Taxpayer paid the taxes assessed.

I. Individual Income Tax – Income of S Corporation shareholders

DISCUSSION

Taxpayer argued that the assessment of additional income tax was erroneous. Taxpayer paid the base tax liability in question between September 15, 2005, and November 15, 2005. By opting into the Indiana Tax Amnesty program and paying the base tax liability during the amnesty period, Taxpayer has withdrawn its protest of base tax, and has agreed to forego any rights to refund, further protest, or appeal of the tax liability. Accordingly, Taxpayer's protest of base tax is denied, and interest and penalties are waived per Ind. Code § 6-8.1-3-17(c).

FINDING

Taxpayer's protest is sustained in part and denied in part.

DEPARTMENT OF STATE REVENUE

75-20050352.LOF

LETTER OF FINDINGS NUMBER: 05-0352
Fiduciary Income Tax
For the Years 1998-1999

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

ISSUES

I. Fiduciary Income Tax – Income of S Corporation shareholders

Authority: Ind. Code § 6-8.1-3-17

Taxpayer protests the assessment of adjusted gross income tax based on its interest as a shareholder in an S Corporation.

STATEMENT OF FACTS

Taxpayer is a trust that was assessed income tax on income derived as a shareholder in an S Corporation. Taxpayer filed a protest of the tax. During Indiana Tax Amnesty, Taxpayer paid the taxes assessed.

I. Fiduciary Income Tax – Income of S Corporation shareholders

DISCUSSION

Taxpayer argued that the assessment of additional income tax was erroneous. Taxpayer paid the base tax liability in question between September 15, 2005, and November 15, 2005. By opting into the Indiana Tax Amnesty program and paying the base tax liability during the amnesty period, Taxpayer has withdrawn its protest of base tax, and has agreed to forego any rights to refund, further protest, or appeal of the tax liability. Accordingly, Taxpayer's protest of base tax is denied, and interest and penalties are waived per Ind. Code § 6-8.1-3-17(c).

FINDING

Taxpayer's protest is sustained in part and denied in part.

DEPARTMENT OF STATE REVENUE

75-20050353.LOF

LETTER OF FINDINGS NUMBER: 05-0353
Fiduciary Income Tax
For the Years 1998-1999

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

ISSUES

I. Fiduciary Income Tax – Income of S Corporation shareholders

Authority: Ind. Code § 6-8.1-3-17

Taxpayer protests the assessment of adjusted gross income tax based on its interest as a shareholder in an S Corporation.

STATEMENT OF FACTS

Taxpayer is a trust that was assessed income tax on income derived as a shareholder in an S Corporation. Taxpayer filed a protest of the tax. During Indiana Tax Amnesty, Taxpayer paid the taxes assessed.

I. Fiduciary Income Tax – Income of S Corporation shareholders

DISCUSSION

Taxpayer argued that the assessment of additional income tax was erroneous. Taxpayer paid the base tax liability in question between September 15, 2005, and November 15, 2005. By opting into the Indiana Tax Amnesty program and paying the base tax liability during the amnesty period, Taxpayer has withdrawn its protest of base tax, and has agreed to forego any rights to refund, further protest, or appeal of the tax liability. Accordingly, Taxpayer's protest of base tax is denied, and interest and penalties are waived per Ind. Code § 6-8.1-3-17(c).

FINDING

Taxpayer's protest is sustained in part and denied in part.

DEPARTMENT OF STATE REVENUE

04-20050356.LOF

LETTER OF FINDINGS NUMBER: 05-0356
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); 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); IC 6-8.1-5-1; 45 IAC 2.2-5-15; 45 IAC 2.2-4-27; 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 and claimed an exemption from sales tax on the purchase. The Department of Revenue ("Department") reviewed the claim for exemption and determined that taxpayer did not qualify for the exemption. As a result of this determination, the Department issued an assessment for use tax on the purchase price of the aircraft. Taxpayer protests the assessment and the determination that it does not qualify for the exemption. Taxpayer failed to attend the scheduled administrative hearing. An individual claiming to represent the taxpayer called shortly before the scheduled administrative hearing to request that the hearing be rescheduled. There was no indication in the file that the taxpayer had representation and the hearing officer explained that the Department required a signed Power of Attorney (POA) form before any discussion of the taxpayer's protest could take place. The individual claiming to represent the taxpayer agreed to send in a POA, and the hearing officer agreed to reschedule the hearing to the next week at the same day and time. No one showed up for the rescheduled hearing either, and no explanation was provided. The Letter of Findings (LOF) is based on the information already in the file. Further facts will be supplied as required.

I. Sales and Use—Aircraft Purchase

DISCUSSION

Taxpayer protests the imposition of use tax on its purchase of an aircraft. Taxpayer purchased the aircraft in September 2004 for a purchase price of five hundred fifteen thousand, seven hundred eighty eight dollars ($515,788.00) but did not pay sales tax on the purchase. Taxpayer claimed the exemption for resale, rental or leasing. The exemption is found in 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 believes that it is entitled to this exemption.

The Department denied the claim for exemption due to the fact that the lease was not an arms-length transaction. The Department based its decision on several factors. First, the lessor and the lessee in the leasing arrangement are owned by the same individual. Second, the rental rate was less all expenses of the lessee, resulting in a rental rate far below the normal market rate. 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 evidence that taxpayer's relationship with its customer was not a valid lessor/lessee relationship. Third, the rate was to be charged on a monthly basis pro-rated for any partial month, without regard to the actual number of hours flown. The lessee could fly the aircraft for any number of hours per month, which could result in an extremely low rate per hour.

Fourth, the insurance policy held by the lessor lists the "purpose of use" of the aircraft as, "Pleasure and Business: means personal and pleasure use in connection with the Insured's business, transportation of executives, employees, guests and customers, but *excluding* any operation for which a charge of any kind is made." (emphasis in original) The insurance policy also defines the only special uses as "Dual Flight Instruction to named Pilots Only", and then names as the only pilot the same individual who owns lessor and lessee. The individual is listed as a student pilot, not a commercially licensed pilot. Fifth, taxpayer is registered with the Department for quarterly Retail Sales Tax (RST) reporting, but has never paid sales tax to the Department. Sixth, there is no evidence that there even is a leasing stream between taxpayer and lessee upon which sales tax would be collected. Taxpayer has failed to prove that it is conducting any business at all, let alone that it leased the aircraft in the regular course of its business as required by 45 IAC 2.2-5-15(c)(2)

After reviewing all of the factors here, 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, the Department reviewed all of the relevant information and properly determined that taxpayer did not qualify for the rental and leasing exemption found in 45 IAC 2.2-5-15. Taxpayer did not enter into a valid lease and has not been in the business of leasing the aircraft. Rather, taxpayer entered into a sham transaction as previously described. Under IC 6-8.1-5-1(b), the burden of proving the assessment wrong rests with the taxpayer. Taxpayer has failed to meet that burden.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

4220050386.LOF

LETTER OF FINDINGS NUMBER: 05-0386
IFTA
For Tax Years 2002-03

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. IFTA—Audit Method

Authority: IFTA VI.A.3

Taxpayer protests the method used to audit IFTA filing.

STATEMENT OF FACTS

Taxpayer operates a charter bus company and construction company in Indiana, with bus operations in various states. As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments for International Fuel Tax Agreement ("IFTA") fees for the years 2002 and 2003. Taxpayer protests these assessments. Further facts will be supplied as required.

I. IFTA—Audit Method

DISCUSSION

Taxpayer protests the Department's assessment of IFTA fees. Taxpayer states in its protest letter that the Department used incorrect methodology to calculate several factors in reaching the assessments. Taxpayer has provided no documentation or analysis beyond the mere assertion that the Department is wrong. The Department refers to IFTA VI.A.3, which states in relevant part:

> The assessment made by a base jurisdiction pursuant to this procedure shall be presumed to be correct, and in any case where the validity of the assessment is drawn into question, the burden shall be on the licensee to establish by a fair preponderance of the evidence that the assessment is erroneous or excessive.

Taxpayer has not met the burden of establishing by a fair preponderance of evidence that the assessments are erroneous or excessive, as required by IFTA VI.A.3. Taxpayer has not provided any documentation or analysis in support of its protest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

4620050387.LOF

LETTER OF FINDINGS NUMBER: 05-0387
SSRS
For Tax Years 2002-03

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. SSRS—Audit Method

Authority: 49 USCS § 14504; IC 6-8.1-5-1; IC 8-2.1-20-7

Taxpayer protests the method used to audit SSRS filing.

STATEMENT OF FACTS

Taxpayer operates a charter bus company and construction company in Indiana, with bus operations in various states. As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments for Single State Registration System ("SSRS") fees for the years 2002 and 2003. Taxpayer protests these assessments. Further facts will be supplied as required.

I. SSRS—Audit Method

DISCUSSION

Taxpayer protests the Department's assessment of SSRS fees. Taxpayer states in its protest letter that the Department used incorrect methodology to calculate several factors in reaching the assessments. Taxpayer's concerns focus on its belief that registration was not required for the total number of vehicles it used in each state in which it operated. Taxpayer believes that it was only required to register the fact that it had a vehicle in the various states, not the total number of vehicles. Taxpayer has supplied no supporting documentation in support of its assertion that the Department is wrong.

The Department refers to IC 8-2.1-20-7, which states:

Before operating a motor vehicle on the public highways of this state in the interstate transportation of property or passengers, the person who operates the motor vehicle must register under the single state registration system established under 49 U.S.C. 11506.

49 USCS § 14504 requires that Indiana:

… establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that--

(I) *is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;*

(emphasis added)

Since 49 USCS § 14504(c)(2)(B)(iv)(I) specifically states that the fee system is based on the number of commercial vehicles the carrier operates in a State and on the number of States in which the carrier operates, the Department's method of calculation is clearly correct.

Taxpayer also states that the audit included mileage in Arkansas and Mississippi for one vehicle which taxpayer claims never went into those States. The audit used taxpayer's own records to determine that the vehicle in question did go into those States. Taxpayer has not provided any argument or documentation to convince the Department to ignore taxpayer's own records.

The burden of proving an assessment wrong rests with the person against whom the assessment is made, as provided in IC 6-8.1-5-1(b). Taxpayer has not provided any documentation in support of its position. Taxpayer has not provided any analysis beyond its assertion that the Department is wrong. Taxpayer has not met its burden under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

01-20050404.LOF

LETTER OF FINDINGS NUMBER: 05-0404
Individual Income Tax
For the Years 1998-1999

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

ISSUES

I. Individual Income Tax – Income of S Corporation shareholders

Authority: Ind. Code § 6-8.1-3-17

Taxpayer protests the assessment of adjusted gross income tax based on its interest as a shareholder in an S Corporation.

STATEMENT OF FACTS

Taxpayer is an individual who was assessed income tax on income derived as a shareholder in an S Corporation. Taxpayer filed a protest of the tax. During Indiana Tax Amnesty, Taxpayer paid the taxes assessed.

I. Individual Income Tax – Income of S Corporation shareholders

DISCUSSION

Taxpayer argued that the assessment of additional income tax was erroneous. Taxpayer paid the base tax liability in question between September 15, 2005, and November 15, 2005. By opting into the Indiana Tax Amnesty program and paying the base tax liability during the amnesty period, Taxpayer has withdrawn its protest of base tax, and has agreed to forego any rights to refund, further protest, or appeal of the tax liability. Accordingly, Taxpayer's protest of base tax is denied, and interest and penalties are waived per Ind. Code § 6-8.1-3-17(c).

FINDING

Taxpayer's protest is sustained in part and denied in part.

DEPARTMENT OF STATE REVENUE

0120050405.LOF

LETTER OF FINDINGS NUMBER: 05-0405
Adjusted Gross Income Tax
For the 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

1. Adjusted Gross Income Tax –Withholding Credit

Authority: IC 6-8.1-5-1 (b), IC 6-3-2-1, IC 6-3-4-15.7.

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

STATEMENT OF FACTS

The taxpayers are a married couple. They filed an amended return for 2003 to include additional income from a retirement distribution on which Indiana adjusted gross income taxes were withheld. When they filed the amended return and paid the associated tax liability, they failed to send in the 1099R indicating the amount of Indiana adjusted gross income taxes withheld from the retirement income. Upon review of the return, the Indiana Department of Revenue (department) disallowed the credit the taxpayers' claimed for the withholding. As a result the department sent the taxpayers a bill for the additional Indiana adjusted gross income, interest, and penalty. The taxpayer's protested the assessment and a hearing was held.

1. Adjusted Gross Income Tax –Withholding Credit

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. Payers of retirement plans are generally required to withhold Indiana adjusted gross income taxes from payments to taxpayers. Those withheld taxes must be remitted to the state and credited to the account of the taxpayers. IC 6-3-4-15.7. In this situation, the retirement income payee actually withheld Indiana adjusted gross income taxes and remitted them to the state. The taxpayer provided the 1099 R to prove that the taxes were withheld and credited to the taxpayer's 2003 Indiana adjusted gross income tax.

The taxpayers sustained their burden of proving that they paid the proper amount of Indiana adjusted gross income taxes to the state.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0320050417P.LOF

LETTER OF FINDINGS NUMBER: 05-0417P
Withholding 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

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of the DB020W-NR annual withholding return for nonresident shareholders for the calendar year 2004. The taxpayer is an out-of-state company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be abated as the taxpayer has a complex accounting system and was not able to assemble the information to complete the withholding return by the due date.

The Department points out that the taxpayer could have paid an estimate and the applied for a refund at a later date.

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

04-20050456.LOF

LETTER OF FINDINGS NUMBER: 05-0456
SALES AND USE TAX
FOR TAX 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 Tax and Use Tax: Exemption

Authority: IC 6-8.1-5-1(b); IC 6-2.5-2-1; IC 6-2.5-5-8; 45 IAC 2.2-5-15; Indiana Dept. of Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003); Black's Law Dictionary 67, 989, 1535, 1587 (8th ed. 1999); Precision Erecting v. Wokurka, 638 N.E.2d 472, 473 (Ind. Ct. App. 1994).

Taxpayer protests the Department's denial of its exemption from sales and use tax.

STATEMENT OF FACTS

Taxpayer purchased an aircraft and registered the aircraft in Indiana. Taxpayer claimed an exemption from sales tax based on renting and leasing the aircraft to others. The Department of Revenue ("Department") conducted an audit review of the taxpayer. The audit denied the taxpayer's sales and use tax exemption claim and assessed tax on the aircraft purchase price. The taxpayer submitted a protest challenging the assessment. The Department held a hearing and now presents this Letter of Findings with additional facts to follow.

I. Sales and Use Tax: Exemption

DISCUSSION

The taxpayer protests the sales and use tax assessment on its aircraft purchase price. The taxpayer purchased the aircraft in August of 2003 for $1,274,610. Taxpayer contends that it purchased the aircraft to rent and lease to others as a business venture. During the course of the protest, the taxpayer provided its operating agreement, a lease agreement, flight logs, and an insurance policy to support its claim of renting and leasing to others. However, the audit review determined that the taxpayer was not entitled to an exemption because the Department questioned whether the lease agreement was negotiated in an arms-length transaction.

A presumption exists that all tax assessments are accurate. IC 6-8.1-5-1(b). IC 6-2.5-2-1(a) states that "[a]n excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana." IC 6-2.5-5-8 provides:

"[t]ransactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property.

45 IAC 2.2-5-15 provides:

(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, rental or leasing are exempt from tax if all 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 the 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…. (emphasis added.)

The Indiana Supreme Court stated:

It is well established that exemption statutes are strictly construed against a taxpayer so long as the intent and purpose of the Indiana Legislature is not thwarted. As such, a taxpayer has the burden of establishing its entitlement to an exemption.

Indiana Dept. of Revenue v. Interstate Warehousing, 783 N.E.2d 248, 250 (Ind. 2003).

IC 6-2.5-5-8 involves a fact intensive analysis. No one fact alone will provide conclusive evidence that a taxpayer is entitled to the IC 6-2.5-5-8 exemption. However, certain facts provided by the taxpayer may suggest whether or not the taxpayer intended to acquire property for renting and leasing in the ordinary course of its business.

Using this analysis, the first fact for consideration is the lease agreement between the taxpayer and the aircraft charter service company ("Service Company"). This agreement was initially provided to the audit review and showed that the taxpayer had entered into an "Aircraft Master Lease Agreement" for five hundred and sixty dollars ($560). The individual that signed the lease agreement for the Service Company, also served as the registered agent of the taxpayer. However, at the protest hearing, the taxpayer stated the agreement was not a lease agreement. The taxpayer stated the agreement was an agreement for pilot service. The taxpayer explained that it desired to charter its aircraft; but, the FAR §91 certificate it held did not allow it to operate as a charter or air-taxi service. To provide this type of service, the FAA requires an individual to have a FAR §135 certificate. As a result of the agreement, the taxpayer was able to charter out its aircraft through the Service Company, until it received its FAR §135 certificate a year later. The taxpayer further argued the rental rate it charged was only for usage of the aircraft, and did not include charges for fuel and pilot service. The taxpayer explained the higher rental rate the audit review used as a comparison reflects the rate charged by holders of a FAR §135 certificate, where the rate includes charges for pilot service and fuel usage. The taxpayer provided additional evidence from other companies to substantiate its argument.

The audit review was correct to question whether the lease agreement between the taxpayer and the Service Company was negotiated in an "arms-length transaction" and for a "fair market rate". An "arm's length transaction" is defined as "[a] transaction between two unrelated and unaffiliated parties." Black's Law Dictionary 1535 (8^{th} ed. 1999). A "fair market rate" is defined as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the ***open market and in an arm's length transaction.***" Black's Law Dictionary 1587 (8^{th} ed. 1999) (emphasis added). "Open market" is defined as "[a] market in which any buyer or seller may trade and in which prices and product availability are determined by free competition." Black's Law Dictionary 989 (8^{th} ed. 1999).

In this case, the taxpayer named the owner of the Service Company as its registered agent in Indiana. Designating a person as a registered agent creates an agency relationship. See Precision Erecting v. Wokurka, 638 N.E.2d 472, 473 (Ind. Ct. App. 1994). An "agency relationship" is defined as "[a] fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by word or actions. Black's Law Dictionary

67 (8th ed. 1999). By designating the Service Company owner as its registered agent, the taxpayer created an agency relationship. This relationship gave the owner of the Service Company the ability to act on behalf of the taxpayer and bind the taxpayer, as well as, the owner's own company. By having this ability, the Service Company owner became a related party to the taxpayer. Thus, because the parties to the transactions are related, the transaction was not done at arms-length. Even more so, the transaction was not done for a "fair market rate" because the price was not set by the "open market" and in an "arm's length transaction". By including "the taxpayer has [the] sole right to determine if the aircraft is available for reservation" in its lease agreement, the taxpayer determined the availability of the aircraft and not free competition. Therefore, because the transaction was not an arm's length transaction and the transaction was not conducted on the open marker, the audit review was correct to question that the lease agreement was negotiated in an "arms-length transaction" and for a "fair market rate".

Another fact that supports the audits denial of the taxpayer's exemption claim is the flight logs. The taxpayer's flight logs indicate from August 2003 to December of 2003 the aircraft was used predominantly by the taxpayer's owner, or a company owned by the taxpayer's owner. During this period, the flight logs do not indicate any activity for chartering. The only activity indicated is the taxpayer's owner's usage. 45 IAC 2.2-5-15(c)(1) clearly states that the renting and leasing exemption does not apply to individual's that "intend to consume or use the property". It is evident from the flight logs that the taxpayer's owner intended to use the aircraft for their own use. The only time that the aircraft was available for renting and leasing usage was when the usage did not inconvenience the taxpayer's owner.

The facts indicate the taxpayer entered into a questionable lease agreement and the taxpayer's owner used the aircraft for itself. Taking these relevant facts into consideration, the taxpayer failed to establish its entitlement to the IC 6-2.5-5-8 exemption for renting and leasing to others.

FINDING

For the reasons stated above, the department denies the taxpayer's protest.

DEPARTMENT OF STATE REVENUE

0420050491P.LOF

LETTER OF FINDINGS NUMBER: 05-0491P

Sales Tax

For the month of April 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 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 a monthly sales tax return for the month of April 2005. The taxpayer was one day late. The taxpayer is an Indiana company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be abated as the taxpayer filed the sales tax return with reasonable business prudence. In filing the return, the taxpayer made an initial filing, canceled the initial filing, and then filed a second return. The taxpayer went through this to make sure the amount was correct. The taxpayer's procedure caused the return to be one day late.

The Department points out that the taxpayer could have filed the initial return and the filed an amended return at a later date. This procedure detailed by the Department would have resulted in a timely filing.

Of further note, the taxpayer had a prior penalty abatement by the Department in March 2001 for the amount of $9,000.

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

10-20050503P.LOF

LETTER OF FINDINGS NUMBER: 05-0503P
Food and Beverage Tax
For the Months of July, August, and September 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: Indiana State Department of Revenue Commissioner's Directive # 30 (July 2005); IC 6-8.1-10-2.1

The taxpayer protests the penalties assessed for failure to calculate and remit the appropriate amounts of food and beverage tax.

II. Tax Administration – Interest

Authority: IC 6-8.1-10-1

The taxpayer protests the assessment of interest.

STATEMENT OF FACTS

The City-County Council of Marion County approved an increase in the food and beverage tax rate from one percent to two percent that became effective on July 1, 2005. The taxpayer used the incorrect rate of one percent when calculating the food and beverage tax for the months of July, August, and September 2005. Accordingly, the department issued assessments for the additional tax due. These assessments included penalty and interest. In correspondence to the Department, the taxpayer requested that the Department abate the penalties and interest due to reasonable cause.

DISCUSSION

I. Tax Administration – Penalty

The food and beverage tax returns and remittance of the tax is due 30 days following the close of each taxable month. In Commissioner's Directive # 30, regarding Local Food and Beverage Taxes, the Department advised the public of the increased tax rate.

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.

Because the taxpayer fails to show facts in support of his reasonable cause argument and the Department provided public notification of the change, the Department correctly assessed penalties on the taxpayer.

FINDING

The taxpayer's protest is denied.

II. Tax Administration – Interest

Under IC 6-8.1-10-1, the Department does not have the authority to waive interest.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20050534.LOF

LETTER OF FINDINGS NUMBER: 05-0534
STATE GROSS RETAIL TAX
For Years 2002, 2003, AND 2004

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. State Gross Retail Tax —Adequate Documentation

Authority: 45 IAC 15-5-4; IC § 6-8.1-5-1; IC § 6-8.1-5-4

Taxpayer protests the proposed assessments of Indiana's State Gross Retail tax.

STATEMENT OF FACTS

Taxpayer is a retail merchant of landscaping and gardening products. An audit found that in some instances the taxpayer sold these products without collecting the required sales tax and without an exemption certificate from the purchaser. Additionally, taxpayer purchased some items for use in the business without paying sales tax or self assessing use tax on them. Taxpayer protested these assessments, and a telephone hearing was held.

I. State Gross Retail Tax —Adequate Documentation

DISCUSSION

By the hearing date taxpayer had secured additional exemption certificates for the Department's review.

This issue revolves around the burden of proof in an audit situation, which IC § 6-8.1-5-4 defines as:

> 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.

Subject to the guidelines above, the Department will grant credit for the applicable transactions for which a valid exemption certificate has been provided. Also, as required by the above guidelines, no credit will be granted for transactions for which no certificate has been provided. Pursuant to the above statute and the requirements of IC § 6-8.1-5-1 and 45 IAC 15-5-4, taxpayer has established a basis for reversal of part of the sales tax assessment.

By the hearing date taxpayer had also provided sufficient documentation to establish that its purchases for the business were exempt purchases and no use tax should be assessed on them.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420050536.LOF

LETTER OF FINDINGS NUMBER 05-0536
RESPONSIBLE OFFICER
SALES TAX
For Tax Period 2002-2003

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

I. Sales Tax -Responsible Officer Liability

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

The taxpayer protests the assessment of corporate sales taxes against him as a responsible officer.

STATEMENT OF FACTS

The taxpayer was the president of two corporations that did not remit the proper amount of sales taxes to the state. The Indiana Department of Revenue (department) personally assessed those delinquent corporate sales taxes, interest, and penalty against the taxpayer. The taxpayer protested the assessment and a hearing was scheduled. The taxpayer failed to appear for the hearing. Therefore, this Letter of Findings is based upon the information in the file.

I. Sales Tax -Responsible Officer Liability

DISCUSSION

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 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 taxpayer was the president of the corporations. As the president, he was responsible for seeing that the sales taxes were collected and remitted to the state. Therefore, he had the statutory duty to remit the taxes. He failed to see that the taxes were remitted. The department correctly personally assessed the corporate sales taxes, interest, and penalty against the taxpayer.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320050537.LOF

LETTER OF FINDINGS NUMBER 05-0537
RESPONSIBLE OFFICER
WITHHOLDING TAX
For Tax Period 1997-2003

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

I. Withholding Tax -Responsible Officer Liability

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

The taxpayer protests the assessment of corporate withholding taxes against her as a responsible officer.

STATEMENT OF FACTS

The taxpayer was listed on Indiana Department of Revenue (department) records as vice president of a corporation that did not remit the proper amount of withholding taxes to Indiana for the tax period 1997-2003. She was formerly married to the president of the corporation. When the marriage ended, the husband was awarded the corporation in the divorce settlement. The taxpayer received shares of corporate stock in the settlement. The department assessed the outstanding corporate withholding taxes, interest, and penalty against the taxpayer personally. The taxpayer protested the assessment and a hearing was held. This Letter of Findings results.

I. Withholding Tax -Responsible Officer Liability

DISCUSSION

The proposed withholding taxes were assessed against the taxpayer pursuant to IC 6-3-4-8(g), 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 any involvement with the operation of the corporation or control over the financial affairs of the corporation. The taxpayer offered adequate documentation to sustain her burden of proving that she was not responsible for the remittance of the trust taxes to the state during the tax period at issue.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420050538.LOF

LETTER OF FINDINGS NUMBER 05-0538
RESPONSIBLE OFFICER
SALES TAX AND WITHHOLDING TAX
For 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 specific issues.

ISSUE

I. Withholding Tax -Responsible Officer Liability

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

The taxpayer protests the assessment of corporate withholding taxes against her as a responsible officer.

STATEMENT OF FACTS

The taxpayer was listed on Indiana Department of Revenue (department) records as a responsible party of a corporation that did not remit the proper amount of withholding taxes and sales taxes to Indiana for the tax period 1998-2000. The department assessed the outstanding corporate withholding taxes, sales taxes, interest, and penalty against the taxpayer personally. The taxpayer protested the assessment and a hearing was held. This Letter of Findings results.

I. 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(g), 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 first argued that he was merely the owner of a small amount of stock in the corporation and that he was not responsible for corporate financial decisions. Therefore, he argued that he did not have the duty to remit the corporate trust taxes to the state. The taxpayer did not submit any evidence to support this contention. Therefore, he did not sustain his burden of proving that the taxes were incorrectly imposed against him.

Secondly, the taxpayer argued that both the corporation and he personally filed bankruptcy and that absolved him of liability for the corporate trust taxes. The taxpayer errs in this conclusion. Corporate trust taxes cannot be erased by a bankruptcy.

Finally the taxpayer argues that the bankruptcy Trustee should have remitted the trust taxes. Responsible parties are jointly and severally liable for the remittance of corporate trust taxes to the state. The trust taxes should have been remitted on a regular basis to the state at the time they were collected. The taxpayer did not see that this was done on a timely basis. Therefore, he is personally responsible for the payment of the taxes. Even if someone else had the opportunity to satisfy the liabilities at a later date but failed to do so, the taxpayer is still personally responsible for the payment of the taxes since liability for these taxes is joint and several.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320060011P.LOF

LETTER OF FINDINGS NUMBER: 06-0011P
Withholding 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

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of an annual withholding tax return for the calendar year 2004. The taxpayer is an Indiana company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be abated as the return was late due to local Post Office procedures.

The U.S. Post Office states the mail procedure in the town where the taxpayer is located is as follows: The Post Office does not postmark the local mail when received. Instead, the local Post Office sends the mail to the regional hub for postmarking. This often results in the mail being postmarked one day late.

The taxpayer states the Post Office procedure is the reason why the annual withholding tax return was not received by the Department on the due date.

The Department points out the annual withholding return was fifteen days late. And therefore, the local Post Office procedures would not 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

0320060014P.LOF

LETTER OF FINDINGS NUMBER: 06-0014P
Withholding 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

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of an annual withholding tax return for the calendar year 2004. The taxpayer is an Indiana company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be abated as the return was late due to local Post Office procedures.

The U.S. Post Office states the mail procedure in the town where the taxpayer is located is as follows: The Post Office does not postmark the local mail when received. Instead, the local Post Office sends the mail to the regional hub for postmarking. This often results in the mail being postmarked one day late.

The taxpayer states the Post Office procedure is the reason why the annual withholding tax return was not received by the Department on the due date.

The Department points out the annual withholding return was fifteen days late. And therefore, the local Post Office procedures would not 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

0320060015P.LOF

LETTER OF FINDINGS NUMBER: 06-0015P
Withholding 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

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of an annual withholding tax return for the calendar year 2004. The taxpayer is an Indiana company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be abated as the return was late due to local Post Office procedures.

The U.S. Post Office states the mail procedure in the town where the taxpayer is located is as follows: The Post Office does not postmark the local mail when received. Instead, the local Post Office sends the mail to the regional hub for postmarking. This often results in the mail being postmarked one day late.

The taxpayer states the Post Office procedure is the reason why the annual withholding tax return was not received by the Department on the due date.

The Department points out the annual withholding return was fifteen days late. And therefore, the local Post Office procedures would not 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

0320060018P.LOF

LETTER OF FINDINGS NUMBER: 06-0018P
Withholding 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

I. Tax Administration – Penalty

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

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late filing of an annual withholding tax return for the calendar year 2004. The taxpayer is an Indiana company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be abated as the return was late due to local Post Office procedures.

The U.S. Post Office states the mail procedure in the town where the taxpayer is located is as follows: The Post Office does not postmark the local mail when received. Instead, the local Post Office sends the mail to the regional hub for postmarking. This often results in the mail being postmarked one day late.

The taxpayer states the Post Office procedure is the reason why the annual withholding tax return was not received by the Department on the due date.

The Department points out the annual withholding return was fifteen days late. And therefore, the local Post Office procedures would not 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

0420060020.LOF

LETTER OF FINDINGS: 06-0020
Sales and Use Tax
For the Years 1994 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.

ISSUES

I. Taxable Sales During 2001 through 2003 – Sales and Use Tax.

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

Taxpayer maintains that the audit improperly assessed use tax on items purchased for its business during 2001, 2002, and 2003; in addition, taxpayer objects to the audit's conclusion that taxpayer should have collected sales tax on items purportedly sold to taxpayer's customers.

II. Best Information Available Assessments – Use Tax.

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

Taxpayer argues that the audit's calculation of additional use tax for 1994 through 2000 was erroneous because the audit relied on a flawed "best information available" formulation.

III. Abatement of Interest.

Authority: IC 6-8.1-10-1; IC 6-8.1-10(a).

Taxpayer asks that the amount of interest which has accumulated on the unpaid base tax liability be abated.

IV. Ten-Percent Negligence Penalty.

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

Taxpayer requests that the Department exercise its discretion to abate the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a company which operates two tanning salons in Indiana. Taxpayer provides tanning services and sells tangible personal property to its customers.

The Indiana Department of Revenue (Department) conducted an audit review of taxpayer's business records. The audit began as a standard three-year (2001 to 2003) audit. However – on the ground that the taxpayer was making taxable sales to its customer but had not registered to collect Indiana sales tax – the audit was extended to cover ten years (1994 to 2003).

For the years 2001 through 2003 – a three-year period during which taxpayer was able to supply a limited number of business records – the audit concluded that taxpayer had purchased items for which use tax had not been paid.

For the remaining seven-year period, taxpayer was unable to produce any business records. Therefore the audit calculated use tax liability for each of the seven years by means of the "best information available" (BIA).

As a result of the audit, taxpayer was assessed additional tax along with interest and penalties. Taxpayer protested, a telephone hearing was conducted during which taxpayer's representative explained the basis for the protest, and this Letter of Findings results.

DISCUSSION

I. Taxable Sales During 2001 through 2003 – Sales and Use Tax.

Although not registered to collect retail sales tax until after the Department made the initial audit contact with taxpayer in 2004, "the taxpayer admitted that they had been making taxable sales during the years 2001 to 2003." After further review of taxpayer's 2001 through 2003 records, the audit found "taxable purchases on which no tax was paid or accrued."

The audit found that taxpayer owed both sales and use tax.

Based upon the total purchases made during 2003, taxpayer protested arguing that the use tax assessment for 2003 was overstated. In addition, taxpayer pointed out that "maybe 1 in 20 clients would buy products, when they can go to Wal-Mart and buy it at a cheaper price." Taxpayer further points out that if it did not have a "purchase exemption number" and that if it bought products and equipment without paying sales tax, then "someone else [was] at fault also."

IC 6-8.1-5-1(a) states that "If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available."

The audit found that taxpayer had purchased items without paying sales tax and – as a result – the taxpayer should have paid use tax on those items. In addition, the audit found (and taxpayer apparently agreed) that taxpayer had been selling its customers tangible personal property without collecting and remitting sales tax. Based upon the incomplete information before it, the audit found that taxpayer owed an amount of sales and use tax

After the assessment was made, it was taxpayer's responsibility to specifically refute the evidence underlying that assessment. IC 6-8.1-5-1(b) in part states that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with person against whom the proposed assessment is made."

Insofar as the 2001, 2002, and 2003 sales and use tax assessment, the Department is unable to agree that taxpayer has met its burden of demonstrating that the assessment is wrong. There is no indication that taxpayer is now prepared to offer more specific, detailed information then that which was available at the time the original audit was conducted. There is little or no justification for reviewing the sales and use tax assessment for 2001, 2002, and 2003.

FINDING

Taxpayer's protest is respectfully denied.

II. Best Information Available Assessments – Use Tax.

Because taxpayer was unable to produce complete sales records for 1994 through 2000, the audit assessed sales tax based upon the best information available. The audit extrapolated the available 1999 to 2002 sales records to determine total sales for 1994 through 1998. The audit found that it "could discern no pattern of [sales] increase or decrease" during 1999 through 2002. As stated in its final report, "the audit averaged the [1999 to 2002] sales and used that average amount as the unreported taxable sales for 1994-1998."

The audit acted well within its authority in proposing a 1994 to 1998 assessment based upon the limited information at hand. IC 6-8.1-5-1(a) states that "If the department reasonably believes that a person has not reported the proper amount of tax due, the department *shall* make a proposed assessment of the amount of the unpaid tax on the basis of the *best information available*." (*Emphasis added*).

Taxpayer has provided information indicating that its tanning business has increased in size. Taxpayer indicates that it had three tanning beds from 1994 through 1997, that six tanning beds were added in 1998, and that the number of tanning beds increased until it eventually reached 20 beds.

Taxpayer argues that the audit's method of calculating taxpayer's 1994 through 1998 sales, by extrapolating data from available records, was erroneous. Taxpayer believes that the audit failed to take into consideration the fact that taxpayer's business significantly increased over the years and that audit's "best information available" methodology gives unfair weight to the documented sales made during the latter years of the business.

IC 6-8.1-5-1(b) states that, "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Taxpayer has not proven that the proposed assessment is wrong; however, taxpayer has raised a substantive question as to whether the proposed assessment overstates the amount of sales made during the years for which the audit proposed an assessment based upon the "best information available."

Taxpayer is provided a *limited* opportunity to supply additional records in order that a supplemental review of the specific years in question may be performed. Specifically, taxpayer is granted 30 days from the issuance of this Letter of Findings to provide the additional records needed for the supplemental review.

FINDING

Taxpayer's protest is sustained.

III. Abatement of Interest.

Taxpayer protests the imposition of interest on assessed taxes and requests that the interest that has accumulated on those taxes be abated. Under IC 6-8.1-10-1(a), if a person incurs a deficiency upon a determination by the Department, "the person *is* subject" to interest on the nonpayment.

The Department has no discretion regarding the imposition of interest. Under IC 6-8.1-10-1, interest may not be abated for any reason.

FINDING

Taxpayer's protest and request for abatement of interest is respectfully denied.

IV. Ten-Percent Negligence Penalty.

Taxpayer asks that the ten-percent negligence penalty be abated.

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

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

The Department is unable to agree that the negligence penalty should be abated. Taxpayer's failure to timely register with the state to collect sales tax, failure to maintain records, and failure to maintain a system to accrue use tax is not indicative of the "ordinary business care and prudence" expected of an "ordinary reasonable taxpayer."

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420060026.LOF

LETTER OF FINDINGS NUMBER 06-0026
RESPONSIBLE OFFICER
SALES TAX AND WITHHOLDING 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 this document will provide the general public with information about the Department's official position concerning specific issues.

ISSUE

I. Sales and Withholding Tax -Responsible Officer Liability

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

The taxpayer protested the assessment of corporate sales and withholding taxes against him as a responsible officer.

STATEMENT OF FACTS

The taxpayer was listed on Indiana Department of Revenue (department) records as a responsible party of a corporation that did not remit the proper amount of withholding taxes and sales taxes to Indiana for the tax period 2000-2002. The department personally assessed the outstanding corporate withholding taxes, sales taxes, interest, and penalty against the taxpayer. The taxpayer protested the assessment and a hearing was held. This Letter of Findings results.

I. 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(g), 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 presented documentation indicating that his employment with the corporation was terminated on June 29, 1999. Since he was not associated with the corporation after his termination date, the taxpayer did not have a duty to remit sales and withholding taxes to the state for the 2000-2002 tax period. The taxpayer sustained his burden in proving that he did not personally owe the assessed corporate sales and withholding taxes, interest, and penalty to Indiana.

FINDING

The taxpayer's protest is sustained. The taxpayer is not personally responsible for any of the corporation's trust taxes after June 29, 1999.