DEPARTMENT OF STATE REVENUE
COMMISSIONER'S DIRECTIVE # 31
June 2006

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

SUBJECT: Fireworks Public Safety Fee

REFERENCE: IC 22-11-14-1; IC 22-11-14-8; IC 22-11-14-12; IC 22-11-14-13; and IC 22-11-14-14

I. INTRODUCTION

House Enrolled Act 1099 which passed during the 2006 session of the Indiana General Assembly enacted a five percent (5%) public safety fee on the gross retail income of fireworks sold in Indiana. The fee is effective for all transactions occurring in Indiana after May 31, 2006.

II. DEFINITIONS

The Act defines the various types of fireworks that will be subject to the fireworks public safety fee.

A "Consumer firework" means a small firework that is designed primarily to produce visible effects by combustion, and that is required to comply with the construction, chemical compositions, and labeling regulations promulgated by the United States Consumer Product Safety Commission under 16 CFR 1507. Examples of consumer fireworks are aerial devices, which include sky rockets, missile type rockets, helicopter or aerial spinners, roman candles, mines and shells, firecrackers, salutes, and clusters.

"Special fireworks" means fireworks designed primarily to produce visible or audible effects by combustion, deflagration, or detonation, including firecrackers containing more than 130 milligrams of explosive composition, aerial shells and other display items that exceed the limits for classification for consumer fireworks.

The following items are also subject to the fireworks public safety fee. They include dipped sticks, wire sparklers, cylindrical fountains, cone fountains, illuminating torches, wheels, ground spinners, flitter sparklers snakes or glow worms, smoke devices, and trick noisemakers.

III. IMPOSITION OF PUBLIC SAFETY FEE

The public safety fee is imposed on the retail sale of fireworks in Indiana. The person who acquires the fireworks in a retail transaction is liable for the public safety fee on the transaction, and shall pay the public safety fee to the retailer as a separate added amount to the transaction. The retailer shall collect the public safety fee as an agent for the state.

The public safety fee is measured by the gross retail income received by the retailer for the sale of fireworks and is imposed at the following rates:

PUBLIC SAFETY FEE	GROSS RETAIL INCOME FROM THE RETAIL UNITARY TRANSACTION		
$ 0		less than	$ 0.10
$ 0.01	at least $ 0.10	but less than	$ 0.30
$ 0.02	at least $ 0.30	but less than	$ 0.50
$ 0.03	at least $ 0.50	but less than	$ 0.70
$ 0.04	at least $ 0.70	but less than	$ 0.90
$ 0.05	at least $ 0.90	but less than	$ 1.10

If the retail transaction exceeds one dollar and ten cents $1.10, the public safety fee is five percent (5%) of the gross retail income.

If the public safety fee computed results in a fraction of one-half cent ($0.005) or more, the amount of the public safety fee shall be rounded to the next additional cent.

IV. REMITTANCE OF THE PUBLIC SAFETY FEE

The public safety fee is collected by the retailer as an agent for the state. The public safety fees collected in trust for the state makes an individual retailer, an employee, officer, partner in a partnership or member of a limited liability company personally liable for the payment of the public safety fee to the state. A person who knowingly or intentionally fails to collect or remit the public safety fees due commits a Class D felony.

The public safety fee is due twenty (20) days after the end of the month in which the public safety fee was collected. The public safety fee shall be remitted to the Department on forms required by the Department.

V. REGISTRATION WITH THE DEPARTMENT OF REVENUE

The Act requires any person selling consumer fireworks, special fireworks, or novelties and trick noisemakers at retail to collect the public safety fee. The Act requires all retailers that are selling consumer fireworks to register with the state fire marshal. The entities that register with the state fire marshal will automatically be registered with the Department and will receive the forms necessary to remit the public safety fee.

A person that is required to register with the state fire marshal and receive a certificate of compliance as a resident wholesaler, manufacturer, importer, or distributor is not prohibited from selling consumer fireworks at retail if the consumer fireworks are to be used on the property of the purchaser, or on the property of another person who has given permission to the purchaser to use the consumer fireworks.

A retailer who is selling items listed in IC 22-11-14 -8(a), which includes sparklers, snakes, ground spinners, smoke devices, and trick noisemakers among other things will be required to collect the public safety fee. All wholesalers, manufacturers, importers, and distributors are required to provide a list to the state fire marshal of all retailers to whom they have sold or will sell these items.

A retailer selling items listed in IC 22-11-14-8(a) from a temporary stand must obtain a fireworks stand retail sales permit from the state fire marshal. These retailers are required to collect and remit the public safety fee to the Department and will receive forms from the Department to remit the fee.

John Eckart
Commissioner

DEPARTMENT OF STATE REVENUE
Departmental Notice #2
June 1, 2006
Prepayment of Sales Tax on Gasoline

This document is not a "statement" required to be published in the Indiana Register under IC 4-22-7-7. However, under IC 6-2.5-7-14, the Department is required to publish the prepayment rate in the June and December issues of the Indiana Register. The purpose of this notice is to inform each refiner, terminal operator, and qualified distributor known to the Department to be required to collect prepayments of sales tax on gasoline of the "prepayment rate" effective for the next six-month period. A prepayment rate is calculated twice a year by the Department and is effective for the period January 1 through June 30, or, July 1 through December 31, as appropriate.

The prepayment rate is defined by IC 6-2.5-7-1 as the product of:

1) the statewide average retail price per gallon of gasoline (excluding the Indiana gasoline tax, the federal gasoline tax, and the Indiana gross retail tax); multiplied by
2) the state gross retail tax rate [6%]; multiplied by
3) ninety percent (90%); and then
4) rounded to the nearest one-tenth of one cent ($0.001)

The prepayment rate of sales tax on gasoline for the six – (6) month period beginning July 1, 2006, is nine and five-tenths cents ($0.095) per gallon.

Using the most recent retail price of gasoline available (as required by IC 6-2.5-7-14(b)), the Department has determined the statewide average retail price per gallon of gasoline to be one dollars and seventy six and seven tenths cents ($1.767). The most recent retail price of gasoline available was based on data contained in the May 2006 Petroleum Marketing Monthly as published by the Energy Information Agency.

The prepayment rates for periods beginning July 1, 1994 are established below:

Period			Rate Per Gallon
July 1, 1994	to	December 31, 1994	2.9 cents
January 1, 1995	to	June 30, 1995	3.7 cents
July 1, 1995	to	December 31, 1995	3.3 cents
January 1, 1996	to	June 30, 1996	3.3 cents
July 1, 1996	to	December 31, 1996	3.4 cents
January 1, 1997	to	June 30, 1997	4.0 cents
July 1, 1997	to	December 31, 1997	3.9 cents
January 1, 1998	to	June 30, 1998	4.0 cents
July 1, 1998	to	December 31, 1998	2.9 cents
January 1, 1999	to	June 30, 1999	3.0 cents
July 1, 1999	to	December 31, 1999	2.4 cents
January 1, 2000	to	June 30, 2000	3.6 cents
July 1, 2000	to	December 31, 2000	4.6 cents

January 1, 2001	to	June 30, 2001	4.9 cents
July 1, 2001	to	December 31, 2001	4.9 cents
January 1, 2002	to	June 30, 2002	4.9 cents
July 1, 2002	to	December 31, 2002	3.2 cents
January 1, 2003	to	June 30, 2003	5.3 cents
July 1, 2003	to	December 31, 2003	6.6 cents
January 1, 2004	to	June 30,2004	6.5 cents
July 1, 2004	to	December 31, 2004	6.6 cents
January 1, 2005	to	June 30, 2005	7.6 cents
July 1, 2005	to	December 31, 2005	7.8 cents
January 1, 2006	to	June 30, 2006	11.2 cents
July 1, 2006	to	December 31, 2006	9.5 cents

Indiana Department of State Revenue

John Eckart
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #22
INCOME TAX
JULY 2006
(Replaces Bulletin #22 dated January 2003)

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SUBJECT: Neighborhood Assistance Tax Credit

REFERENCE: IC 6-3.1-9

INTRODUCTION

An income tax credit is available to Indiana taxpayers who contributed to individuals, groups or neighborhood organizations, or who engage in activities to upgrade economically disadvantaged areas for economically disadvantaged households. This credit is limited to the lesser of fifty percent (50%) of the amount contributed or invested, state income tax due, or twenty-five thousand dollars ($25,000) in any taxable year. The credit can be applied against the taxpayer's adjusted gross income tax liability or the financial institutions tax.

I. Qualification for Claiming the Neighborhood Assistance Credit

The credit may be claimed by any taxpayer (including any S Corporation, partnership or individual) who makes a contribution to or an investment in some type of activity which will result in the upgrading of an area designated as economically disadvantaged by the Indiana Housing and Community Development Authority after consultation with the community services agency. Examples of qualifying activities are:

1. Furnishing financial assistance, labor, material, and technical advice to aid the physical or economic improvement of an economically disadvantaged area.
2. Any type of instruction to an individual who resides in an economically disadvantaged area or an economically disadvantaged household that enables the individual to acquire the necessary vocational skills to become either employable, or to be able to seek a higher grade of employment.
3. Any activity which aids in the reduction of crime in an economically disadvantaged area.
4. Contributions to any neighborhood organization which performs community services in an economically disadvantaged area or for an economically disadvantaged household, provided that such organization qualifies and obtains a ruling as exempt from taxation under provisions of the Internal Revenue Code and from the Indiana Department of Revenue as a religious, charitable, scientific, literary, educational or civic organization.
5. Any type of scholastic instruction or scholarship assistance to an individual residing in an economically disadvantaged area which enables the individual to prepare for better life opportunities.

NOTE: None of the above activities can benefit an individual employed by the donor or an individual administering such activities. On-going volunteer activities and out of pocket expenses necessary for day to day operation of the program do not qualify for the credit.

II. Credit Limitations and Application

The credit is limited to the lesser of fifty percent (50%) of the amount contributed or invested, the state income tax due, or twenty-five thousand dollars ($25,000) and should be claimed for the tax year in which the contribution is made. There is no provision for carry back, carry forward or refund of the credit. For purposes of the limitation, state income tax due is first reduced by any credit for taxes paid to other states, and the college contribution credit, before the application of the neighborhood assistance credit.

The total amount of neighborhood assistance credit allowed to all taxpayers in any state fiscal year is limited to $2,500,000. Applications for the credit will be considered in the chronological order received until the $2,500,000 limit is reached.

III. Procedure

Any organization or individual providing neighborhood assistance must first apply to the Indiana Housing and Community Development Authority requesting approval of a proposed program. Such application should set forth the program to be conducted, the economically disadvantaged area selected, the estimated amount to be invested and the plans for implementing the program.

Donors with approved programs should complete Form NC-10, Neighborhood Assistance Credit Application, and Form NC-20, Notice of Department Decision on Neighborhood Assistance Credit Application, and submit both forms along with the Contributor Application and Certification to the Indiana Housing and Community Development Authority. Indiana Housing and Community Development Authority will review the application and forward it to the Department of Revenue with a recommendation for approval or rejection of the credit.

The Department of Revenue will return Form NC-20 to the donor indicating the amount of credit approved or the reason the credit was disapproved. The Department of Revenue will accept a properly completed Contributor Application and Certification as proof of cash donations. Contributions of property and or services require additional documentation as shown below.

IV. Contributions Other Than Cash

In order to qualify for the credit, contributions other than cash must be contemplated by the program proposal submitted by an organization for approval. Donors to approved programs should check with the organization administering the program to determine if contributions other than cash are within the scope of the approved program.

Contributions other than cash should be valued and documented according to the following guidelines:

Property

Donations of property should be valued at the lower of cost or market value. The value for new property will be determined on the basis of fair and reasonable market price as available to consumers on the open market but not in excess of the substantiated cost to the donor. The value of used property will be determined on the basis of book value (using generally accepted accounting principles) as certified by the donor. Book value is the purchase cost less reasonable depreciation using the straight line method, with one-half year of depreciation used in the year purchased and one-half used in the year of contribution. Unless it can be otherwise clearly established, a five-year useful life should be used in calculating depreciation.

"New Property" is property which has not been used by the end user and which is packaged as it would normally be received by the end user upon purchase. Unless it can be otherwise clearly established, "new property" held more than twelve (12) months prior to contribution will be treated as used property.

A copy of the original invoice showing cost and date of purchase must be submitted with each application. In the case of manufactured property, a statement supporting the cost of the manufactured property must accompany any claim.

Services

Contributions of services should be valued at the donor's usual charge for such services, but not to exceed the average fee charged for the same type of services in the locality in which the services are rendered.

An itemized listing of the services rendered with the proposed charge for each service should be submitted with each application.

John Eckart
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #91
INCOME TAX
JUNE 2006
(Replaces Bulletin #91, dated July 2005)

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SUBJECT: Biodiesel Tax Credits

REFERENCES: IC 6-3.1-27

INTRODUCTION

There are three separate tax credits related to biodiesel. The first is a credit for producing biodiesel; the second credit is for producing blended biodiesel; and the third is for the retail sale of blended biodiesel to an end user. The credits can be applied against the sales tax, the adjusted gross income tax, the financial institutions tax, and the insurance premiums tax.

I. BIODIESEL PRODUCTION TAX CREDIT

Biodiesel is defined as a renewable, biodegradable, mono alkyl ester combustible liquid fuel derived from agricultural plant oils or animal fats that meets American Society for Testing and Materials specification D6751- 03a Standard Specification for biodiesel fuel (B100) blend stock for Distillate Fuels.

A taxpayer that has been certified by the Indiana Economic Development Corporation (IEDC), and produces biodiesel at a facility located in Indiana is entitled to a credit against the taxpayer's state tax liability equal to the product of one dollar ($1.00) multiplied by the number of gallons of biodiesel produced by the taxpayer during the taxable year and used to produce blended biodiesel.

The total amount of credits allowed may not exceed three million dollars ($3,000,000) for a taxpayer for all taxable years. This amount may be increased to five million dollars ($5,000,000) with the prior approval of the IEDC.

II. BLENDED BIODIESEL TAX CREDIT

Blended biodiesel is defined as a blend of biodiesel with petroleum diesel, so that the percentage of biodiesel in the blend is at least two percent (2%) (B2 or greater). The term does not include biodiesel (B100).

A taxpayer that has been certified by the IEDC, and produces blended biodiesel at a facility located in Indiana is entitled to a credit against the taxpayer's state tax liability equal to the product of two cents ($.02) multiplied by the number of gallons of blended biodiesel produced at the Indiana facility and blended with Indiana produced biodiesel.

The total amount of credits allowed may not exceed three million dollars ($3,000,000) for all taxpayers and all taxable years.

III. RETAIL SALE OF BLENDED BIODIESEL TAX CREDIT

A taxpayer that is a dealer and distributes at retail blended biodiesel is entitled to a credit against the taxpayer's state tax liability.

The credit allowed is one cent ($.01) multiplied by the number of gallons of blended biodiesel distributed at retail by the taxpayer in a taxable year.

The total amount of credits allowed may not exceed one million dollars ($1,000,000) for all taxpayers and all taxable years. A credit may not be taken for blended biodiesel distributed at retail after December 31, 2010.

IV. APPLICATION FORM AND APPROVAL OF THE TAX CREDIT

Taxpayers desiring to claim one of the three credits must file a claim for credit on Form BD-100 Biodiesel Credit Application which is available at the Department's web site (www.in.gov/dor/taxforms/f&eforms).

Taxpayers desiring to claim the credit for biodiesel production or for blending biodiesel must attach a copy of the certification from the IEDC. Retailers selling to end users are not required to be certified by the IEDC. The claim for credit must be completed by the taxpayer and filed with the Department for approval. The approved claim will be returned to the applicant. A copy of the approved claim and certification from the IEDC must be attached to any tax return on which the credit is taken. The application and claim can be filed on a monthly, quarterly, semi-annual or annual basis depending on which tax type the taxpayer is claiming the credit for and the filing frequency of the return for the type of tax. Failure to submit the approved BD-100 with the tax return will result in the claim being denied by the Department.

V. ADMINISTRATION OF THE TAX CREDITS

Qualifying taxpayers include pass through entities such as S Corporations, partnerships, limited liability companies, and limited liability partnerships. If the pass through entity is entitled to a credit but does not have state tax liability to which the credit can be applied, a shareholder, partner, or member of the pass through entity is entitled to the credit in the same percentage as the person's distributive income to which the person is entitled.

If the credit is applied against the taxpayer's adjusted gross income tax, financial institutions tax, or insurance premiums tax, the credit shall be taken on the annual return filed by the taxpayer. If the credit is to be applied against a taxpayer's sales tax liability, the credit can be taken on a monthly basis. A taxpayer may not take a credit against sales tax collected as a retail merchant, but may take a credit against the use tax due on the taxpayer's taxable purchases.

If the credit claimed exceeds the taxpayer's state tax liability for the taxable year, the taxpayer may carry over the excess credit to the following taxable years. A credit may be carried forward for up to six (6) taxable years following the taxable year in which the taxpayer was first entitled to claim the credit. The taxpayer is not entitled to a refund or carryback of any unused credits.

The total amount of credits allowed for biodiesel production, biodiesel blending, and ethanol production may not exceed fifty million dollars ($50,000,000) for all taxpayers and all taxable years beginning after December 31, 2004. The IEDC shall determine the maximum amount for each type of credit, but the amount must be at least four million ($4,000,000) for each type of credit.

John Eckart
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN #93
INCOME TAX
JUNE 2006
(Replaces Bulletin #93, dated July 2005)

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SUBJECT: Ethanol Production Tax Credit

REFERENCES: IC 6-3.1-28

INTRODUCTION

There is a tax credit for ethanol production. The credit can be applied against the sales tax, the adjusted gross income tax, the financial institutions tax, and the insurance premiums tax.

I. ETHANOL PRODUCTION TAX CREDIT

Ethanol is defined as agriculturally derived ethyl alcohol. A taxpayer that produces ethanol at a facility located in Indiana that has the capacity to produce at least forty million (40,000,000) gallons of ethanol a year or which after December 31, 2003 increased its ethanol production capacity by at least forty million (40,000,000) gallons per year, may qualify for the credit.

A taxpayer that produces ethanol is entitled to a credit against the taxpayer's state tax liability equal to the product of twelve and one-half cents ($.125) multiplied by the number of gallons of ethanol produced at the Indiana facility.

The total amount of credits for all taxable years allowed per taxpayer may not exceed a total of two million dollars ($2,000,000) if the taxpayer produces at least forty million (40,000,000) but less than sixty million (60,000,000) gallons of ethanol in a taxable year. The total amount of credits for all taxable years for a taxpayer may not exceed three million dollars ($3,000,000) in the case of a taxpayer who produces at least sixty million (60,000,000) gallons of ethanol in a taxable year. The total credits available to all taxpayers for all years that may be awarded for biodiesel production, blended biodiesel production and ethanol production may not exceed fifty million dollars ($50,000,000).

II. ADMINISTRATION OF THE TAX CREDIT

Taxpayers desiring to claim the ethanol production tax credit must file a copy of the Indiana Economic Development Corporation's certificate of eligibility when they claim the credit on the appropriate Indiana tax return.

III. PASS THROUGH ENTITIES

Qualifying taxpayers include pass through entities such as S Corporations, partnerships, limited liability companies, and limited liability partnerships. If the pass through entity is entitled to a credit, but does not have state tax liability to which the credit can be applied, a shareholder, partner, or member of the pass through entity is entitled to the credit in the same percentage as the person's distributive income to which the person is entitled. A shareholder, partner or member of the pass through entity should attach a copy of the certificate received from the IEDC by the pass through entity.

IV. CLAIMING THE CREDIT

If the credit is applied against the taxpayer's adjusted gross income tax, financial institutions tax, or insurance premiums tax, the credit shall be taken on the annual return filed by the taxpayer. If the credit is applied against a taxpayer's sales tax liability, the taxpayer is required to obtain a direct pay permit in accordance with IC 6-2.5-8-9. A taxpayer may not take a credit against sales tax collected as a retail merchant, but may take a credit against use tax due on its taxable purchases.

If the credit claimed exceeds the taxpayer's state tax liability for the taxable year, the taxpayer may carry over the excess to the succeeding taxable years. The taxpayer is not entitled to a refund or carryback of any unused credits.

John Eckart
Commissioner

DEPARTMENT OF STATE REVENUE
INFORMATION BULLETIN # 95
INCOME TAX
JULY 2006
(Replaces Bulletin #95 dated October 2005)

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SUBJECT: Hoosier Business Investment Tax Credit

REFERENCES: IC 6-3.1-26

INTRODUCTION

The Hoosier business investment tax credit (HBITC) was originally passed in 2003 effective for taxable years beginning after December 31, 2003. The statute was amended during the 2005 session of the Indiana General Assembly to expand the entities eligible for the credit, to change the calculation of the credit, and expand the definition of qualified investment. Certification of an applicant is approved by the Indiana Economic Development Corporation (IEDC).

I. QUALIFIED ENTITIES

A taxpayer is defined as an individual, corporation, partnership or other entity that has a state tax liability.

Pass through entities are defined as S Corporations, partnerships, trusts, limited liability companies, or limited liability partnerships. If a pass through entity does not have state tax liability against which the tax credit may be applied, a shareholder, partner, or member of the pass through entity is entitled to the credit.

II. QUALIFIED INVESTMENTS

The qualified investment is determined to be the amount of a taxpayer's expenditure in Indiana for any of the following items:

- The purchase of, costs associated with modernization of, or the construction of facilities and equipment used for telecommunications, production, manufacturing, fabrication, assembly, extraction, mining, processing, refining, finishing, distribution, transportation, or logistical distribution.
- Costs associated with the purchase of machinery, equipment, or special purpose buildings used to make a motion picture or audio production. Motion picture or audio production includes a feature length film, video, television services, commercial, music video or audio recording. The term also includes a corporate production for any combination of theatrical, television, or other media viewing or a television pilot.

Qualified investments include expenditures for onsite infrastructure improvements, and costs associated with retooling existing machinery and equipment. Costs associated with the construction of special purpose buildings and foundations for use in the computer, software, biological sciences, or telecommunications industry are also qualified investments.

Property that can be readily moved outside of Indiana does not qualify as a qualified investment.

All qualified investments must be made during the period from January 1, 2004 through December 31, 2011 effective for taxable years beginning after December 31, 2003.

III. CREDIT CALCULATION PRIOR TO MAY 15, 2005

Prior to May 15, 2005 the credit in a taxable year equaled the lesser of thirty percent (30%) of the qualified investment or the taxpayer's state tax liability growth. The following provisions apply to HBITC certifications for a pass through entity prior to May 15, 2005. "State tax liability growth" means the difference between a taxpayer's state tax liability in a taxable year minus the greater of the taxpayer's state tax liability in the most recent prior taxable year or the taxpayer's base state tax liability. "Base state tax liability" means a taxpayer's state tax liability in the taxable year immediately preceding the taxable year in which a taxpayer makes a qualified investment. The base state tax liability amount shall not be adjusted as a result of any net operating loss that could be carried back to the base year. The taxpayer can file an amended return to use a net operating loss deduction, but it will not change the amount of the base state tax liability for purposes of calculating the HBITC.

EXAMPLE: A regular C Corporation (taxpayer) made a qualified investment of $2,000,000 in 2004. The taxpayer had a state tax liability of $350,000 in 2003 (base state tax liability). The taxpayer's state tax liability in 2004 was $520,000. The state tax liability growth is the difference between the current year liability and the base state tax liability ($520,000-350,000=$170,000). The amount of the credit for the taxable year is the lesser of $600,000 (30% of the qualified investment (30% multiplied by $2,000,000=$600,000)), or the state tax liability growth of $170,000). The remaining tax credit balance of $430,000 can be carried forward to future tax years.

A pass through entity by definition is not subject to the adjusted gross income tax, and therefore does not have a state tax liability to calculate a base state tax liability or the amount of state tax liability growth, but the legislation creating the HBITC provides that pass through entities shall be eligible for the credit.

In order for a pass through entity to claim a credit, the pass through entity will calculate a state tax liability based on its Indiana taxable income and the tax liability that would be incurred based on the imputed tax liability of its partners, shareholders, or members.

EXAMPLE: A limited liability company has individuals and a regular C Corporation as members. The individuals represent 80% of the ownership and the Regular C Corporation represents 20%. The members' imputed rate is 4.42% (.8 multiplied by.034) for the individual members and (.2 multiplied by.085) for the Regular C member. This is arrived at by taking the individual members' percent of ownership multiplied by the individual income tax rate, plus the Regular C member's percent of ownership multiplied by the corporate adjusted gross income tax rate.

After the determination of the imputed tax rate is made for the base year, the rate shall be applied to the Indiana taxable income to arrive at the base state tax liability amount. The imputed rate will be recalculated on an annual basis to be used to calculate the state tax liability growth amount and the amount of credit that the entity is eligible to claim.

IV. CREDIT CALCULATION FOR CERTIFICATIONS AFTER MAY 15, 2005

SEA 496-2005 amended the HBITC statute to change the calculation of the credit by eliminating the state tax liability growth as a calculation to be used in determining the amount of the credit that an entity is eligible to receive.

The amount of credit that may be claimed by a taxpayer for a taxable year is a percentage determined by the IEDC, not to exceed ten percent (10%) of the amount of the qualified investment made by the taxpayer during the taxable year.

V. ADMINISTRATION OF THE CREDIT

A. Application

A taxpayer that proposes a project to create new jobs or increase wage levels in Indiana shall apply to the IEDC before the taxpayer makes the qualified investment.

B. Amount of Credit

The IEDC shall certify the amount of the qualified investment that is eligible for a credit. The IEDC may grant a credit that is up to ten percent (10%) of the amount of qualified investment that is directly attributable to expanding the workforce in Indiana.

C. Claiming the Credit

A taxpayer claiming a credit is required to submit to the Department a copy of the certificate of verification when claiming the credit on the tax return filed by the taxpayer. The certificate of verification shall be supplied to the taxpayer by the IEDC.

D. Carry Forward of Credit

A taxpayer is allowed to carry forward an unused credit for the number of years determined by the IEDC, but not to exceed nine (9) consecutive taxable years, beginning with the taxable year after the taxable year in which the taxpayer makes the qualified investment.

E. Expiration and Time Limitation of Credit

The credit applies to qualified investments made for taxable years beginning after December 31, 2003, and ending on or before December 31, 2011. A taxpayer is not prevented from carrying forward an unused credit to a taxable year beginning after December 31, 2011 for a qualified investment made before January 1, 2008.

For further information concerning this tax credit, contact the Indiana Economic Development Corporation at One North Capitol, Suite 700, Indianapolis, IN 46204.

John Eckart
Commissioner

DEPARTMENT OF STATE REVENUE

18-20020278.LOF

LETTER OF FINDINGS NUMBER: 02-0278
Financial Institutions Tax
For the Year 1992-1998

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

ISSUES

I. Financial Institutions Tax—Statute of Limitations

Authority: Ind. Code § 6-8.1-5-2; *Phoenix Coal Co. v. Comm'r*, 231 F.2d 420 (2d Cir. 1956)

Taxpayer protests the assessment of additional tax for certain taxable years, based on the assessments being made in an untimely manner.

II. Financial Institutions Tax--Unitary Filing and Economic Nexus

Authority: Ind. Code § 6-5.5-1-18; *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983); *Exxon Corp. v. Dep't of Revenue of Wisconsin*, 447 U.S. 207 (1980).

Taxpayer protests the inclusion of three subsidiaries as part of Taxpayer's unitary group based on economic nexus.

III. Financial Institutions Tax—Apportionment Factors

Authority: Ind. Code § 6-5.5-2-4; *Citicorp North America Inc. v. Franchise Tax Bd.*, 100 Cal. Rptr. 2d 509 (Cal. Ct. App. 1st Dist. 2000).

Taxpayer protests the inclusion of the receipts from Indiana credit card holders in Taxpayer's receipts numerator for determining apportionment.

IV. Tax Administration--Negligence Penalty

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

Taxpayer protests the assessment of a negligence penalty.

STATEMENT OF FACTS

Taxpayer consists of a number of corporations engaged in varying businesses. One of Taxpayer's subsidiaries, Sub P, filed Financial Institutions Tax returns for 1992 to 1998. Two other subsidiaries, Sub C and Sub L, filed regular Corporate Income Tax returns for 1994 to 1997. After a merger between Sub C and Sub L, the successor company, Sub F, filed corporate income tax returns for part of 1997 and 1998.

In addition to the various banking activities that they may have been engaged in, Sub D and Sub B were in the credit card business at various points during the years in question. Sub D and Sub B had credit cards issued to Indiana customers; however, Sub D and Sub B did not have property in Indiana, and they did not have any payroll in Indiana. Further, any solicitation of credit cards was done by telephone or by United States Mail. Sub H was a company that held and managed an investment portfolio and did not otherwise have any other apparent activities.

The Department audited Taxpayer for the years in question. As a result of the Department audit, it was determined that the various subsidiaries of Taxpayer should have properly filed a combined Financial Institutions Tax return for each of the years in question. As a result, Taxpayer was assessed additional tax, interest, and penalty. Taxpayer protested the assessments, and a hearing was held.

I. Financial Institutions Tax—Statute of Limitations

DISCUSSION

Taxpayer's first argument is that the statute of limitations for assessment of additional taxes passed prior to the Department's assessment. In particular, Taxpayer argues that it waived the statute of limitations only for tax years 1996 and 1997; however, for 1992 to 1995, it did not waive the statute of limitations.

In general, a three-year statute of limitations from the later of the due date of the return or the actual filing date of the return applies for all listed taxes. Ind. Code § 6-8.1-5-2. However, if a person's income is understated by at least twenty-five percent, the statute of limitations is extended to six years. If a taxpayer fails to file a return, no statute of limitations for assessment exists.

For the years from 1992 to 1995, Taxpayer filed separate returns for Sub P. It filed regular corporate income tax returns for Sub C and Sub L in 1994 and 1995. The period for assessing income taxes with respect to these entities started with the timely filed returns, and the time was not tolled by agreement between Taxpayer and the Department. Therefore, Taxpayer has provided sufficient information to conclude that the assessments were untimely with respect to Sub P, Sub C, and Sub L for the years in which they filed returns.

However, based on the information provided by Taxpayer, Taxpayer had a net operating loss carryforward from prior years. While Indiana statutes and case law have not dealt with this particular situation, federal law governing net operating losses has dealt with this situation. In *Phoenix Coal Co. v. Comm'r*, 231 F.2d 420 (2d Cir. 1956), a corporation incurred a net operating loss in 1947. The corporation carried back its net operating losses to eliminate its 1945 income and reduce its 1946 income. The corporation incurred a further net operating loss in 1948, which served to eliminate its 1946 income.

The Commissioner reviewed the corporation's returns. Upon review of the corporation's returns, the Commissioner determined that the corporation had underreported its 1945 income. Accordingly, the Commissioner redetermined the amount of net operating losses that could be carried forward to 1946, and assessed additional tax for that year. At the time of the assessment, the statute of limitations for imposition of additional tax for 1945 had passed, though not for 1946. The court held that, though taxes for 1945 could not be assessed due to the passing of the statute of limitations, the income for 1945 could be redetermined to compute the proper amount of net operating losses allowable for 1946. *Id.* at 421-422.

The Department can revisit the determinations of the proper amount of net operating losses, along with carryforwards, for the prior audit period and any previous years solely for purposes of determining the proper amount of income subject to tax for years not subject to the statute of limitations, just as the Commissioner in *Phoenix Coal* recomputed the corporation's income for 1945 to determine the proper income for 1946. This does not permit assessment for Sub P for any year prior to 1996 or for Sub C and Sub

L for 1994 and 1995, just as the Commissioner's redetermination for 1945 did not permit assessment for that year. Thus, the Department can redetermine the net operating loss carryforwards available for the years in question by combining all Taxpayer's entities into one return. However, the Department cannot assess tax for 1992 to 1995 against Sub P or for 1994 and 1995 against Sub C and Sub L by virtue of the newly combined return.

Further, with respect to Sub B, Sub D, and Sub H, these entities did not file Indiana returns for the period from 1992 to 1995. Also, Sub C and Sub L did not file Indiana returns for 1992 and 1993. The Department is not precluded from making assessments with respect to these entities per Ind. Code § 6-8.1-5-2(e). However, the remedial measures may not result in inconsistent results (e.g., the combination of the unfilled entities creating an assessment, then using the same entities to disallow Sub P's net operating losses).

FINDING

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

II. Financial Institutions Tax--Unitary filing

DISCUSSION

Taxpayer's second argument is that the financial institutions tax is unconstitutional as applied to Sub B, Sub D, and Sub H under the Commerce Clause of the United States Constitution. Taxpayer cites to *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Taxpayer argues that, because the only contacts Sub B, Sub D, and Sub H had with Indiana were Sub B and Sub D's credit cards and solicitation of credit cards, it did not have sufficient nexus with Indiana to permit taxation. Taxpayer urges the rejection of economic nexus as a basis for imposition of Financial Institutions Tax.

However, the issue here is one of a unitary business, rather than one of nexus. First, Taxpayer has not provided sufficient information to conclude that it was not a unitary business as defined in Ind. Code § 6-5.5-1-18 (amended effective January 1, 1999). For the years in question, the presence of a unitary business was sufficient to impose taxation, rather than the presence of a unitary business plus transacting business in Indiana (the test before 1992 and after 1998).

Second, in the case of a unitary business, entities that are considered to be transacting business in a given state in sense of having property, payroll, and sales in that state, as well as other entities that are not transacting business in that state, are considered to be one large business. *See Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983) (unitary filing held to permit subsidiaries doing business outside the United States to be combined on a California corporate tax return); *Exxon Corp. v. Dep't of Revenue of Wisconsin*, 447 U.S. 207 (1980) (though company only had marketing activities in Wisconsin, its other activities conducted outside Wisconsin were part of a unitary business, and thus combining the subsidiaries engaged in the other activities was permissible). The unitary business does not consist of individual entities operating separately; it is a large, interdependent group with varying roles for individual entities. Accordingly, nexus concerns with respect to certain entities are not relevant for unitary analysis; the only concern is whether the businesses are part of one large enterprise, and whether Indiana is taxing its apportioned share of the income of the larger entity. Taxpayer was properly assessed tax on its proportion of Indiana receipts to overall receipts of the overall entity.

Third, even if the issue of nexus was relevant for Sub B, Sub H, and Sub D, Sub B and Sub D conducted their credit card business with Indiana customers at various times during the audit period. By doing so, Taxpayer has sought the benefit of Indiana laws and the business environment that Indiana provides for Taxpayer and Taxpayer's customers. Accordingly, Sub B and Sub D conducted the business of a financial institution in Indiana, and were properly subject to tax during those periods in which they had credit card customers in Indiana.

FINDING

Taxpayer's protest is denied.

III. Financial Institutions Tax—Apportionment Factors

DISCUSSION

Taxpayer argues that only certain members of its unitary group should be included in determining Taxpayer's numerator for apportionment purposes; however, all members of the unitary group, including those that Taxpayer has stated did not conduct business in Indiana, should be included in the denominator.

Under Ind. Code § 6-5.5-2-4:

For a taxpayer filing a combined return for its unitary group, the group's apportioned income for a taxable year consists of:

(1) the aggregate adjusted gross income, from whatever source derived, of the members of the unitary group; multiplied by:

(2) the quotient of:

(A) all the receipts of the taxpayer members of the unitary group that are attributable to transacting business in Indiana; divided by

(B) the receipts of all the members of the unitary group from transacting business in all taxing jurisdictions.

Taxpayer concedes that Sub F, Sub C, Sub L, and Sub P engaged in business in Indiana. However, Taxpayer maintains that the Indiana receipts of its credit card companies, Sub B and Sub D, as well as Sub H should not have been included in the numerator of the sales factor on Taxpayer's combined return, but should have been included in the denominator of the sales factor.

When the Financial Institutions Tax (FIT) was enacted effective January 1, 1990, the FIT originally provided that all income of resident members of a unitary group, plus the apportioned income of the members of a unitary group that transacted the business of a financial institution in Indiana, was subject to Financial Institutions Tax. Thus, a non-resident entity first was required to be a member of a unitary group, and second, the non-resident entity was required to transact business in Indiana.

However, effective in 1992, the scope of taxation was redefined. The scope of taxation was broadened to include unitary entities that did not transact business in Indiana, rather than just those that transacted business in Indiana. Thus, the income of a non-resident entity that did not transact business in Indiana was subject to tax, and the receipts of that entity were added to the denominator of the group's apportionment factor. The scope of the numerator remained the same throughout the period; Indiana could only tax the receipts of the unitary group from Indiana sources. Thus, the term "taxpayer member" (in the numerator) as opposed to "member" (the term in the denominator) was a redundancy that carried over from the 1990 enactment's initial limitations on taxable entities.

Further, while Indiana case law has not addressed the definition of "taxpayer" in a unitary group context when a member had receipts from Indiana but would not have been taxed as a separate entity, California has addressed such a contention in *Citicorp North America Inc. v. Franchise Tax Bd.*, 100 Cal. Rptr. 2d 509 (Cal. Ct. App. 1st Dist. 2000). In that case, Citicorp had several subsidiaries that were taxpayers in California and filed separate returns. Later, Citicorp amended its returns to file as a unitary group. Citibank, a subsidiary included on the unitary return, was not a separate taxpayer for California purposes and had no property or payroll in California. However, Citibank had credit cardholders in California. The issue was whether Citibank's credit card receipts from California cardholders were required to be included in the Citicorp unitary group's sales numerator. The court held that the Citibank's credit card receipts from California cardholders were properly includible in Citicorp's sales numerator for apportionment purposes. In so ruling, the court held that "taxpayer" meant the entire unitary group, rather than just the individual members of the group. *Id.* at 521.

Assuming *arguendo* that Sub B and Sub D were not subject to taxation based on mere solicitation activities, they were still conducting a credit card business in Indiana. Sub B and Sub D were part of a unitary business that included other members of Taxpayer's group. Accordingly, just as the term "taxpayer" in *Citicorp* included a company transacting a credit card business in California when the credit card company was not taxable on a separate company basis, the term "taxpayer member" includes all members of Taxpayer's unitary group transacting business in Indiana, not just those that would have been subject to tax on a separate company basis.

FINDING

Taxpayer's protest is denied.

V. Tax Administration--Negligence Penalty

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty for all taxes that the Department has imposed.

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.

With respect to this assessment, Indiana's statutes and regulations were clear with respect to the scope of Financial Institutions Tax. Notwithstanding the statutes and regulations, Taxpayer assumed a position contrary to those statutes and regulations. Accordingly, Taxpayer has not provided sufficient information to conclude that penalty waiver is justified.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420040121.LOF

LETTER OF FINDINGS: 04-0121
GROSS RETAIL TAX
For 2000 and 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.

ISSUE

I. Sales of Goods to Out-of-State Destinations – Gross Retail Tax.

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

Taxpayer argues that two invoices were included in the audit's sample report that were not subject to sales tax because the two invoices were for items that were sent to out-of-state customers.

STATEMENT OF FACTS

Taxpayer is an in-state company in the business of manufacturing and selling both at retail and wholesale items such as commemorative plaques, certificates, and trophies. The Department of Revenue (Department) conducted an audit review of taxpayer's business records. Due to the large number of sales invoices involved, the audit prepared a sample report for each of the two audit periods. Two individual sales were recorded in the February 2000 sample for which the audit determined that taxpayer should have collected sales tax. The audit did so on the ground that "[b]oth sales were clearly coded on the sales invoice as being held/stored in Indiana." The audit provided taxpayer with an opportunity to supply information showing that the sales were actually made to out-of-state customers. According to the audit, taxpayer "was unable to provide the shipping detail for these two sales."

Taxpayer submitted a protest, the issue was assigned to a hearing officer, an administrative hearing was held, and this Letter of Findings results.

DISCUSSION

I. Sales of Goods to Out-of-State Destinations – Gross Retail Tax.

As a threshold issue, taxpayer's original protest letter suggested certain other adjustments to which taxpayer felt it was entitled. However, at the administrative hearing, taxpayer only addressed the issue of whether it should have collected sales tax on the two purportedly out-of-state sales invoices.

The audit determined that taxpayer should have collected sales tax on two sales invoices which totaled approximately $520. Taxpayer disagreed stating that the two sales were for items which had been prepared for – but not shipped to – an out-of-state customer.

IC 6-2.5-2-1(a) states that, "An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana." 45 IAC 2.2-2-2 requires that a retail seller, "[A]cting as an agent for the state of Indiana, must collect the tax."

The audit was unable to agree that the two transactions occurred outside Indiana. To the contrary, the audit concluded that "[b]oth sales were clearly coded on the sales invoice as being held/stored in Indiana." In effect, the audit found that the two invoices evidenced "retail transactions made in Indiana." IC 6-2.5-2-1(a) Because taxpayer failed to charge or collect the sales tax, the audit assessed taxpayer sales tax on the purchase price indicated on each of the two invoices.

IC 6-8.1-5-1(b) states, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The *burden of proving* that the proposed assessment is wrong rests with the person against the proposed assessment is made." (*Emphasis added*).

Taxpayer's representative indicated that documentary evidence would be presented subsequent to the hearing demonstrating that the two invoiced transactions were for sales made to out-of-state customers. Just as it did while the audit was being conducted, taxpayer failed to provide the evidence. Instead, taxpayer seems to rely wholly on its bare assertion that it was not required to collect Indiana sales tax; unfortunately, this bare assertion is – standing alone – insufficient, and taxpayer has failed to meet its burden of "proving that the proposed assessment is wrong...." Id.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0120040196.LOF

LETTER OF FINDINGS NUMBER: 04-0196
Adjusted Gross Income Tax
For the Tax Period 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. Adjusted Gross Income Tax – Imposition

Authority: IC 6-8.1-5-1 (b), IC 6-3-2-1, 45 IAC 3.1-1-23(2)

The taxpayers protest the assessment of adjusted gross income tax on unreported gross income.

II. Adjusted Gross Income Tax – Credit for Taxes Paid to other States

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

The taxpayer protests the lack of credit given them for payment of taxes to other states.

III. Tax Administration – Ten Percent Negligence Penalty

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

The taxpayers protest the imposition of the penalty.

STATEMENT OF FACTS

The taxpayers are a married couple. They moved to Texas at the end of June, 2002. As a result, they filed an Indiana partial year resident return for 2002. The Indiana Department of Revenue (department) assessed the taxpayers additional Indiana adjusted gross income tax, interest, and penalty. The taxpayers protested the assessment and a hearing was held. This Letter of Findings results.

I. Adjusted Gross Income Tax – Imposition

DISCUSSION

There is no dispute that the taxpayers changed their domicile from Indiana to Texas at the end of June, 2002. The dispute centers on what income is subject to the Indiana adjusted gross income tax. The taxpayers declared their Indiana 2001 adjusted gross income tax refund and capital gains on assets sold while they lived in Indiana as taxable Indiana income. These amounts totaled $8,384. The department imposed Indiana adjusted gross income tax on one half of their federally reported $517,552. The taxpayers protested this assessment.

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).

Indiana imposes an adjusted gross income tax at IC 6-3-2-1(a) as follows:

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

The issue of the Indiana adjusted gross taxability of taxpayers who move from Indiana to another state is discussed at 45 IAC 3.1-1-23(2) as follows:

> Any person who, on or before the last day of the taxable year, changes his residence or domicile from Indiana to a place without Indiana, with the intent of abiding permanently without Indiana, is subject to adjusted gross income tax on all taxable income earned while an Indiana resident. Indiana will not tax income of a taxpayer who moves from Indiana and becomes an actual domiciliary of another state or country except that income received from Indiana sources will continue to be taxable.

The taxpayers also protested the imposition of Indiana adjusted gross income tax on wages of $50,829. The taxpayers provided documentation indicating that those wages were earned by the husband for performance of a job for a corporation when the family lived in Texas. This is income was not earned in Indiana and therefore is not from an Indiana source. It is not subject to the Indiana adjusted gross income tax.

The taxpayers also protested the imposition of Indiana adjusted gross income tax on a capital gain of $2,854. realized upon the sale of stock on December 16, 2002. The Indiana part year resident adjusted gross income tax return instructions deal with which state to report capital gains to on page 9 as follows:

> For part-year residents, the portion of the following types of income received while a nonresident would not be reported Indiana income: interest, dividends, royalties and gains from the sale of capital assets, unless such income results from the conduct of a trade or business.

The taxpayers sold the stock and earned the income while they were residents of Texas. Therefore, the gain from the sale of the stock is not subject to the Indiana adjusted gross income tax.

The final point of protest concerns the partnership income of $444,187 distributed on September 30, 2006. The husband was a partner in a major accounting firm with a September-September fiscal year. During the year the partners are paid a draw. At the end of the firm's fiscal year, the draws are trued up. Each partner is then paid his final distributive share of the partnership income. If the partner's total draw is less than his total distributive share, the partner receives an additional payment. If the partner's total draw is more than his total distributive share, the partner must reimburse the partnership for the overage paid to him. The taxpayers argued that he did not have final rights to the distributive share and therefore did not earn it until after his move from Indiana to Texas. In essence, the taxpayers argued that the draws were not really income but were more in the nature of nontaxable loans from the partnership to the partners. The taxpayers argued that the total distributive share is taxed at the time it is received like the capital gains on the sale of stock. In this case, that date would be September 30, 2002, after the taxpayers moved to Texas.

The department agrees that the draws are in the nature of loans not subject to income tax at the time they are paid. The department did not, however, impose tax on the draws at the time they were paid. Rather the department imposed tax on the six months worth or 50% of the distributive share that the husband earned when he worked with the accounting firm in Indianapolis. The taxpayer did not just receive the money in Texas like the proceeds from the sale of stock. Rather, the taxpayer received the money as compensation for the efforts he made throughout the fiscal year on behalf of the partnership. Six months of that effort and work during 2002 were from the Indiana office while the taxpayer was a resident of Indiana. This is Indiana source income subject to the Indiana adjusted gross income tax.

FINDING

The taxpayers' protest is sustained as to the imposition of Indiana adjusted gross income tax on the wages earned in Texas and gain from the sale of stock while residents of Texas. The taxpayers' protest to the imposition of Indiana adjusted gross income tax on half of the distributive share of the partnership is denied.

II. Adjusted Gross Income Tax – Credit for Taxes Paid to other States

DISCUSSION

The taxpayers argued that should they be found liable for Indiana adjusted gross income tax on a portion of the partnership distribution, he should also receive a credit against the tax for taxes paid in other states.

Indiana law provides for credits against Indiana adjusted gross income tax for taxes paid to another state at IC 6-3-3-3(a) as follows:

> Whenever a resident person has become liable for tax to another state upon all or any part of his income for a taxable year derived from sources without this state and subject to taxation under IC 6-3-2, the amount of tax paid by him to the other state shall be credited against the amount of tax payable by him. Such credit shall be allowed upon the production to the department of satisfactory evidence of the fact of such payment except that such application for credit shall not operate to reduce the tax payable under IC 6-3-2 to an amount less than would have been payable were the income from the other state ignored. The credit provided for by this subsection shall not be granted to a taxpayer when the laws of the other state, under which the adjusted gross income in question is subject to taxation, provides for a credit to the taxpayer substantially similar to that granted by subsection (b).

The statute clearly sets out a credit for taxes paid to another state for no more than the Indiana tax rate. To take this credit, however, the taxpayer must provide the department with evidence that the tax was actually paid to another state.

FINDING

The taxpayers' claim to be allowed to take credits against the Indiana adjusted gross income tax for taxes paid to other states is sustained to the extent that the taxpayer can verify the credits for taxes paid with filed tax returns and receipts for payment of taxes to the other states.

III. Tax Administration – Ten Percent (10%) Negligence Penalty

DISCUSSION

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

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

As one spouse is a partner in a major accounting firm, the taxpayers are expected to know and follow the tax laws of the state of Indiana. Their failure to report half of the husband's distributive share of the partnership is a clear situation of failing to use the diligence and reasonable care required of taxpayers. This breach of the taxpayers' duty constitutes negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120040399.LOF

LETTER OF FINDINGS NUMBER: 04-0399
Income Tax
For Tax Year 2001

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

ISSUE

I. Income Tax—Individual

Authority: IC 6-3-2-1; IC 6-8.1-5-1

Taxpayer protests the assessment of individual income tax.

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 negligence penalty.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an information exchange with the Federal government, the Indiana Department of Revenue ("Department") issued a proposed assessment for individual income tax for 2001. Taxpayer protests the proposed assessment of tax and negligence penalty. Further facts will be supplied as required.

I. Income Tax—Individual

DISCUSSION

Taxpayer protests the imposition of individual income tax. Taxpayer's protest consists of the sentence, "I have received disability social security for many years and have not made enough to file taxes." Taxpayer provides no further explanation or documentation supporting his position.

The Department received information from the Federal government that taxpayer had taxable income for 2001. The Indiana income tax is established in IC 6-3-2-1, which states in relevant part:

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

The Department issued a proposed assessment on the income reported by the Federal government.

The Department refers to IC 6-8.1-5-1(b), which explains that the burden of proving an assessment wrong rests with the person against whom the assessment is made. In this case, the taxpayer has not provided any explanation or documentation supporting his protest. Taxpayer has not met the burden of proving the assessment wrong, as required by IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Negligence Penalty

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax year 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 read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) 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 affirmatively established that his 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

04-20050010P.LOF

LETTER OF FINDINGS NUMBER 05-0010P
TAX ADMINISTRATION (USE TAX)—NEGLIGENCE PENALTIES FOR
THE REPORTING PERIODS COVERING CALENDAR YEARS 2000-01
AND JANUARY 1—NOVEMBER 30, 2002

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

ISSUE

I. Tax Administration—Negligence Penalties—Audit Deficiencies--Good Filing History

Authority: IC §§ 6-8.1-5-1(b) and -10-2.1 (2004); *State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M.*, 765 N.E.2d 1257, 1264 (Ind. 2002); *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1024 and 1024-25 (Ind. Tax Ct. 1999); 45 IAC §§ 15-3-2(e), -5-3(b)(8) and -11-2 (2004)

The taxpayer protests the Audit Division's proposed assessment of negligence penalties.

STATEMENT OF FACTS

The Department's Audit Division conducted a field audit of the taxpayer for the tax type and reporting periods set out in the heading of this Letter of Findings. As a result of the audit, the taxpayer incurred tax deficiencies. The Audit Division proposed assessing, and the taxpayer has only protested the proposed, negligence penalties. The Department will provide additional information as needed.

I. Tax Administration—Negligence Penalties—Audit Deficiencies--Good Filing History

DISCUSSION

A. TAXPAYER'S PROTEST

The taxpayer argues that the Department should waive the negligence penalties because the taxpayer has substantially complied with its tax reporting and remitting duties.

B. ANALYSIS

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. These taxes are listed in IC § 6-8.1-1-1 and include the gross retail and use tax. 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.* (Emphasis added). The amount is set by IC § 6-8.1-10-2.1(b)(4), which states that "(b) [e]xcept as provided in subsection (g) [,] [not in issue here], the penalty described in subsection (a) is ten percent (10%) of:… (4) the amount of deficiency as finally determined by the department[.]" *Id.* However, IC § 6-8.1-10-2.1(d) states that "[i]f a person subject to the penalty imposed under this section can show that the failure to…pay the deficiency determined by the department was due to *reasonable cause* and not due to willful neglect, the department shall waive the penalty." *Id.* (Emphasis added).

Title 45 IAC § 15-11-2(b) states:

(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.

Id. (Emphasis added.) The next subsection of the regulation sets out the standard of care a taxpayer must prove pursuant to IC § 6-8.1-10-2.1(e) to establish reasonable cause for failing to meet its tax compliance duties to the Department. Subsection (c) of 45 IAC § 15-11-2 reads in relevant part as follows:

(c) The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 [sic][should read IC 6-8.1-10-2, repealed and re-enacted in 1991 as IC 6-8.1-10-2.1] if the taxpayer affirmatively establishes that the failure to…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.….*

…

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.)

Under IC § 6-8.1-5-1(b) (2004) and 45 IAC § 15-5-3(b)(8) (2004), the person against whom a proposed assessment is made has the burden of proving that it is wrong. That burden applies to abatement of penalty assessments, as well as substantive tax assessments. *"A person who wishes to avoid the penalty imposed under [IC § 6-8.1-10-2.1(a) and (b)] must make an affirmative showing of all facts alleged as a reasonable cause* for the person's failure to file the return, pay the amount of tax shown on the person's return, pay the deficiency, or timely remit tax held in trust[.]" IC § 6-8.1-10-2.1(e) (emphasis and alterations added). The burden of proof is not on the Department to show negligence, willful or otherwise, by, or the absence of reasonable cause for the actions or inaction of, a taxpayer.

The taxpayer's argument is in effect that it exercised ordinary care and prudence in filing its returns with and remitting tax to this Department, thereby implying that it had "reasonable cause," as 45 IAC § 15-11-2(c) defines that term, for incurring the audit deficiencies. That argument does not support the taxpayer's protest because it does not address the basis on which the negligence penalties were proposed against it. The taxpayer was not penalized by the Compliance Division under IC § 6-8.1-10-2.1(a)(1) or (2) for failing to file returns, for failing to file returns on time, or for failing to pay the full amount of tax shown on those returns. It was penalized by the Audit Division under IC § 6-8.1-10-2.1(a)(3) for "[i]ncur[ring], upon examination by the department, a deficiency that is due to negligence[.]" *Id.* (Alterations added.) The fact that the taxpayer filed its returns promptly and paid all the tax it reported has no tendency to prove that the present deficiencies, resulting from its omissions of tax from those returns, were incurred for reasonable cause.

The taxpayer has failed to make any argument that it had reasonable cause for incurring the audit deficiencies. 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 the rationale for this rule 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 (alterations added).

Entertaining the taxpayer's protest of the negligence penalties, much less granting this protest and refunding those penalties, on substantial compliance grounds would be inappropriate. If the Department were to do so, it could set a bad example. It could imply both to the present taxpayer and to future penalized persons who would learn of any such action that the Department is willing to accept something less than full compliance with the listed tax laws. The risk of leaving taxpayers with such an impression is an unacceptable one. Although the result is unfortunate for this particular taxpayer, the alternative would be worse for tax administration and tax compliance.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0220050048.LOF

LETTER OF FINDINGS NUMBER: 05-0048
Adjusted Gross Income Tax
Tax Period 1999-2002

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. Adjusted Gross Income Tax-Net Operating Loss

Authority: IC § 6-8.1-5-1(b), IC § 6-3-2-2.6.

The taxpayer protested the department's failure to carry forward prior year net operating losses to the fiscal year 1999 return.

II. Adjusted Gross Income Tax-Inclusion of Corporations in Combined Return

Authority: IC § 6-3-2-2(m), IC § 6-5.5-1-18, *Container Corporation of America v. Franchise Tax Board.,* 463 U.S. 159, 103 S.Ct.

293 (1983); *Allied-Signal, Inc. v. Director, Division of Taxation,* 504 U.S. 768, 112 S.Ct. 2251 (1992); *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982).

The taxpayer protested the inclusion of two corporations into its combined return. The taxpayer also protested the exclusion of one corporation from its combined return.

III. Adjusted Gross Income Tax-Loss on Sale of Account Receivables

Authority: IC § 6-3-2-2(m).

The taxpayer protested the disallowance of a loss deduction on the sale of account receivables.

IV. Adjusted Gross Income Tax-Calculation Issues

Authority: IC § 6-8.1-3-12.

The taxpayer protested the method of calculation used in several areas and failure to give credit for payments made.

STATEMENT OF FACTS

The taxpayer is a corporation with several subsidiaries and related corporations in the business of creating, manufacturing, and distributing greeting card products. The Indiana Department of Revenue ("department") audited the corporation for the tax years ending February, 1999 through February, 2002. As a result of the audit, the department assessed additional adjusted gross income tax, interest, and penalty. The taxpayer protested this assessment and a hearing was held. This Letter of Findings results.

I. Adjusted Gross Income Tax-Net Operating Loss

DISCUSSION

During the audit, the department determined that the taxpayer needed to file a combined return with many of its subsidiaries and related corporations. Two of the corporations included in the combined return had unused separate return net operating losses (NOLs) from periods prior to the fiscal year ending February 1999 combined return. The taxpayer requests that those NOLs be carried forward against the fiscal year 1999 combined Indiana return.

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

Indiana allows the utilization of NOLs in computing the adjusted gross income tax liability of corporations reporting on a combined basis. IC § 6-3-2-2.6. The taxpayer provided documentation of its NOLs.

FINDING

The taxpayer's protest is sustained with regards to the net operating loss carryforward. The file will be returned to the audit division to determine the correct Indiana loss amount (if any) available for carryforward into the applicable tax years. The loss will be calculated in accordance with the applicable statute including the application of the separate return year limitation computations if needed.

II. Adjusted Gross Income Tax-Inclusion of Corporations in Combined Return

DISCUSSION

The taxpayer protests the inclusion of two affiliated corporations (corporations A and B) in the combined return. The taxpayer also protests the exclusion of one corporation (Corporation C) from the combined return for the periods the entity did business in Indiana.

Corporation A makes display cabinets and other fixtures. The taxpayer argued that Corporation A should not be included in the unitary return because they are a separate corporation that sells to taxpayer and its related corporations as well as other parties. Corporation A's manufacturing facility and company management are located in North Carolina. The taxpayer buys some of its cabinets from other corporations and is not totally dependent on Corporation A for its fixtures.

Corporation B sells products that are similar but not identical to taxpayer's main product. Corporation B's product is often used in conjunction with taxpayer's primary product. Corporation B's product is sold mainly to unrelated parties. Corporation B had two manufacturing facilities in Tennessee during the audit period. It had no property in Indiana. Corporation B's sales are shipped into Indiana from Tennessee. Corporation B maintains its own customers' list and computer system.

Corporation C was in business for only one year of the audit period, fiscal year 1999. The taxpayer did not own this corporation like it did the others that the department included in the unitary business corporation. Corporation C was not involved in the creation, manufacturing, and distribution of social expression products like the others in the unitary business. Rather, this corporation allowed customers to manufacture personalized product items in retail establishments.

The taxpayer argued that Corporations A and B should not be included in a unitary return for several reasons. First they argued that the corporations A and B did not have sufficient contact with Indiana to be included in a combined return. Secondly, the taxpayer argued against the inclusion of Corporations A and B because they do not meet the definition of "a unitary business" found at IC § 6-5.5-1-18 as follows:

> "[U]nitary business" means business activities or operations that are of mutual benefit, dependent upon, or contributory to one another, individually or as a group, in transacting the business of a financial institution.

This statute defines "unitary business" for the Financial Institutions Tax purposes, not adjusted gross income tax. The basic concepts, however, apply to the adjusted gross income tax.

The only Indiana statute dealing with the issue of unitary business for adjusted gross income tax purposes is IC § 6-3-2-2(m) as follows:

In the case of two (2) or more organizations, trades, or businesses owned or controlled directly or indirectly by the same interests, the department shall distribute, apportion, or allocate the income derived from sources within the state of Indiana between and among those organizations, trades, or businesses in order to fairly reflect and report the income derived from sources within the state of Indiana by various taxpayers.

Indiana law requires first a determination that the entities are operated as a unitary business. After it has been determined that the entities are unitary, the law requires that the income be reported in such a manner as to "fairly reflect" the Indiana income. The Supreme Court has considered the issue of a unitary relationship for adjusted gross income tax in several cases and with several analyses. The essential characteristic they require for a unitary business is that the individual entities are functionally integrated in a common business. *Container Corporation of America v. Franchise Tax Board,* 463 U.S. 159, 103 S.Ct. 293 (1983).; *Allied-Signal, Inc. v. Director, Division of Taxation,* 504 U.S. 768, 112 S.Ct. 2251 (1992); *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982). The Supreme Court found that unitary businesses that were functionally integrated shared many common characteristics. They had common ownership. They had centralized management with a corporate strategy including the various entities. The individual businesses were operated in such a manner as to further a common purpose.

The taxpayer owned corporations A and B. The taxpayer and its related corporations operated businesses creating, manufacturing, and distributing social expression products. There is clear evidence that they operated as a functional whole to achieve these common goals. Management decisions were made to further the common goal of selling all the varieties of greeting card products. The taxpayer's SEC filings included the names of the taxpayer and Corporations A, B, and C. Several of the corporations used the same related accounts receivable servicing corporation.

Significant percentages of Corporation A's product (display cabinets and fixtures for the marketing of the social expression products) were sold to the taxpayer and related corporations. Corporation C's product was displayed with the taxpayer's and Corporation B's product on Corporation A's display cabinets. Labels on Corporation B's product indicate that Corporation B's trademark is held by the corporation that also holds taxpayer's trademarks.

There were substantial intercompany transfers among the various related entities listed in the subsidiary's Cost of Goods Sold. Each year the taxpayer's consolidated federal 1120 return included transfer pricing adjustments. These adjustments distorted the taxpayer's and its subsidiaries Indiana adjusted gross income. To fairly reflect their Indiana adjusted gross income, the taxpayer and corporations A and B must be combined as a unitary business.

The taxpayer did not provide adequate documentation to sustain its burden of proving that Corporation C was part of the unitary business and should have been included in the combined return.

FINDING

The taxpayer's protest is denied. Corporations A and B are to be included in the combined return. Corporation C is not to be included in the combined return.

III. Adjusted Gross Income Tax-Loss on Sale of Account Receivables

DISCUSSION

Much of the taxpayer's product is seasonal. It is considered the optimum marketing strategy to have a full selection of seasonal product available for consumers through the last day of any season or holiday. The taxpayer allows retailers to return all unsold seasonal product at the end of the season. There are also discounts for volume purchases, worn or tattered products, outdated products allowances and others. The taxpayer's liberal return policy and the other types of discounts and credits result in significant discounts to the taxpayer's accounts receivables.

During the last three years of the audit, the taxpayer sold its discounted accounts receivables to another related corporation (service corporation). This corporation was formed for several reasons including the achievement of cost savings through consolidation of its collection operations and to help the taxpayer obtain financing from external lenders. The service corporation is owned 75 percent by the taxpayer and 25 percent by a Canadian subsidiary of the taxpayer. Therefore, it does not meet the 80 percent rule necessary to file a federal consolidated return.

To determine the fair market value of the receivables for the sale, the invoiced amount of the receivables is discounted to reflect the taxpayer's historical rate of returned merchandise. The sale of the accounts receivables to the service corporation is without recourse. Therefore the service corporation has no right to reimbursement from the taxpayer for receivables that are not collected in full. The service corporation has no rights in returned merchandise.

The department disallowed the taxpayer's reporting of losses from the sale of accounts receivable to the service corporation because the sale was not an arms length transaction. The taxpayer protests this disallowance. The taxpayer argues that the service corporation was set up for actual business purposes. Further, it argues that the sale of the taxpayer's accounts receivables to the service corporation was an arms length transaction. The taxpayer states that the Internal Revenue Service (IRS) has reviewed the losses generated by the sales. In that review, the taxpayer asserts that the IRS approved the structure of the corporations and sales and has merely not determined the appropriate value to be assigned to the sold accounts receivables. The taxpayer also asserts that the returned merchandise has a value of "0" because the merchandise is destroyed. At most, according to the taxpayer, the value of the returned goods can be no higher than the minimal cost to produce the merchandise. The taxpayer proposes that the department allow the deductions as taken by the taxpayer. The taxpayer asserts that should the IRS determine that the accounts receivables have a value different than that currently reported, the taxpayer would amend its returns and report the adjusted amount to the department as required by statute.

The taxpayer errs in its statement that the service corporation cannot be part of the taxpayer's unitary business for Indiana adjusted gross income tax purposes because it does not qualify to file a federal consolidated return. Indiana does not have the 80 percent ownership rule to be considered a unitary business. The determination as to whether or not a particular corporation is part of a unitary business must be based on the factors discussed in the previous issue.

The taxpayer owns 75 percent of the service corporation. The service corporation was formed by the taxpayer's management to utilize its accounts receivables to obtain bank financing for its business. This function aids the overall group of corporations in achieving its common goal of creating, manufacturing, and distributing of social expression products. The service corporation provides for economies of scale in that it services the accounts of several of the related corporations.

The taxpayer and its related entities sell their accounts receivables to the service corporation, a related corporation. Each of the corporations selling its accounts receivables recognized business losses from the sales of the receivables. These sales and the resulting claims of business losses distorted the results of the Indiana adjusted gross income of the taxpayer and its related corporations. The service corporation would normally be combined with the other members of the unitary business to fairly reflect Indiana adjusted gross income as required by IC § 6-3-2-2(m). However, the taxpayer did not provide the department with sufficient documentation to combine the adjusted gross income tax returns. Therefore the department disallowed the losses reported from the sales of the accounts receivables to the service corporation.

Since the service corporation federal return was not provided for the years of the audit, the department properly made adjustments to disallow losses reported from the sales of accounts receivables to the service corporation.

FINDING

The taxpayer's protest to the adjustments to disallow losses reported from sales of the accounts receivables to the service corporation is denied.

IV. Adjusted Gross Income Tax-Calculation Issues

DISCUSSION

The department audited the taxpayer pursuant to authority granted it at IC § 6-8.1-3-12. During the course of that audit the department's auditor made certain tax calculations. The taxpayer protested the calculation of the elimination entries made in the audit work papers, the payroll apportionment and the fiscal year 2002 bonus depreciation adjustment. After receipt of the protest letter, the department contacted the taxpayer to obtain the additional data that the taxpayer wanted the department to consider. The department then adjusted the calculations based upon the data provided by the taxpayer.

The taxpayer also protested that two corporations' income tax payments were not credited on the combined return. However, the companies in question were not included in the Indiana audit report for gross income tax. They were only included in the audit report for the combined adjusted gross income tax. The companies in question had originally filed separate returns which reflected a gross income tax liability, but they had losses for adjusted gross income tax. Therefore, all tax payments were to pay the gross income tax liability of the two companies in question. Since those two corporations were not included in the Indiana audit report for gross income tax, the credits used to satisfy their separate gross income tax liability cannot be used to offset the Indiana combined adjusted gross income tax liability. To do so would, in effect, give the taxpayer credit twice for the same tax payment.

FINDING

The taxpayer's protest to the original calculations is sustained to the extent that the calculations were adjusted based upon the additional figures supplied by the taxpayer. The taxpayer's protest to the failure to give credit for gross income tax payments made is denied.

DEPARTMENT OF STATE REVENUE

0420050079.LOF

LETTER OF FINDINGS NUMBER 05-0079
SALES AND TAX
For Tax Period 2001-2002

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 Use Tax - Sales Tax on ATVs

Authority: IC § 6-8.1-5-1(b), IC § 6-2.5-2-1(a), IC § 6-2.5-2-1(b), IC § 6-2.5-5-15, 45 IAC 2.2-5-21, 45 IAC 2.2-3-5.

The taxpayer protested the assessment of sales tax on sales of ATVs taken out-of-state immediately upon delivery.

II. Sales and Use Tax – Exemption Certificates

Authority: IC § 6-2.5-8-8, 45 IAC 2.2-8-12.

The taxpayer protested the assessment of sales tax when there is purported to be a valid exemption certificate.

III. Sales and Use Tax – Subcontracted Materials Sales

Authority: IC § 6-2.5-2-1.

The taxpayer protested the assessment of sales tax on materials used in subcontracted repairs of boats.

IV. Tax Administration- Ten Percent Negligence Penalty

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

The taxpayer protested the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The taxpayer is a corporation that sells and services motorcycles and all-terrain vehicles (ATVs). The taxpayer also retrieves racing boats from locations around the country. It then repairs the boats and returns them to the owners. Pursuant to an audit, the Indiana Department of Revenue (department) assessed the corporation with additional sales and use tax, penalty, and interest for the tax period 2001-2002. The taxpayer protested some of the assessments and a hearing was held. This Letter of Findings results.

I. Sales and Use Tax –Sales Tax on ATVs and Motorcycles

DISCUSSION

The department assessed sales tax on sales of ATVs where out-of-state customers came into Indiana, purchased the vehicles, and then immediately took the ATVs out-of-state. The taxpayer protested these assessments.

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

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a). The tax is imposed on the purchaser of the property. The retail merchant collects the tax and holds it in trust until it is remitted to the state. IC § 6-2.5-2-1(b).

The taxpayer argued that the ATVs were exempt from the sales tax pursuant to IC § 6-2.5-5-15 as follows:

Transactions involving motor vehicles, trailers, watercraft, and aircraft are exempt from the state gross retail tax, if:

(1) upon receiving delivery of the motor vehicle, trailer, watercraft, or aircraft, the person immediately transports it to a destination outside Indiana;

(2) the motor vehicle, trailer, watercraft, or aircraft is to be titled or registered for use in another state; and

(3) the motor vehicle, trailer, watercraft, or aircraft is not to be titled or registered for use in Indiana.

The exemption for motor vehicles taken out of state is also discussed at 45 IAC 2.2-5-21 as follows:

The state gross retail tax shall not apply to sales of motor vehicles, trailers, and aircrafts, delivered in Indiana for immediate transportation to a destination outside of Indiana and for licensing or registration for use in another state, and not to be licensed or registered in Indiana.

The exemption upon which the taxpayer based its protest applies to motor vehicles, trailers, watercraft, and aircraft. ATVs are not trailers, watercraft, or aircraft. 45 IAC 22-5-21 also exempts "motor vehicles." "Motor vehicles" are defined at 45 IAC 2.2-3-5 as "vehicle[s] required to be licensed by the state for highway use in Indiana." There is no requirement that ATVs be licensed for highway use in Indiana. Therefore, ATVs are not motor vehicles. Since they are not motor vehicles, they do not qualify for exemption from the sales tax as motor vehicles taken out-of-state.

The department properly assessed sales tax on the sales of ATVs taken out-of-state.

FINDING

The taxpayer's protest is denied.

II. Sales and Use Tax – Exemption Certificates

DISCUSSION

At the time of the audit, the taxpayer did not have exemption certificates on file for several purchasers. The taxpayer obtained exemption certificates for some of these purchasers prior to the hearing. The taxpayer protested the tax assessed on sales to purchasers with exemption certificates provided.

IC 6-2.5-8-8 which 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 clarifies the law concerning exemption certificates in pertinent part as follows:

(d)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. The taxpayer produced valid exemption certificates after the audit but prior to the hearing. The taxpayer is not obligated to pay the sales tax on the sales covered by those certificates.

FINDING

The taxpayer's protest is sustained.

III. Sales and Use Tax – Subcontracted Materials Sales

DISCUSSION

The taxpayer subcontracted some of its repair jobs. The vendors who actually repaired the motorcycles, boats, and ATVs provided the labor and materials for the repairs. They then invoiced the taxpayer for the repairs. The taxpayer invoiced its customers listing the amount charged by the vendor plus mark-up. The taxpayer did not collect and remit sales tax on any of the materials used in these repairs as required by IC § 6-2.5-2-1. The department assessed these sales taxes and the taxpayer protested the assessment. The taxpayer did not sustain its burden or proving that this assessment was in error.

FINDING

The taxpayer's protest to this assessment is denied.

IV. Tax Administration- Ten Percent Negligence Penalty

DISCUSSION

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

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

The department can waive the negligence penalty pursuant to the provisions of 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-1-10-1 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 re 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, letter 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.

The taxpayer provided substantial documentation indicating that it based its business practices on a previous audit and a previously issued Letter of Findings. After the previous audit, the taxpayer changed its use tax reporting to comply with the law. The totality of the facts in this situation indicate that the taxpayer used reasonable care, caution, and diligence in the filing and remitting of sales and use taxes to the state.

FINDING

The taxpayer's protest to the imposition of the negligence penalty is sustained.

DEPARTMENT OF STATE REVENUE

0120050134.LOF

LETTER OF FINDINGS NUMBER: 05-0134
Adjusted Gross Income Tax
For 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. Adjusted Gross Income Tax-Imposition

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

The taxpayer protests the imposition of adjusted gross income tax.

STATEMENT OF FACTS

The taxpayer's deceased husband operated a used car business. The taxpayer and her husband filed joint adjusted gross income tax returns for the years 2001 and 2003. No return was filed for 2002. After an investigation, the Indiana Department of Revenue (department) assessed the taxpayer and her deceased husband additional adjusted gross income tax, interest, and penalty for the tax period 2001-2003. The taxpayer protested and a telephone hearing was held. This Letter of Findings results.

I. Adjusted Gross Income Tax-Imposition

DISCUSSION

An adjusted gross income tax is imposed upon all Indiana residents. IC § 6-3-2-1. The taxpayer contended that the department erred in calculating the amount of adjusted gross income tax due. The taxpayer alleged that some of the receipts from car sales actually should have been attributed to her brother in law. Further the taxpayer alleged that she and her deceased husband were both disabled during part of the tax period and did not have any taxable earnings for those periods.

All tax assessments are presumed to be accurate and taxpayers bear the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b). Taxpayers are required to maintain adequate records to allow the department to later determine the taxpayer's proper liability by reviewing those records. IC § 6-8.1-5-4. The taxpayer was unable to produce any documentation to demonstrate that the department calculated the adjusted gross income tax liability incorrectly.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420050171.LOF

LETTER OF FINDINGS NUMBER: 05-0171
Sales and Use 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.

ISSUES

I. Sales and Use Tax- Imposition

Authority: IC § 6-8.1-5-1 (b), IC § 6-2.5-2-1, IC § 6-2.5-5-8, IC § 6-2.5-8-8, 45 IAC 2.2-8-12.

The taxpayer protests the imposition of sales tax.

STATEMENT OF FACTS

The taxpayer is a corporation that manufactures bedding. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use tax, interest, and penalty for the tax period 2000-2002. The taxpayer protested the assessment of sales tax on several of its sales. The taxpayer contended that its sales qualified for exemption because its customers sold the bedding in retail sales. A telephone hearing was held and this Letter of Findings results.

I. Sales and Use Tax-Imposition

DISCUSSION

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC 6-8.1-5-1 (b).

Indiana imposes a sales tax on retail sales of tangible personal property in Indiana. The sellers of the property are required to collect the sales tax from the purchasers and remit that tax to the state unless the sale qualifies for a statutory exemption. IC 6-2.5-2-1.

Indiana grants an exemption from the sales tax at IC § 6-2.5-5-8 (b) as follows:

> Transactions involving tangible personal property... are exempt from the state gross retail tax if the person acquiring the property acquires it for resale... in the ordinary course of the person's business without changing the form of the property.

The taxpayer argued that all of its sales on which the department assessed sales tax qualified for this exemption. Indiana law provides for manufacturers to establish that its sales qualify for exemption at IC § 6-2.5-8-8 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 clarifies the law concerning exemption certificates in pertinent part as follows:

(d) 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.

After the audit, the taxpayer provided valid exemption certificates from two of the customers to whom the taxpayer sold bedding. The taxpayer's protest to these assessments is sustained.

The taxpayer also had several customers who did not provide valid exemption certificates. Therefore, the taxpayer has the burden of proving that the leases to these customers were exempt from the sales tax. The taxpayer provided substantial evidence that three of the customers were actually retail merchants reselling the bedding in their ordinary course of business. As such, sales to those merchants also qualified for exemption from the sales tax.

FINDING

The taxpayer's protest to the assessment on transactions for which the taxpayer provided exemption certificates is sustained. The taxpayer's protest to the assessments on sales to the first, third, and fifth customers listed on Page 10 of the audit is also sustained. The remainder of the protest is denied.

DEPARTMENT OF STATE REVENUE

0120050174.LOF

LETTER OF FINDINGS NUMBER: 05-0174
County Adjusted Gross Income Tax
Tax Period 2001

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

ISSUE

I. County Option Income Tax-Imposition

Authority: IC 6-8.1-5-1(b); IC § 6-3.5-6-8; IC § 6-3.5-6-1.

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

STATEMENT OF FACTS

The taxpayers are a married couple living in Illinois. In 2001 they received a distribution from an Indiana Sub Chapter S corporation. The Indiana Department of Revenue assessed the County Option Income Tax, penalty, and interest on the distribution. The taxpayers protested this assessment. A hearing was held and this Letter of Findings results.

I. County Option Income Tax-Imposition

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 County Option Income Tax is imposed on county taxpayers. IC § 6-3.5-6-8.

A "county taxpayer" is defined at IC § 6-3.5-6-1 as follows:

"County taxpayer" as it relates to a county, means any individual:

(1) who resides in that county on the date specified in section 20 of this chapter; or

(2) who maintains his principal place of business or employment in that county on the date specified in section 20 of this chapter and who does not reside on that same date in another county in which the county option income tax, county adjusted gross income tax, or the county economic development tax is in effect.

The taxpayers did not live in the same county as the Sub Chapter S corporation. Their principal places of business or employment were not in that county. Therefore, they do not meet the definition of a taxpayer subject to the imposition of the County Option Income Tax for the county in which the Sub Chapter S corporation is located. The Indiana Department of Revenue improperly imposed the tax on the taxpayers.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

04-20050240P.LOF

LETTER OF FINDINGS NUMBER 05-0240P
TAX ADMINISTRATION—CIVIL FRAUD PENALTIES FOR
THE REPORTING PERIODS COVERING 1996—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—Civil Fraud Penalties—Failure to File Returns

II. Tax Administration—Civil Fraud Penalties—Failure to Make Full Tax Payments with Returns

Authority: IC §§ 6-2.5-6-7, -9-3 and -8-1-24 (1993) (1998) (current respective versions at *id.* (2004)); IC §§ 6-8.1-5-1(a) and (e), -2.5, -10-2.1, -10-4 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. Safayan,* 654 N.E.2d 270 (Ind. 1995); *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs,* 715 N.E.2d 1018 (Ind. Tax Ct. 1999); 45 IAC §§ 2.2-6-8(b) and -9-4(a) (1996) (2001) (current respective versions at *id.* (2004)); 45 IAC §§ 15-5-7(f)(3) and -11-4 (2004)

The taxpayer has asked for a waiver or reduction of the 100 percent fraud penalties the Audit Division of the Department has proposed to assess against him.

STATEMENT OF FACTS

The taxpayer is an individual retail merchant engaged in the sale at retail of vehicle tires and tire-related accessories. The taxpayer also performs tire installation, alignment and repair services. He had operated his business as an Indiana-chartered corporation from July 15, 1983, according to the records of the Business Services Division of the Indiana Secretary of State's office. That corporation began filing Sales and Use Tax Vouchers (Forms ST-103) with this Department with the reporting period ending July 31, 1983. The Secretary of State administratively dissolved the corporation effective December 31, 1987. Notwithstanding that dissolution, the present individual taxpayer has continued to hold himself out to third parties, including this Department, as being a corporation.

The Department conducted a gross retail (sales) and use tax field audit of the taxpayer's putative corporation for calendar years 1996-2003 (hereinafter "the audit period"). The auditor made no adjustments to the taxpayer's use tax liability for the audit period or to the taxpayer's sales tax liability for 2002. However, the auditor made adjustments to the taxpayer's sales tax liability for every other year of the audit period. The audit Summary states that the taxpayer failed to file Forms ST-103 or to remit collected sales to the Department on several occasions during those years. The auditor also recommended, and the Audit Division proposed, assessing the 100 percent civil fraud penalty on the proposed liabilities resulting from his base tax adjustments. The Audit Division issued the Notices of Proposed Assessment arising from all of these adjustments in the name of the taxpayer's putative corporation rather than the taxpayer individually. The taxpayer, in his individual name, made a timely protest of only the civil fraud penalties.

I. Tax Administration—Civil Fraud Penalties—Failure to File Returns

II. Tax Administration—Civil Fraud Penalties—Failure to Make Full Tax Payments with Returns

DISCUSSION

A. TAXPAYER'S ARGUMENT

The taxpayer states in his protest letter that he should pay a penalty, but that it should be for a reduced percentage of the base tax proposed assessments. In support of his request the taxpayer's only statement, which strictly speaking is not an argument, is that paying the penalties in a reduced percentage "would really help," implying that paying the full amounts of the fraud penalties would be a financial hardship to him. He had indicated to the field auditor that he would be forced into bankruptcy if he had to pay more than a ten percent penalty and would request to be put on a payment plan.

B. ANALYSIS

The sales tax is a trust fund tax. IC § 6-2.5-9-3 (1993) (1998) and 45 IAC § 2.2-9-4(a) (1996) (2001) (current respective versions at *id.* (2004)); *see also Ind. Dep't of State Revenue v. Safayan,* 654 N.E.2d 270, 272 (Ind. 1995) (so stating and quoting IC § 6-2.5-9-

3). A retail merchant is absolutely liable for the sales tax on its total gross retail income from taxable transactions for a reporting period, "regardless of the amount of tax he actually collects." IC § 6-2.5-6-7 and 45 IAC § 2.2-6-8(b).

IC § 6-8.1-10-4 (2004) is the section of the Tax Administration Act, IC article 6-8.1, that imposes a penalty for civil fraud. That penalty is 100 percent of the full amount of tax due for any period for which the taxpayer fails to file a return, or of the unpaid balance of tax reported on any filed return, if the taxpayer fails to file or pay "with the fraudulent intent of evading the tax[.]" *Id.*(a). One of the implementing regulations, 45 IAC § 15-11-4 (2004), describes "the [kind of] intent required [to constitute fraud as having] the specific purpose of evading tax believed to be owing." *Id.* Civil tax fraud in Indiana is thus what lawyers call a "specific intent" offense. *Cf.* IC § 6-8-1-24 (requiring intent to defraud the state or to evade payment of tax for certain actions described therein to be criminal tax offenses).

The one hundred percent civil penalty is the maximum penalty the Department can assess. IC § 6-8.1-10-7. It "is imposed in place of and not in addition to the penalty imposed under section 2.1 of this chapter [i.e., IC § 6-8.1-10-2.1 governing the negligence penalty]." IC 6-8.1-10-4(d). Since IC § 6-8.1-10-2.1 thus does not apply to the civil fraud penalty. That being the case, a taxpayer against whom the latter penalty is assessed cannot use the procedure set out in IC § 6-8.1-10-2.1(d) and (e) to prove the existence of such "reasonable cause[,]" *id.*, for the taxpayer's actions as would require the Department to waive that penalty.

Thus, a taxpayer assessed with a civil fraud penalty must prove that it did not commit fraud at all. Specifically, the taxpayer must submit evidence that disproves the existence of one or more of the material facts (what lawyers call "elements") that together constitute fraud. Title 45 IAC § 15-5-7(f)(3) lists and describes the elements applicable to fraudulent failure to file a return, and 45 IAC § 15-11-4 does so for fraudulently made tax underpayments. If the taxpayer fails to prove it did not commit civil fraud as described in the applicable regulation/s, the Department has no authority to waive the penalty.

All the present taxpayer has done in this protest is to make a vague plea for the Department to reduce the penalty to a percentage he can bear, a request that is more properly directed to the Department's Taxpayer Advocate than to the Legal Division. He has submitted no actual evidence whatever, much less evidence that would disprove that he committed fraud, or at the very least evidence that his failures to file returns and pay tax were without fraudulent intent.

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 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. Considering the total absence of evidence negating fraud, legal relief from the proposed civil fraud penalties is thus impossible. Even if it were possible such relief would be inappropriate given the trust fund nature of the sales tax as discussed at the beginning of this Analysis.

Lastly, the Legal Division notes that the Audit Division issued the Notices of Proposed Assessment to the former corporation, which was dissolved before the audit period began and thus could not be the responsible taxpayer. However, IC § 6-8.1-5-4 permits the Department to issue a new assessment or assessments to the taxpayer that is responsible, and for this purpose makes inapplicable the assessment period of limitations of IC § 6-8.1-5-2(a) that would otherwise govern. In addition, IC § 6-8.1-5-2(e) states in relevant part that if a taxpayer does not file a return (with or without fraudulent intent), there is no period limiting when the Department can issue a proposed assessment against that taxpayer for the reporting period the return would have covered. There is thus no legal impediment to the Audit Division to issue the Demand Notices for the proposed assessments to the individual taxpayer rather than to the former corporation. The Legal Division therefore directs the Audit Division to do so accordingly.

FINDING

The taxpayer's protest is denied. The file is to be returned to the Audit Division to issue the Demand Notices for the proposed assessments to the individual taxpayer rather than to the former corporation.

DEPARTMENT OF STATE REVENUE

0520050255.LOF

LETTER OF FINDINGS NUMBER: 05-0255
Cigarette Tax and Use Tax
For Tax Years 2004 and 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue ("Department") determined that taxpayer owed cigarette tax, use tax, and penalty on cigarettes ordered via the internet and delivered in Indiana. Taxpayer protests that she does not owe these taxes.

On February 2, 2006, Taxpayer was notified by mail of a hearing to be held on March 1, 2006. However, at the designated time of the hearing, Taxpayer neither appeared at the Department's office nor called the hearing officer assigned to the file, and thus this letter of findings is written based on the information contained in the Department's file. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

Taxpayer protests the imposition of cigarette tax. Taxpayer argues that she does not owe cigarette tax. Taxpayer argues that the assessment was for a different name, that cigarette taxes were paid to Kentucky, and that the cigarettes were delivered to her son in Indiana while Taxpayer was out of town.

The cigarette tax is found at IC 6-7-1-1, which states:

> It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes pursuant to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. The Jenkins Act states in relevant part:

(a) Contents. Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--

> (1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and
>
> (2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

(b) Presumptive evidence. The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

15 U.S.C. § 376

Also of relevance, a distributor is defined by 15 U.S.C. § 375(3) as:

(A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes.

Taxpayer did not file a return with the Department which included the cigarette taxes. The Department refers to IC 6-8.1-5-1(a), which states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

The Department received information from the vendor naming Taxpayer—under the alias that was used ten times in a seven month period, at the address that was provided each time—as the purchaser of cigarettes. The Department made proposed assessments based on the best information available to it, as provided by IC 6-8.1-5-1(a).

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with Taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on her purchase of cigarettes ordered via the internet and delivered in Indiana. Taxpayer offers the same arguments as in Issue I. The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0520050257.LOF

LETTER OF FINDINGS NUMBER: 05-0257
Cigarette Tax, Use Tax and Penalty
For Tax Years 2004 and 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

III. 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 negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that Taxpayer owed cigarette tax, use tax, and penalty on cigarettes ordered via the internet and delivered in Indiana. Taxpayer protests that he does not owe these taxes.

On February 2, 2006, Taxpayer was notified by mail of a hearing to be held on March 1, 2006. However, at the designated time of the hearing, Taxpayer neither appeared at the Department's office nor called the hearing officer assigned to the file, and thus this letter of findings is written based on the information contained in the Department's file. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

Taxpayer protests the imposition of cigarette tax. Taxpayer argues that he does not owe cigarette tax. Taxpayer argues that the cigarettes were delivered to an Indiana address for his consumption, but the cigarettes were neither bought nor used in Indiana.

The cigarette tax is found at IC 6-7-1-1, which states:

> It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes pursuant to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. The Jenkins Act states in relevant part:

> (a) Contents. Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

(b) Presumptive evidence. The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

15 U.S.C. § 376

Also of relevance, a distributor is defined by 15 U.S.C. § 375(3) as:

(A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes. Rather than providing a mechanism for which a consumer's identity is shielded, the Jenkins Act provides that the consumer's identity must be revealed to the Department if the sale of cigarettes is in interstate commerce.

Taxpayer did not file a return with the Department which included the cigarette taxes. The Department refers to IC 6-8.1-5-1(a), which states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

The Department received information from the vendor naming taxpayer as the purchaser of cigarettes. The Department made proposed assessments based on the best information available to it, as provided by IC 6-8.1-5-1(a).

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on his purchase of cigarettes ordered via the internet and delivered in Indiana. Taxpayer offers the same arguments as in Issue I. The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

III. Tax Administration—Negligence Penalty

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. With regard to the 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 read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) 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 affirmatively established that his 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

05-20050258.LOF

LETTER OF FINDINGS NUMBER: 05-0258
Cigarette Tax
For Tax Years 2004 and 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.

I. Cigarette Tax--Imposition

Authority: IC 6-8.1-5-1(b); 45 IAC 15-5-3(b); IC 6-7-1-1; 15 U.S.C. §§ 375-378; IC 6-8.1-5-1(a);

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

III. Tax Administration—Negligence Penalty and Interest
Authority: IC 6-8.1-10-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax on cigarettes ordered via the internet/telephone and delivered in Indiana. Taxpayer protests that she does not owe these taxes. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

The taxpayer, in correspondence, argues "[t]he cigarettes in question were neither sold nor used in Indiana. I do not live, work, play, or 'use cigarettes' in Indiana." And further, she states:

> [W]hen the State of Illinois decided to make it illegal for consumers to have cigarettes purchased out of state and shipped to residences, I requested a co-worker (a resident of Indiana) to accept shipment at her residence in Indiana. (I checked first to ensure there was nothing illegal about this policy.)

The cigarette tax is found at IC 6-7-1-1, which states:

> *It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state*, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. *Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only.* When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

(*Emphasis* added) As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet/telephone, or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department's assessment is based on information received pursuant to the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes.

The Department refers to IC 6-8.1-5-1(a), which states:

> If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

The Department received information from the vendor naming taxpayer as the purchaser of cigarettes. The Department made proposed assessments based on the best information available to it, as provided by IC 6-8.1-5-1(a).

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Regarding the use tax, the taxpayer offers the same arguments as in Issue I. ("I reiterate the fact that not only were the cigarettes not sold in Indiana, but they were not 'used' in Indiana…." Taxpayer also makes an additional argument regarding the number of cartons purchased that were shipped into Indiana). The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I., under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use, or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, per IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

III. Tax Administration—Negligence Penalty and Interest

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to IC 6-8.1-10-1, which states in relevant part:

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

…

(e) The department may not waive the interest imposed under this section.

Since taxpayer incurred a deficiency upon a determination by the Department, as explained in Issues I. and II., the Department may not waive interest under IC 6-8.1-10-1.

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

45 IAC 15-11-2(c) 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 argues that "charging me 'penalties and interest for late payment' is grossly unfair on the grounds that I was totally unaware of this whole matter…." Taxpayer has not affirmatively established that her 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

0520050259.LOF

LETTER OF FINDINGS NUMBER: 05-0259
Cigarette Tax
For Tax 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Tax Administration—Negligence Penalty and Interest

Authority: IC 6-8.1-10-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax, use tax and penalty on cigarettes ordered via the internet and telephone and delivered in Indiana. Taxpayer protests that it does not owe these taxes. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

Taxpayer protests the imposition of cigarette tax. Taxpayer argues that he/she does not owe cigarette tax. Taxpayer argues that she does not owe cigarette tax, since she did not buy cigarettes for resale and did not know about the tax beforehand.

The cigarette tax is found at IC 6-7-1-1, which states:

> It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, telephone or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes due to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. The Jenkins Act states in relevant part:

> (a) Contents. Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

(b) Presumptive evidence. The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

15 U.S.C. § 376

Also of relevance, a distributor is defined by 15 U.S.C. § 375(3) as:

(A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes.

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Negligence Penalty and Interest

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to IC 6-8.1-10-1, which states in relevant part:

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

…

(e) The department may not waive the interest imposed under this section.

Since taxpayer incurred a deficiency upon a determination by the Department, as explained in Issues I and II, the Department may not waive interest under IC 6-8.1-10-1.

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

45 IAC 15-11-2(c) 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 affirmatively 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). The Department cannot waive the interest, as provided by IC 6-8.1-10-1. The negligence penalty shall be waived.

FINDING

Taxpayer's protest is sustained regarding penalty and denied regarding interest.

DEPARTMENT OF STATE REVENUE

0520050260.LOF

LETTER OF FINDINGS NUMBER: 05-0260
Cigarette Tax
For Tax 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

III. Tax Administration—Negligence Penalty and Interest

Authority: IC 6-8.1-10-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax, use tax and penalty on cigarettes ordered via the internet and telephone and delivered in Indiana. Taxpayer protests that he does not owe these taxes. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

Taxpayer protests the imposition of cigarette tax. Taxpayer argues that he does not owe cigarette tax. Taxpayer states that there were no warnings about possible tax liabilities on the website and that he had no way of knowing about the taxes.

The cigarette tax is found at IC 6-7-1-1, which states:

It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, by telephone or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes due to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. The Jenkins Act states in relevant part:

(a) Contents. Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

(b) Presumptive evidence. The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

15 U.S.C. § 376

Also of relevance, a distributor is defined by 15 U.S.C. § 375(3) as:

(A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on its purchase of cigarettes ordered via the internet and delivered in Indiana. Taxpayer offers the same arguments as in Issue I. The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

III. Tax Administration—Negligence Penalty and Interest

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to IC 6-8.1-10-1, which states in relevant part:

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

…

(e) The department may not waive the interest imposed under this section.

Since taxpayer incurred a deficiency upon a determination by the Department, as explained in Issues I and II, the Department may not waive interest under IC 6-8.1-10-1.

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

45 IAC 15-11-2(c) 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 affirmatively established by documentation and explanation 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). The interest cannot be waived, under IC 6-8.1-10-1. The negligence penalty shall be waived.

FINDING

Taxpayer's protest is sustained regarding penalty and denied regarding interest.

DEPARTMENT OF STATE REVENUE

0520050284.LOF

LETTER OF FINDINGS NUMBER: 05-0284
Cigarette Tax and Use Tax
For Tax 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax, use tax, and penalty on cigarettes ordered via the internet and delivered in Indiana. Taxpayer protests that he does not owe these taxes. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

Taxpayer protests the imposition of cigarette tax. Taxpayer argues that he does not owe cigarette tax.

The cigarette tax is found at IC 6-7-1-1, which states:

> It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes due to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. The Jenkins Act states in relevant part:

> (a) Contents. Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--
>
> > (1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and
> >
> > (2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.
>
> (b) Presumptive evidence. The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.
>
> 15 U.S.C. § 376
>
> Also of relevance, a distributor is defined by 15 U.S.C. § 375(3) as:
>
> (A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes.

Taxpayer did not file a return with the Department which included the cigarette taxes. The Department refers to IC 6-8.1-5-1(a), which states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

The Department received information from the vendor naming taxpayer as the purchaser of cigarettes. The Department made proposed assessments based on the best information available to it, as provided by IC 6-8.1-5-1(a).

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on his purchase of cigarettes ordered via the internet and delivered in Indiana. Taxpayer offers the same arguments as in Issue I. The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use, or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02-20050294.LOF

LETTER OF FINDINGS NUMBER: 05-0294
Gross Income Tax
For the Tax Years 2000-2002

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

ISSUES

I. Gross Income Tax—Small Business Exemption

Authority: Ind. Code § 6-2.1-3-24.5; I.R.C. § 1361; I.R.C. § 1362.

Taxpayer protests imposition of gross income tax with respect to Taxpayer's parent and subsidiaries.

II. Gross Income Tax—Advertising Fees

Authority: Ind. Code § 6-2,1-1-10; Ind. Code § 6-2.1-2-2; *U-Haul Co. of Ind., Inc. v. Ind. Dep't of State Revenue*, 784 N.E.2d 1078, 1082-1084 (Ind. Tax Ct. 2002).

Taxpayer protests the imposition of gross income tax with respect to funds used to purchase advertising on behalf of its franchisees.

STATEMENT OF FACTS

Taxpayer consists of a group of corporations engaged in the businesses of commercial cleaning and cleaning equipment sales. Taxpayer is comprised of a parent corporation ("Parent") and four wholly-owned subsidiaries ("Subsidiaries"). During the years in question, Taxpayer filed consolidated gross income and adjusted gross income tax returns. Taxpayer claimed an exemption from gross income tax based on the statutory exemption for small business companies. However, upon Department audit, it was discovered that one of Parent's shareholders was a family limited partnership. As a result, the audit determined that Taxpayer was not eligible for the small business exemption, and assessed gross income tax.

In addition, one of the subsidiaries ("Franchise Subsidiary") received monies that were to be used for advertising expenditures on behalf of the franchisors. The Department included those monies as gross income. Taxpayer protested these assessments, and a telephone hearing was held. Additional facts will be supplied as necessary.

I. Gross Income Tax—Small Business Exemption

DISCUSSION

Taxpayer's first contention is with respect to the disallowance of the small business corporation exemption for gross income tax purposes. Under Ind. Code § 6-2.1-3-24.5(b), a corporation which qualifies as a small business corporation is exempt from Gross Income Tax. For Gross Income Tax purposes, a small business corporation is defined as having the same definition that term has in I.R.C. § 1361(b). *See* Ind. Code § 6-2.1-3-24.5(a).

During the audit, the Department indicated that Parent had a multiple-owner partnership that owned a small percentage of Parent's shares. This disqualified Parent from being a small business corporation within the meaning of I.R.C. § 1361(b)(1)(B), which limits shareholders of small business companies to certain entities, of which a multiple-owner partnership was not one of the permissible classes of owners.

Taxpayer argues that the termination of small business status with respect to Parent was inadvertent. I.R.C. § 1362(f)(1)(B) allows small business corporations that inadvertently terminate small business corporation to take remedial steps to permit continued small business corporation status. Indiana does not have a parallel remedial actions provision. Even if remedial actions were appropriate, Taxpayer has not provided sufficient information to conclude that the assessment was improper. While the federal statute provided for remedial actions, the disqualified shareholder has not undertaken remedial actions to permit the Department to reconsider the assessment with respect to Parent.

Regardless of whether Parent was a small business corporation, Subsidiaries were not small business corporations due to the fact that the Subsidiaries had a corporate shareholder, which renders Subsidiaries ineligible for such status under I.R.C. § 1361(b)(1)(B). This section limits the range of permissible shareholders to various persons or entities, but does not permit ownership by another for-profit C corporation. Accordingly, Subsidiaries did not qualify as small business corporations.

FINDING

Taxpayer's protest is denied.

II. Gross Income Tax—Advertising Fees

DISCUSSION

Taxpayer argues that monies received by Franchise Subsidiary from its franchisees for advertising expenses on behalf of the franchisees were not subject to gross income tax. Franchise Subsidiary's arrangement was that a set amount of income from the franchisees was determined to be used for advertising on behalf of the franchisees. The franchisees paid the money to Franchise Subsidiary, which in turn used the funds for advertising expenses incurred on behalf of the franchisees. Prior to being expended, the funds used for advertising were maintained by Franchise Subsidiary in a segregated account. Franchise Subsidiary had some degree of control over the advertising expenses; however, the amounts paid were required to be used for advertising expenses. Franchise Subsidiary earned interest on the amounts deposited for advertising and retained the interest earned.

Under Ind. Code § 6-2.1-2-2(a)(1), the receipt of "the entire taxable gross income of a taxpayer who is not a resident or a domiciliary of Indiana" was subject to gross income tax. "Receipts" means the gross income of a taxpayer, including cash or notes, for the taxpayer's benefit. Ind. Code § 6-2.1-1-10.

The legal question is whether the subsidiary was an agent for the franchisees, and thus the funds for franchise expense were not for Franchise Subsidiary's benefit. Taxpayer indicated that Franchise Subsidiary had some control over the revenues that it received. The ability to exercise control the over the agent is the critical element for agency. *See generally U-Haul Co. of Ind., Inc. v. Ind. Dep't of State Revenue*, 784 N.E.2d 1078, 1082-1084 (Ind. Tax Ct. 2002). Franchise Subsidiary had some degree of control over the advertising funds. Franchise Subsidiary's control—actual or potential—over the advertising funds was sufficient to permit taxation of the advertising funds received by Franchise Subsidiary.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

05-20050336.LOF

LETTER OF FINDINGS NUMBER: 05-0336
Cigarette Tax
For Tax Years 2004 and 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Tax Administration—Negligence Penalty and Interest

Authority: IC 6-8.1-10-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax and penalty on cigarettes ordered via the internet and delivered in Indiana. Taxpayer protests that it does not owe these taxes. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b). Here, taxpayer protests the imposition of cigarette tax. Taxpayer argues that he does not owe cigarette tax due to his assertion that he did not purchase the cigarettes in question.

The cigarette tax is found at IC 6-7-1-1, which states:

> It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes due to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. 15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes.

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. In the course of this protest, taxpayer has provided sufficient documentation and explanation to establish that he did not sell, use, consume, handle, or distribute these cigarettes. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has met this burden.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration—Negligence Penalty and Interest

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to IC 6-8.1-10-1, which states in relevant part:

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

…

(e) The department may not waive the interest imposed under this section.

Since taxpayer incurred a deficiency upon a determination by the Department, as explained in Issue I, the Department may not waive interest under IC 6-8.1-10-1.

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

45 IAC 15-11-2(c) 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 has affirmatively established that it did not owe the deficiency, and was not negligent, as explained by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

05-20050338.LOF

LETTER OF FINDINGS NUMBER: 05-0338
Cigarette Tax
For Tax 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.

I. Cigarette Tax--Imposition

Authority: IC 6-8.1-5-1(b); 45 IAC 15-5-3(b); IC 6-7-1-1

Taxpayer protests the imposition of cigarette tax.

II. Tax Administration—Negligence Penalty and Interest

Authority: IC 6-8.1-10-1; IC 6-8.1-10-2.1

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax on cigarettes ordered via the internet and delivered in Indiana. Taxpayer protests that she does not owe these taxes. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

The cigarette tax is found at IC 6-7-1-1, which states:

> It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department refers to IC 6-8.1-5-1(a), which states:

> If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

The Department received information from the vendor (through the Jenkins Act) naming taxpayer as the purchaser of cigarettes. The Department made proposed assessments based on the best information available to it, as provided by IC 6-8.1-5-1(a).

Taxpayer argues that she did not purchase cigarettes from the vendor. To that end taxpayer has provided the Department with sufficient documentation and explanation to show that she did not buy, sell, use, consume, handle, or distribute the cigarettes. Taxpayer has met her burden of proof.

FINDING

Taxpayer's protest is sustained.

II. Tax Administration—Negligence Penalty

DISCUSSION

Regarding the penalty and interest that was assessed under IC 6-8.1-10-2.1 and IC 6-8.1-10-1, since the taxpayer has shown that it did not owe the cigarette tax (*See* Section **I.**, *supra*), the taxpayer prevails on this issue too.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0520050340.LOF

LETTER OF FINDINGS NUMBER: 05-0340
Cigarette Tax, Use Tax and Penalty
For Tax Years 2004 and 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

III. Tax Administration—Negligence Penalty and Interest

Authority: IC 6-8.1-10-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax, use tax, and penalty on cigarettes ordered via the internet and delivered in Indiana. Taxpayer protests that she does not owe these taxes.

Taxpayer was notified of a hearing to be held on March 1, 2006. However, Taxpayer did not wish to participate in the hearing, and thus this letter of findings is written based on the information contained in the Department's file. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

Taxpayer protests the imposition of cigarette tax. Taxpayer argues that she does not owe cigarette tax. Taxpayer argues that cigarette taxes were paid to Kentucky.

The cigarette tax is found at IC 6-7-1-1, which states:

> It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes under the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. The Jenkins Act states in relevant part:

> (a) Contents. Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

(b) Presumptive evidence. The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

15 U.S.C. § 376

Also of relevance, a distributor is defined by 15 U.S.C. § 375(3) as:

(A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes. Rather than providing a mechanism for which a consumer's identity is shielded, the Jenkins Act provides that the consumer's identity must be revealed to the Department if the sale of cigarettes is in interstate commerce.

Taxpayer did not file a return with the Department which included the cigarette taxes. The Department refers to IC 6-8.1-5-1(a), which states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

The Department received information from the vendor naming taxpayer as the purchaser of cigarettes. The Department made proposed assessments based on the best information available to it, as provided by IC 6-8.1-5-1(a).

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on her purchase of cigarettes ordered via the internet and delivered in Indiana. Taxpayer offers the same arguments as in Issue I. The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use, or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

III. Tax Administration—Negligence Penalty and Interest

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to IC 6-8.1-10-1, which states in relevant part:

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

…

(e) The department may not waive the interest imposed under this section.

Since taxpayer incurred a deficiency upon a determination by the Department, as explained in Issues I and II, the Department may not waive interest under IC 6-8.1-10-1.

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

45 IAC 15-11-2(c) 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 affirmatively established that her 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 0520050341.LOF

LETTER OF FINDINGS NUMBER: 05-0341

Cigarette Tax

For Tax Years 2004 and 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

III. Tax Administration—Negligence Penalty and Interest

Authority: IC 6-8.1-10-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax, use tax, and penalty on cigarettes ordered via the internet and delivered in Indiana. Taxpayer protests that she does not owe these taxes. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

Taxpayer protests the imposition of cigarette tax. Taxpayer argues that she does not owe cigarette tax. Taxpayer states that she believes the vendor paid tax prior to her purchase.

The cigarette tax is found at IC 6-7-1-1, which states:

> It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, telephone or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes due to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. The Jenkins Act states in relevant part:

> (a) Contents. Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--
>
> > (1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and
> >
> > (2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.
>
> (b) Presumptive evidence. The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or

transfer was to other than a distributor licensed by or located in such State.

15 U.S.C. § 376

Also of relevance, a distributor is defined by 15 U.S.C. § 375(3) as:

(A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes.

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on its purchase of cigarettes ordered via the internet and delivered in Indiana. Taxpayer offers the same arguments as in Issue I. The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

III. Tax Administration—Negligence Penalty and Interest

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to IC 6-8.1-10-1, which states in relevant part:

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

…

(e) The department may not waive the interest imposed under this section.

Since taxpayer incurred a deficiency upon a determination by the Department, as explained in Issues I and II, the Department may not waive interest under IC 6-8.1-10-1.

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

45 IAC 15-11-2(c) 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 affirmatively established that her failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c). The Department cannot waive interest, under IC 6-8.1-10-1. The negligence penalty shall be waived.

FINDING

Taxpayer's protest is sustained regarding penalty and denied regarding interest.

DEPARTMENT OF STATE REVENUE

0520050344.LOF

LETTER OF FINDINGS NUMBER: 05-0344
Cigarette Tax, Use Tax and Penalty
For Tax Years 2004 and 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

III. 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 negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that Taxpayer owed cigarette tax, use tax, and penalty on cigarettes ordered via the internet and delivered in Indiana. Taxpayer protests that he does not owe these taxes.

On February 2, 2006, Taxpayer was notified by mail of a hearing to be held on March 1, 2006. However, at the designated time of the hearing, Taxpayer neither appeared at the Department's office nor called the hearing officer assigned to the file, and thus this letter of findings is written based on the information contained in the Department's file. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

Taxpayer protests the imposition of cigarette tax. In particular, Taxpayer argues that he was unaware of the ramifications of purchasing cigarettes out-of-state, and that the Department had not provided any published guidance with respect to the cigarette tax. Taxpayer makes this argument notwithstanding the fact that the tax at issue was first enacted in 1947, with current Department regulations promulgated in 1982.

The cigarette tax is found at IC 6-7-1-1, which states:

> It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes pursuant to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. The Jenkins Act, first enacted in 1949 and amended to its current language in 1955, states in relevant part:

> (a) Contents. Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--
>
> > (1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and
> >
> > (2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.
>
> (b) Presumptive evidence. The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.
>
> 15 U.S.C. § 376

Also of relevance, a distributor is defined by 15 U.S.C. § 375(3) as:

> (A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or
>
> (B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;
>
> but such term in no case includes a person who acquires cigarettes for purposes other than resale.

15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes.

Taxpayer did not file a return with the Department which included the cigarette taxes. The Department refers to IC 6-8.1-5-1(a), which states:

> If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

The Department received information from the vendor naming taxpayer as the purchaser of cigarettes. The Department made proposed assessments based on the best information available to it, as provided by IC 6-8.1-5-1(a).

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on his purchase of cigarettes ordered via the internet and delivered in Indiana. Taxpayer offers the same arguments as in Issue I. The use tax, first enacted in 1963, is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

> 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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

> 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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

III. Tax Administration—Negligence Penalty

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. With regard to the 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 read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) 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 affirmatively established that his 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

0520050408.LOF

LETTER OF FINDINGS NUMBER: 05-0408
Cigarette Tax
For Tax Years 2004 and 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-7-1-24; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

III. Tax Administration—Negligence Penalty and Interest

Authority: IC 6-8.1-10-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax, use tax and penalty on cigarettes ordered via the internet and telephone and delivered in Indiana. Taxpayer protests that he does not owe these taxes. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

Taxpayer protests the imposition of cigarette tax. Taxpayer argues that he does not owe cigarette tax. Taxpayer states that there were no warnings about possible tax liabilities on the website and that he had no way of knowing about the taxes.

The cigarette tax is found at IC 6-7-1-1, which states:

It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, by telephone or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes due to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. The Jenkins Act states in relevant part:

(a) Contents. Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

(b) Presumptive evidence. The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

15 U.S.C. § 376

Also of relevance, a distributor is defined by 15 U.S.C. § 375(3) as:

(A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes. Rather than providing a mechanism for which a consumer's identity is shielded, the Jenkins Act merely provides that the consumer's identity must be revealed to the Department if the sale of cigarettes is in interstate commerce.

Taxpayer protests that he believes he is entitled to 1500 cigarettes a year without paying taxes on them. Taxpayer refers to IC 6-7-1-24(d), which states:

The possession of more than one thousand five hundred (1,500) cigarettes in packages not bearing Indiana tax stamps by any person other than a distributor, a common carrier, or an employee of the state or federal government performing his official duties in the enforcement of this chapter constitutes prima facie evidence that the cigarettes are possessed for the purpose of sale.

This means that if a person possesses more than 1,500 cigarettes not bearing Indiana tax stamps, the possession is proof that the cigarettes are possessed for resale. This does not mean that any of the cigarettes are tax-free, even if they are for personal use.

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on its purchase of cigarettes ordered via the internet and delivered in Indiana. Taxpayer offers the same arguments as in Issue I. The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

III. Tax Administration—Negligence Penalty and Interest

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to IC 6-8.1-10-1, which states in relevant part:

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

…

(e) The department may not waive the interest imposed under this section.

Since taxpayer incurred a deficiency upon a determination by the Department, as explained in Issues I and II, the Department may not waive interest under IC 6-8.1-10-1.

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

45 IAC 15-11-2(c) 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 affirmatively established by documentation and explanation that his failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c). The interest cannot be waived, under IC 6-8.1-10-1. The negligence penalty shall be waived.

FINDING

Taxpayer's protest is sustained regarding penalty and denied regarding interest.

DEPARTMENT OF STATE REVENUE

05-20050410.LOF

LETTER OF FINDINGS NUMBER: 05-0410
Cigarette Tax
For Tax Years 2004 and 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.

I. Cigarette Tax--Imposition

Authority: IC 6-8.1-5-1(b); 45 IAC 15-5-3(b); IC 6-7-1-1; 15 U.S.C. §§ 375-378; IC 6-8.1-5-1(a)

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

III. Tax Administration—Negligence Penalty and Interest

Authority: IC 6-8.1-10-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax, use tax and penalty on cigarettes ordered via the internet and delivered in Indiana. Taxpayer protests that she does not owe these taxes. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

The cigarette tax is found at IC 6-7-1-1, which states:

> It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. *Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user.* Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

(*Emphasis* added). As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department's assessment is based on information received pursuant to the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes.

The Department refers to IC 6-8.1-5-1(a), which states:

> If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

The Department received information from the vendor naming taxpayer as the purchaser of cigarettes. The Department made proposed assessments based on the best information available to it, as provided by IC 6-8.1-5-1(a).

The taxpayer argues in a letter dated August 22, 2005, that she "was never notified from the company that [she] would be responsible for paying a tax on the cigarettes [she] had purchased." Further, taxpayer states, "It was my understanding the company would take care of it and therefore your department should be going after them not me, the consumer." To summarize, taxpayer does not believe she owes the taxes (she believes the vendor does), and she assumed the taxes were paid.

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. Despite the taxpayer's argument, IC 6-7-1-1 makes it clear that "the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the *retail purchaser or ultimate consumer, precollected for convenience and facility only.*" (*Emphasis* added) Thus the taxpayer owes the taxes.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on her purchase of cigarettes ordered via the internet and delivered in Indiana. Taxpayer offers the same arguments as in Issue I. The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

> 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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

> 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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

III. Tax Administration—Negligence Penalty and Interest

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to IC 6-8.1-10-1, which states in relevant part:

> (a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.
>
> …
>
> (e) The department may not waive the interest imposed under this section.

Since taxpayer incurred a deficiency upon a determination by the Department, as explained in Issues I and II, the Department may not waive interest under IC 6-8.1-10-1.

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

45 IAC 15-11-2(c) 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 affirmatively established that her 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

0120050415.LOF

LETTER OF FINDINGS: 05-0415
Individual Adjusted Gross Income Tax
For 2001 through 2004

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

ISSUES

I. Individual Adjusted Gross Income Tax Assessments.

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

Taxpayer maintains that the assessments are being protested because the income that has been used in the Department's calculations is incorrect.

STATEMENT OF FACTS

The taxpayer and his spouse are Indiana residents. The Department of Revenue (Department) completed an audit based upon the best information available for the tax years 2001 through 2004. In 2001 and 2002 the taxpayer was a sole proprietor. For the tax years 2003 and 2004 the taxpayer was a shareholder of a Subchapter S corporation.

DISCUSSION

I. Individual Adjusted Gross Income Tax Assessments.

Taxpayer's representative contends that the assessments are being protested because the income that has been used in the calculations is incorrect.

Lacking proper documentation, the Department was forced to base the proposed assessments upon the best information it had available. Indiana law provides as follows: "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 due on the basis of the best information available to the department." IC 6-8.1-5-1(a) (*Emphasis added*). In taxpayer's case, the Department believed that the "best information available" consisted of the limited records provided by the taxpayer. After obtaining that information, the Department fulfilled its legal responsibility to make a "proposed assessment." Indiana law provides that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is wrong." IC 6-8.1-5-1(b).

At hearing, the taxpayer's representative provided additional documentation in support of its protest. The representative contends that the assessments are being protested because the income that has been used in the calculations is incorrect. The representative argues that the auditor's computations were based upon all invoices that were mailed during the years in question (accrual basis). However, according to the taxpayer's representative, the returns were filed reporting income on the cash basis of accounting. Therefore, when reviewing the information on the cash basis, there should be no change to the taxpayer's personal return for the years in question.

FINDING

Taxpayer's protest is sustained subject to audit verification of taxpayer's records.

DEPARTMENT OF STATE REVENUE

0520050418.LOF

LETTER OF FINDINGS NUMBER: 05-0418
Cigarette Tax
For Tax 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

III. Tax Administration—Negligence Penalty and Interest

Authority: IC 6-8.1-10-1; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that taxpayer owed cigarette tax, use tax and penalty on cigarettes ordered via the internet and telephone and delivered in Indiana. Taxpayer protests that he does not owe these taxes. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

Taxpayer protests the imposition of cigarette tax. Taxpayer argues that he does not owe cigarette tax. Taxpayer states that there were no warnings about possible tax liabilities on the website and that he had no way of knowing about the taxes.

The cigarette tax is found at IC 6-7-1-1, which states:

It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, by telephone or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes due to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. The Jenkins Act states in relevant part:

(a) Contents. Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

(b) Presumptive evidence. The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

15 U.S.C. § 376

Also of relevance, a distributor is defined by 15 U.S.C. § 375(3) as:

(A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes.

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on its purchase of cigarettes ordered via the internet and delivered in Indiana. Taxpayer offers the same arguments as in Issue I. The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

III. Tax Administration—Negligence Penalty and Interest

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. Taxpayer protests the imposition of penalty and interest. With regard to interest, the Department refers to IC 6-8.1-10-1, which states in relevant part:

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

…

(e) The department may not waive the interest imposed under this section.

Since taxpayer incurred a deficiency upon a determination by the Department, as explained in Issues I and II, the Department may not waive interest under IC 6-8.1-10-1.

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

45 IAC 15-11-2(c) 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 affirmatively established by documentation and explanation 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). The interest cannot be waived, under IC 6-8.1-10-1. The negligence penalty shall be waived.

FINDING

Taxpayer's protest is sustained regarding penalty and denied regarding interest.

DEPARTMENT OF STATE REVENUE

0420050475.LOF

LETTER OF FINDINGS NUMBER 05-0475
RESPONSIBLE OFFICER
SALES AND WITHHOLDING TAX
For 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 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 withholding taxes against him as a responsible officer.

STATEMENT OF FACTS

The taxpayer was a director of a corporation that did not remit the proper amount of sales and withholding taxes to Indiana for the tax period 2001-2003. The Indiana Department of Revenue 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 contended that he merely loaned the corporation start-up and operating money and was not responsible for the payment of the taxes to the state. Further, he argued that he 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 his burden of proving that he 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

0520050476.LOF

LETTER OF FINDINGS NUMBER: 05-0476
Cigarette Tax, Use Tax and Penalty
For Tax Years 2004 and 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.

I. Cigarette Tax--Imposition

Authority: 15 U.S.C. §§ 375-378; IC 6-7-1-1; IC 6-8.1-5-1; 45 IAC 15-5-3

Taxpayer protests the imposition of cigarette tax.

II. Use Tax--Imposition

Authority: IC 6-2.5-3-2; IC 6-2.5-3-7; IC 6-8.1-5-1; 45 IAC 2.2-3-4

Taxpayer protests the imposition of use tax.

III. 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 negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an individual. As the result of an investigation, the Indiana Department of Revenue determined that Taxpayer owed cigarette tax, use tax, and penalty on cigarettes ordered via the internet and delivered in Indiana. Taxpayer protests that he does not owe these taxes.

On February 2, 2006, Taxpayer was notified by mail of a hearing to be held on March 1, 2006. However, at the designated time of the hearing, Taxpayer neither appeared at the Department's office nor called the hearing officer assigned to the file, and thus this letter of findings is written based on the information contained in the Department's file. Further facts will be supplied as required.

I. Cigarette Tax--Imposition

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC 6-8.1-5-1(b) states in pertinent part:

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

The Indiana Administrative Code also states "[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer…." 45 IAC 15-5-3(b).

Taxpayer protests the imposition of cigarette tax. Taxpayer argues that he does not owe cigarette tax. Taxpayer argues that the cigarettes were delivered to an Indiana address for his consumption, but the cigarettes were neither bought nor used in Indiana.

The cigarette tax is found at IC 6-7-1-1, which states:

It is the intent and purpose of this chapter to levy a tax on all cigarettes sold, used, consumed, handled, or distributed within this state, and to collect the tax from the person who first sells, uses, consumes, handles, or distributes the cigarettes. It is further the intent and purpose of this chapter that whenever any cigarettes are given for advertising or any purpose whatsoever, they shall be taxed in the same manner as if they were sold, used, consumed, handled, or distributed in this state. Notwithstanding any other provisions contained in this chapter, the liability for the excise taxes imposed by this chapter shall be conclusively presumed to be on the retail purchaser or ultimate consumer, precollected for convenience and facility only. When such taxes are paid by any other person, such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Distributors, wholesalers, or retailers may state the amount of the tax separately from the price of such cigarettes on all price display signs, sales or delivery slips, bills, and statements which advertise or indicate the price of such cigarettes.

As this statute makes clear, this tax applies to all purchases of cigarettes. It does not make a difference if the purchase is over the counter, via the internet, or in any other manner. Just as every person who purchases cigarettes in a store owes cigarette tax, so does the person who purchases cigarettes from an internet vendor.

The Department was informed that taxpayer had purchased cigarettes pursuant to the provisions of the Jenkins Act, 15 U.S.C. §§ 375-378, which is an enforcement mechanism for states to prevent evasion of state cigarette taxes. The Jenkins Act states in relevant part:

(a) Contents. Any person who sells or transfers for profit cigarettes in interstate commerce, whereby such cigarettes are shipped into a State taxing the sale or use of cigarettes to other than a distributor licensed by or located in such State, or who advertises or offers cigarettes for such sale or transfer and shipment, shall--

(1) first file with the tobacco tax administrator of the State into which such shipment is made or in which such advertisement or offer is disseminated a statement setting forth his name and trade name (if any), and the address of his principal place of business and of any other place of business; and

(2) not later than the 10th day of each calendar month, file with the tobacco tax administrator of the State into which such shipment is made, a memorandum or a copy of the invoice covering each and every shipment of cigarettes made during the previous calendar month into such State; the memorandum or invoice in each case to include the name and address of the person to whom the shipment was made, the brand, and the quantity thereof.

(b) Presumptive evidence. The fact that any person ships or delivers for shipment any cigarettes shall, if such shipment is into a State in which such person has filed a statement with the tobacco tax administrator under subsection (a) (1) of this section, be presumptive evidence (1) that such cigarettes were sold, or transferred for profit, by such person, and (2) that such sale or transfer was to other than a distributor licensed by or located in such State.

15 U.S.C. § 376

Also of relevance, a distributor is defined by 15 U.S.C. § 375(3) as:

(A) in the case of any State which by State statute or regulation authorizes the distribution of cigarettes at wholesale or retail, any person so authorized, or

(B) in the case of any other State, any person located in such State who distributes cigarettes at wholesale or retail;

but such term in no case includes a person who acquires cigarettes for purposes other than resale.

15 U.S.C. § 376 provides that a seller of cigarettes that sells cigarettes from one state to consumers for delivery in another state must provide the tobacco tax administrator of the state into which the cigarettes are distributed certain information. This information includes the name of the person to whom the cigarettes were sold, the brand of cigarettes sold, and the quantity of cigarettes sold. The Department's current assessment was based on information received pursuant to the Jenkins Act. The internet distributor was required by law to provide the names, brands, and quantities of all Indiana purchasers of its cigarettes. The internet distributor provided those names, and the Department sought to collect the tax from the persons to whom the distributor shipped its cigarettes. Rather than providing a mechanism for which a consumer's identity is shielded, the Jenkins Act provides that the consumer's identity must be revealed to the Department if the sale of cigarettes is in interstate commerce.

Taxpayer did not file a return with the Department which included the cigarette taxes. The Department refers to IC 6-8.1-5-1(a), which states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

The Department received information from the vendor naming taxpayer as the purchaser of cigarettes. The Department made proposed assessments based on the best information available to it, as provided by IC 6-8.1-5-1(a).

In conclusion, the Department received information under the Jenkins Act which named taxpayer as the purchaser of cigarettes in Indiana. The cigarette tax is imposed on all purchases of cigarettes in Indiana, including those purchases which are delivered into Indiana, as provided by IC 6-7-1-1. The burden of proving the assessment wrong rests with the taxpayer, as provided in IC 6-8.1-5-1(b). Taxpayer has not met this burden.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Imposition

DISCUSSION

Taxpayer protests the imposition of use tax on his purchase of cigarettes ordered via the internet and delivered in Indiana. Taxpayer offers the same arguments as in Issue I. The use tax is complementary to the sales tax and is found at IC 6-2.5-3-2(a), which states:

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.

Also of relevance is 45 IAC 2.2-3-4, which 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.

This means that Indiana use tax is due when Indiana sales tax is not collected. The Department has received no documentation to indicate, let alone establish, that sales tax was collected on the purchase of the cigarettes at issue.

As explained in Issue I, under IC 6-8.1-5-1(b) the burden of proving the assessment wrong rests with the taxpayer. Beyond this general burden is IC 6-2.5-3-7(a), which states:

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.

Taxpayer has not produced sufficient evidence to rebut the presumption that the cigarettes were acquired for storage, use or consumption in Indiana. Since Indiana sales tax was not collected on the purchase of the cigarettes, under IC 6-2.5-3-2(a) and 45 IAC 2.2-3-4, Indiana use tax is due on the purchase of the cigarettes. Taxpayer has not met the burden of proving the proposed assessment wrong, as explained under IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

III. Tax Administration—Negligence Penalty

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty and interest for the tax years in question. With regard to the 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 read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) 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 affirmatively established that his 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

0920050490.LOF

LETTER OF FINDINGS: 05-0490
County Innkeeper's Tax
For 2002

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

ISSUE

I. County Innkeeper's Tax

Authority: IC 6-2.5-2-1(b); IC 6-2.5-9-3; IC 6-9-18-3(a); IC 6-9-18-3(c) IC 6-9-18-3(e); 45 IAC 15-11-2(b).

Taxpayer argues that it should not be required to pay the County Innkeeper's Tax which it should have collected from its customers during 2002 because taxpayer was not aware that the tax had been adopted by Shelby County.

STATEMENT OF FACTS

Taxpayer is a hotel located in Shelby County Indiana. The hotel began operations on March 1, 2000.

Taxpayer failed to collect and remit the five percent Innkeeper's Tax from March 2, 2002, through September 30, 2002. The Department of Revenue (Department) conducted an investigation and prepared a report. The report stated that "[County Innkeeper's Tax] is now due in the amount of 5 [percent] of the gross lodging receipts for this period." As a result, the Department sent a notice of proposed assessment.

On the grounds that taxpayer was unaware of the Innkeeper's Tax and had not collected the tax from its customers during this period, taxpayer challenged the proposed assessment by filing a protest. An administrative hearing was conducted during which taxpayer explained the basis for the protest. This Letter of Findings results.

DISCUSSION

I. County Innkeeper's Tax

Taxpayer argues that it is not liable for the County Innkeeper's Tax which it should have collected during the seven-month period at issue because taxpayer was unaware that the tax had been imposed and because the tax had not been collected from taxpayer's customers.

IC 6-9-18-3(a) states that, "The fiscal body of a county may levy a tax on every person engaged in the business or renting or furnishing, for periods of less than thirty (30) days, any room or rooms, lodgings, or accommodations in any (1) hotel; (2) motel... (4) inn... or (7) tourist cabin; located in the county." Id.

IC 6-9-18-3(c) sets the maximum rate that a county may set for this tax. "The tax may not exceed the rate of five percent (5 [percent]) on the gross retail income derived from lodging income only and is in addition to the state gross retail tax imposed under IC 6-2.5." Id.

IC 6-9-18-3(e) describes the manner, means, and responsibilities attendant on the collection of the County Innkeeper's Tax. "All the provisions of IC 6-2.5 relating to rights, duties, liabilities, procedures, penalties, definitions, exemptions and administration are applicable to the imposition and administration of the tax imposed under this section...." Id.

IC 6-9-18-3(e) incorporates by reference the gross retail (sales) tax provisions. Among those is IC 6-2.5-2-1(b) which states that, "The retail merchant shall collect the tax as agent for the state." Also incorporated is IC 6-2.5-9-3 which – in relevant part – states that the retail merchant (the innkeeper), "has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department; [and] holds those taxes in trust for the state and is *personally liable* for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." (*Emphasis added*).

Nonetheless, taxpayer maintains that it should not now be found liable for the Innkeeper's Tax because it was unaware the tax had been implemented in Shelby County and that taxpayer only became aware of the tax after a customer pointed out the discrepancy between the rates taxpayer charged and the rates charged by competitors. Taxpayer explained that he called his county treasurer's office which was – according to taxpayer – unaware that Shelby County had adopted this tax. Taxpayer also stated that – after having filled out "zero balance" vouchers for the seven-month period during 2002 – taxpayer heard nothing on the matter until contacted by the Department in 2005.

Essentially, taxpayer argues that it should not be required to pay the Innkeeper's Tax assessment because it did not collect the tax from its customers. In support of this argument, taxpayer presented copies of its financial records which showed that, although taxpayer collected the five percent state sales tax, it did not collect the Innkeeper's Tax from its customers.

The Department cannot explain why – according to taxpayer – the Shelby County Treasurer was unaware that its county had adopted this tax on February 2, 2002. Nevertheless, the Department is not in a position to abate the tax on the ground that taxpayer was unaware of its responsibility to collect and forward the tax to the state. Rather, the Department assumes that both individuals and businesses are aware of their tax responsibilities or will make themselves aware of those responsibilities. "Ignorance of the listed tax laws, rules and/or regulations is treated as negligence." 45 IAC 15-11-2(b). The Department does not believe that it is reasonable to assume that those persons or businesses which – for whatever reason – remain unaware of their tax responsibilities should be excused from collecting and remitting that tax.

The Department has no reason to doubt taxpayer's good faith or that taxpayer may have been confused as to the applicability of the County Innkeeper's Tax. There is no reason to believe that taxpayer *did* collect tax but then withheld payment to the state. However, the statutory provisions are clear; taxpayer had a duty to collect the tax as an agent for the state and to forward that tax to the state. There is nothing in law or equity permitting the Department to abate this tax liability because taxpayer failed to collect the tax from its customers.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0320050497.LOF

LETTER OF FINDINGS: 05-0497
Withholding Tax
For 2003 Through 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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Withholding Tax.

Authority: IC 6-3-4-8

Taxpayer maintains that the Department's assessment for withholding tax is incorrect.

STATEMENT OF FACTS

The taxpayer was a sole proprietorship in 2001 and 2002. Taxpayer became a corporation in 2003. The taxpayer's sales are primarily marketing signs for realty agents, apartment complexes, contractors, property managers, and retail establishments. The audit was for the years January 1, 2003, through June 30, 2005. Some records were provided for 2003 and no records were provided to the Department's auditor for January 1, 2004, through June 30, 2005. In the records that were available during the audit, there were payments made to employees in the first quarter; however these payments were not included in the tax return figures or the general ledgers. The Department issued a "BIA" or best information available assessment. Taxpayer disagreed with the Department's decision and submitted a protest letter to that effect.

DISCUSSION

I. Withholding Tax.

Taxpayer maintains that the Department's assessment for withholding tax is incorrect.

IC 6-3-4-8(a) states in part that each "employer making payments of any wages... shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section...." Pursuant to IC 6-3-4-8(a), if an employer is required by the Internal Revenue Code to withhold federal taxes, that employer must do the same for state income tax purposes.

The taxpayer's representative contends that the amounts shown on the Department's audit summary sheet in the amount of $957.24 for 2003, $1,441.94 for 2004, and $2,059.10 for the period ending June 30, 2005, are incorrect. The representative at hearing provided a calculation and the associated returns received from an automated payroll service. The representative states that the proper amount of withholding due is $1,641.08 for 2003, $2,059.120 for 2004, and $713.35 for the period ending June 30, 2005.

FINDING

Taxpayer's protest is sustained subject to audit verification. The application of the ten percent negligence penalty will be dependant upon the outcome of audit's review. The ten percent penalty will be applicable to any remaining tax liability.

DEPARTMENT OF STATE REVENUE

04-20050501P.LOF

LETTER OF FINDINGS NUMBER 05-0501P
TAX ADMINISTRATION (USE TAX)—NEGLIGENCE PENALTY FOR
THE REPORTING PERIOD COVERING DECEMBER 2004

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

ISSUE

I. Tax Administration—Negligence Penalty—Effect of Partial Payment on Liability
Tax Administration— Effect of Oral Statement of Department Employee on Liability

Authority: IC §§ 6-8.1-5-1(b), -8-1.5 and -10-2.1(d) and (e) (2004); *State Bd. of Tax Comm'rs v. New Castle Lodge # 147, L.O.O.M.*, 765 N.E.2d 1257, 1264 (Ind. 2002); *Sholes v. Sholes*, 760 N.E.2d 156, 159 (Ind. 2001); *State Bd. of Tax Comm'rs v. Two Market Square Assocs., L.P.*, 679 N.E.2d 882, 885 (Ind. 1997); *Ind. Dep't of State Rev. v. Horizon Bancorp,* 644 N.E.2d 870, 872 (Ind. 1994); *Middleton Motors, Inc. v. Ind. Dep't of State Rev.,* 380 N.E.2d 79, 81 (Ind. 1978); *Hoogenboom-Nofziger v. State Bd. of Tax Comm'rs*, 715 N.E.2d 1018, 1024 and 1024-25 (Ind. Tax Ct. 1999); 45 IAC §§ 15-3-2(e), -5-3(b)(8) and -8-1 (2004)

The taxpayer protests the Audit Division's proposed assessment of a negligence penalty.

STATEMENT OF FACTS

The Department's Audit Division conducted a field audit of the taxpayer for the tax type and reporting periods set out in the heading of this Letter of Findings. As a result of the audit, the taxpayer incurred a tax deficiency. The field auditor recommended that the Audit Division waive assessing any negligence penalty, but it nevertheless assessed such a penalty. The taxpayer paid the Department the combined amount of the base tax and the accrued interest. The Department will provide additional information as needed.

DISCUSSION

A. TAXPAYER'S PROTEST

The representative's cover letter for the final payment alleges the field auditor advised the taxpayer not to pay the negligence penalty, and asks that the Department consider the assessment to be fully paid. The Department interprets these statements as a request by the taxpayer that the Department waive the negligence penalty imposed pursuant to IC § 6-8.1-10-2.1(a)(3) and (b)(4) (2004), and will analyze the request on that basis.

B. ANALYSIS

The taxpayer's request is based on three assumptions. The first is that the taxpayer can specify the component/s of a proposed assessment to which it wants partial payment/s to be applied. The second is that the Department has the discretion to change the order of application of such payment/s. The third and last is that the oral advice of a Department employee can bind the Department. The following Analysis will show that all three assumptions are wrong.

IC § 6-8.1-8-1.5 (2004), which sets out how the Department is to allocate partial payments on listed taxes, reads as follows:

Sec. 1.5. Whenever a taxpayer makes a partial payment on the taxpayer's tax liability, the department [of state revenue] *shall* apply the partial payment in the following order:

(1) To any penalty owed by the taxpayer.
(2) To any interest owed by the taxpayer.
(3) To the tax liability of the taxpayer.

Id. (Emphasis added.) The implementing regulation, 45 IAC § 15-8-1 (2004), is to the same effect. *See id.* (so stating, adding that the payment "*shall only* be [so] applied" to "the particular billing for a given year and tax[ ]")(emphasis and alterations added).

In *Indiana Department of State Revenue v. Horizon Bancorp*, 644 N.E.2d 870 (Ind. 1994), the Indiana Supreme Court set out certain general rules of statutory interpretation that bind the Department in applying the above statute and regulation to the present issue:

Nothing may be read into a statute which is not within the manifest intention of the legislature as gathered from the statute itself. …. An unambiguous statute must be held to mean what it plainly expresses, and its plain and obvious meaning may not be

> enlarged or restricted. …. Because a statute which is clear and unambiguous on its face needs no further interpretation beyond the plain and ordinary meaning of the words contained therein, the statute must be applied and enforced as written.

Id. at 872 (citations omitted). "The rules of statutory construction [also] apply to the construction of administrative regulations." *State Bd. of Tax Comm'rs v. Two Market Square Assocs., L.P.*, 679 N.E.2d 882, 885 (Ind. 1997) (alteration added).

Applying the above rules to IC § 6-8.1-8-1.5 and 45 IAC § 15-8-1, it is clear that the statute and the regulation do not confer any right on, or imply any right of, a taxpayer to tell the Department how to apply partial payment/s to an outstanding assessment. Nor does the statute give the Department discretion to apply partial payment/s to the part/s of an assessment that a taxpayer may request. Instead, IC § 6-8.1-8-1.5 and 45 IAC § 15-8-1 both state that the Department "shall[,]" and 45 IAC § 15-8-1 states that the Department "shall only[,]" *id.*, apply the partial payment to the various components of the liability in the order specified. *Sholes v. Sholes*, 760 N.E.2d 156 (Ind. 2001) states the usual effect of "shall" in a statute as follows:

> Indiana case law presumptively treats "shall" as mandatory … unless it appears clear from the context or the purpose of the statute that the legislature intended a different meaning. … We see no basis in the [former version of the civil pauper counsel] statute [in issue in *Sholes*, IC § 34-10-1-2 (1998),] to suggest any unusual or stylized meaning of a commonly understood word. Moreover, when a statute is unambiguous, a court must apply the plain and obvious meaning and not resort to other rules of construction.

Id. at 159 (citations and internal quotation marks omitted)(alteration added), *partially superseded on other grounds by statute*, Pub. L. 125-2002, § 1, 2002 Ind. Acts 1887, 1887-88, codified at IC § 34-10-1-2 (Supp. 2002). The supreme court went on to hold in that opinion, among other things, that "[a]s a matter of construction, we agree that the [former civil pauper counsel] statute by its terms confer[red] no discretion on the trial court to deny counsel if its terms [we]re met." *Id.*

Likewise, the Department has no discretion to ignore the order of assessment components set out in IC § 6-8.1-8-1.5 and 45 IAC § 15-8-1 to which a partial payment is to be applied. There is nothing in IC § 6-8.1-8-1.5 to suggest that the General Assembly intended "shall," as used in this statute, and the Department did not intend "shall" in 45 IAC § 15-8-1, to have an out-of-the-ordinary meaning. Such being the case, the Department must treat "shall" in IC § 6-8.1-8-1.5 and 45 IAC § 15-8-1 in its usual, mandatory sense. In addition, the word "only" in 45 IAC § 15-8-1 means that the specified order of application of partial payment/s is the sole, exclusive order the Department will use. *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 1577 (4th ed. 1976) (definition 1b, "only" "EXCLUSIVELY, SOLELY ….").

It follows that the Department must apply any partial payment/s received so as to satisfy the three components of an assessment in the literal order in which the statute and regulation list them. It follows that in situations like the present one, where a taxpayer makes partial payment/s equal to the base tax and accrued interest, the effect is to satisfy any negligence penalty or penalties imposed, then the accrued interest and a part of the base tax. The result of such payment/s is to leave a reduced base tax deficiency outstanding on which interest will begin accruing anew if it is left unsatisfied.

Turning to the taxpayer's third assumption, the Department will likewise assume for purposes of discussion, without necessarily finding, that the field auditor gave the advice alleged. That being said, it should be clear from the foregoing discussion that the alleged advice would have had no effect, since the taxpayer would already have satisfied the negligence penalty by the time the auditor allegedly gave that advice. Even if the penalty were still unsatisfied, however, the law is clear that the field auditor's alleged advice would not have bound the Department. Its own regulation is sufficient to give the taxpayer constructive notice that such would have been the case: "Oral opinions or advice will not be binding upon the department." 45 IAC § 15-3-2(e) (2004). In addition, the Indiana Supreme Court has ruled to the same effect. In *Middleton Motors, Inc. v. Ind. Dep't of State Rev.,* 380 N.E.2d 79 (Ind. 1978), *vacating* 366 N.E.2d 226 (Ind. Ct. App. 1977), the named taxpayer had relied on wrong advice of a former deputy director of revenue that the period for bringing suit on a denied claim for refund was substantially longer than that actually set out in the refund nonsuit statute. 366 N.E.2d at 227. The supreme court affirmed the trial court's dismissal of the untimely refund suit, stating: "All persons are charged with the knowledge of the rights and remedies prescribed by [Indiana's tax] statute[s]." 380 N.E.2d at 81 (alterations added). Such knowledge necessarily includes whether rights or remedies under those statutes actually exist, if so what conditions are imposed on their availability, what acts will and will not invoke them, and any restrictions on exercising them.

Middleton Motors thus imputes to persons subject to the listed taxes constructive knowledge of IC §§ 6-8.1-8-1.5 and -10-2.1(d) and (e). In particular, regarding the present situation, such knowledge of IC § 6-8.1-8-1.5 includes knowledge that a taxpayer has no right under that statute to specify how the Department is to apply partial payment/s on an assessment of a listed tax. Constructive knowledge of IC § 6-8.1-10-2.1(d) and (e) includes knowledge that the Department may (but is not necessarily required to) waive a negligence penalty only when the person requesting such a waiver complies with the procedures set out in those subsections for doing so. The present taxpayer did not comply with those subsections, and the Department therefore cannot consider, and the taxpayer is not entitled to, relief from the negligence penalty assessed.

As previously noted, the effect of the taxpayer's partial payment was to leave a reduced base tax deficiency outstanding. The taxpayer has made no argument as to why the base tax assessment is wrong, as IC § 6-8.1-5-1(b) requires. 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 the rationale for this rule 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 (alterations added).

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02-20050506.LOF

LETTER OF FINDINGS NUMBER: 05-0506
Gross Income Tax and Adjusted Gross Income Tax
For the Years 2001-2002

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. Gross Income Tax--Interstate Commerce

Authority: 45 IAC 1.1-3-3

Taxpayer protests the assessment of gross income tax on certain sales that Taxpayer maintains were made in interstate commerce.

II. Adjusted Gross Income Tax—Royalty Expenses

Authority: Ind. Code § 6-3-2-2

Taxpayer protests the disallowance of deductions for royalties paid to a sister corporation, along with the disallowance of net operating loss carryforwards from years in which the statute of limitations has passed.

III. Tax Administration--Negligence Penalty

Authority: Ind. Code § 6-3-4-4.1; Ind. Code § 6-8.1-10-2.1

Taxpayer protests penalties based on Taxpayer's failure to make estimated tax payments.

STATEMENT OF FACTS

Taxpayer is a company engaged in the sale of food and food service supplies. Taxpayer operates three sales offices, three transit and delivery stations, and thirteen retail stores in Indiana. Taxpayer has two types of operations, which will be described as grocery-type operations and restaurant-type operations. Taxpayer's grocery-type operations are ones in which customers enter Taxpayer's retail stores and purchase food and other related items for personal or group use. Taxpayer's restaurant-type operations are ones in which Taxpayer delivers items ordered by restaurants, cafeteria, and similar customers. Taxpayer excluded some restaurant-type sales made to Indiana customers from its gross income for gross income tax purposes. However, upon audit of Taxpayer, the Department concluded that the sales were connected with an Indiana business situs and assessed gross income tax.

In addition, Taxpayer deducted payments made to a sister corporation (hereinafter "TP Brands") which Taxpayer paid for the use of intellectual property. For the period from 1998 to 2000, the deduction resulted in a net operating loss that Taxpayer carried forward to 2001 and 2002. The auditor disallowed the net operating loss carryforwards from 1998 to 2000 that Taxpayer used in 2001. For 2001 and 2002, the Department disallowed Taxpayer's deductions for payment to TP Brands and assessed additional adjusted gross income tax.

Further, Taxpayer claimed a deduction for a special depreciation allowance permitted under federal law but not permitted under Indiana law. Taxpayer has conceded this issue.

Finally, Taxpayer protests the imposition of penalties imposed for underpayment of estimated taxes determined to be due. Taxpayer protests that the Department made its penalty assessment based on calculations that used Taxpayer's amount of tax as determined by the Department's audit as a basis for determining the amount of tax due rather than the amount listed on Taxpayer's return as filed. Additional facts will be supplied as necessary.

I. Gross Income Tax—Interstate Commerce

DISCUSSION

Taxpayer argues that the restaurant-type sales were negotiated by out-of-state personnel and accordingly should not be subject to gross income tax. Taxpayer asserts that the sales in question were not connected to an Indiana business situs, and cites 45 IAC 1.1-3-3(c)(5) for the proposition that sales not connected with Taxpayer's business situs should be exempt from gross income tax. That regulation states:

Gross income derived from the sale of tangible personal property in interstate commerce is not subject to the gross income tax if the sale is not completed in Indiana. The following examples are situations where a sale is not completed in Indiana prior to or after shipment in interstate commerce:

* * *

(5) A sale to an Indiana buyer by a nonresident with an in-state business situs or activities but the situs or activities are not significantly associated with the sale because it was initiated, negotiated, and serviced by out-of-state personnel, and the goods are shipped from out-of-state. The in-state business situs or activities will be considered significantly associated with the sale if the sale is initiated, negotiated, or serviced by in-state personnel.

Also of note is 45 IAC 1.1-3-3(d)(7), which states in relevant part

Gross income derived from the sale of tangible personal property in interstate commerce is subject to the gross income tax if the sale is completed in Indiana. The following examples are situations where a sale is completed in Indiana prior to or after shipment in interstate commerce:

* * *

(7) A sale to an Indiana buyer by a nonresident seller if the sale:

(A) originated from;

(B) was channeled through; or

(C) was otherwise connected with;

an Indiana business situs established by the seller.

As noted in the audit report, Taxpayer has several locations in Indiana, which gave Taxpayer an Indiana business situs. These locations include sales offices, delivery stations, and retail stores. Taxpayer has not provided sufficient information to conclude that the sales in controversy for gross income tax purposes were not associated with Taxpayer's Indiana business situs.

FINDING

Taxpayer's protest is denied.

II. Adjusted Gross Income Tax—Royalty Expense

DISCUSSION

Taxpayer argues that the expenses for royalties paid to TP Brands should be permitted for 2001 and 2002. In particular, Taxpayer notes that the auditor indicated that the assessment was made pursuant to Ind. Code § 6-3-2-2(*l*). Taxpayer states that this section deals with apportionment and allocation rather than the disallowance of deductions. Taxpayer notes that Ind. Code § 6-3-2-2(m) is a more appropriate section for the rationale of the Department's assessment. The Department agrees that subsection (m) is more appropriate than subsection (*l*) for the disallowance of deductions.

Taxpayer argues that the Department's conclusion—that disallowing the deduction for payments from Taxpayer to TP Brands more fairly reflected Taxpayer's Indiana income—was erroneous.

First, Taxpayer claimed deductions of almost $76,000,000 in royalties for 2001 and 2002. Taxpayer's income—taking into account the royalty payments—was $4,000,000 for 2001 and a net *loss* of $5,000,000 for 2002. Taxpayer and TP Brands' shareholders—the identical shareholders—are in exactly the same position as if Taxpayer had earned a $75,000,000 profit. In summary, Taxpayer operated a business that *generated* a net profit of $75,000,000, but *reported* a net loss for tax purposes by virtue of a claimed deduction for royalties to a related party. The arbitrary reduction of income leads to a conclusion that Taxpayer's income was not fairly reflected in its returns as filed, and the Department's disallowance of the royalty deductions for payments to TP Brands more fairly reflected Taxpayer's Indiana income.

Second, Taxpayer argues that the arrangement between Taxpayer and TP Brands had a valid business purpose and substance beyond simply garnering tax benefits. At the hearing, Taxpayer's representative indicated that the Department had not provided notice or guidance with respect to the issue of royalty or intangible income expenses. The Department's auditor sent correspondence to Taxpayer on November 11, 2004. In relevant part, the request for additional information (page 16 of the Department's audit report) requested the following (grammar and punctuation in original):

1. Who are royalties paid to and what for. Where is the recipient of the royalty fees located and what business activities are they engaged in. How is the dollar amount of the royalty fee determined?

2. Who owns [Taxpayer] trademarks? [TP Brands]. Who is responsible for the expense of maintaining and defending the trademarks?

On February 18, 2005, the Department's auditor sent additional information (page 17 of the audit report) requesting the following (grammar and punctuation in original):

1. What are the royalty fees paid for? Specifically, what do any trademarks or intellectual property held by [TP Brands] relate

to? Who developed any trademarks, trade names, patents, etc.?
2. Are the royalty fees pursuant to a licensing agreement? May I please have a copy of this agreement?
3. How and by whom was the amount of the royalty fees determined? How was the value of the intellectual properties determined?
4. I need to know the history of the trademarks and the companies holding them. When and how was [TP Brands] formed? Explain the transactions involved in the formation of this company. Through what transactions did [TP Brands] acquire any intellectual property? Who held the marks prior to the formation of the company currently holding them? Has [Taxpayer] always paid royalty fees for the use of the trademarks? Did [Taxpayer] pay royalty fees prior to [TP Brands]?
5. What is the business purpose of [TP Brands]? What activities does this holding company engage in? What activities does it engaged in related to intellectual property? Is it involved in creating, enhancing, or protecting intellectual properties? How many employees and officers are there and where are they located. What are the employee's and officers' responsibilities? What property does the holding company have. Does the holding company loan money to affiliates. If so, to whom and how much and for what interest charge? Are loan contracts available? What intellectual property does the company hold. Please provide a recent annual financial statement for [TP Brands].

Finally, on July 22, 2005, the Department auditor submitted a final request to Taxpayer for information to be submitted in the final audit report due August 9, 2005. In relevant part, the letter (pages 18 and 19 of the audit report) stated (grammar and punctuation in original):

A. Are there inter-company royalty charges?
- 1. Who holds the patent and/or trademark?
  - a. Is it a domestic (U.S.) company?
  - b. Is it a foreign operating company?
- 2. Who developed the patent and/or trademark?
- 3. For what are the patent and/or trademark?
- 4. How was the value of the patent and/or trademark determined? By whom?
- 5. How were the patent and/or trademark transferred?
- 6. When were the patent and/or trademark transferred?
- 7. Who determined the basis on which to charge royalties and the rate to be charged?

B. Is any income received by the royalty receiving company from unrelated parties? If so,
- 1. Is it from royalty payments?
- 2. Is it interest?

C. Does the royalty receiving company have any employees?
- 1. What are their duties?
- 2. Who are the officers?
- 3. Who pays the employees?
- 4. Who makes the day-to-day operating decisions?

D. Who handles the administrative functions (maintains books and records, prepares financials, prepares tax returns) for the royalty receiving company?

E. Does the royalty receiving company have property other than the patent and/or trademark? If so, what?

F. Income from patent and/or trademark
- 1. What does the royalty receiving company do with the income generated by the patent and/or trademark?
  - a. Research and development?
  - b. Protecting the patent and/or trademark?
  - c. Patent and/or trademark litigation?
- 2. Is the income returned to the royalty paying company?
  - a. Inter-company loans?
    - i. Is there a loan agreement?
    - ii. What rate of interest is charged?
    - iii. Are periodic payments made on this loan?
  - b. Dividends?
- 3. Are loans made to unrelated third parties?

The auditor further requested the following information in the July 22, 2005, letter:

A. Minutes of Board of Directors meeting regarding the formation of the royalty receiving company and minutes from meeting concerning the original issue of company's stock.

B. Copy of independent appraisers report determining the value of the patent and/or trademark

C. Copy of Royalty Agreement

D. Copy of all inter-company loan agreements, notes receivable and revolving credit lines.

E. Names, titles and social security numbers of the officers of the royalty receiving company.

Taxpayer never provided this information to the Department despite three requests. At the hearing on March 22, 2006, Taxpayer's representative protested that Taxpayer did not know what information would be considered sufficient to prove their case, notwithstanding the prior correspondence referenced above. The Department's hearing officer reiterated the requests for information, and Taxpayer's representative indicated that Taxpayer would attempt to supply the information by the end of that business day. Taxpayer did not provide any documentation requested by the hearing officer.

Furthermore, the Department attempted to search federal records for intellectual property that might be held by TP Brands. There were no records associated with TP Brands' name; however, Taxpayer's name showed up repeatedly as owner of various items of intellectual property.

The lack of documentation of the royalty arrangement, lack of identifiable intellectual property, along with payments of $76,000,000 to an entity in a state where Taxpayer has neither a store or even sales (but which state does not impose an income tax on the income of TP Brands), lend further weight to the conclusion that the deductions for royalties paid by Taxpayer to TP Brands were properly disallowed.

With respect to the disallowance of net operating loss carryforwards, the Department is not seeking to reassess the years 1998 to 2000. The Department is seeking to assess 2001 and 2002, and the redetermination of net operating loss carryforwards from 1998 to 2000 is necessary to permit the correct computation of tax for 2001 and 2002. Accordingly, Taxpayer's protest is denied with respect to net operating loss carryforwards from 1998 to 2000.

FINDING

Taxpayer's protest is denied.

III. Tax Administration--Negligence Penalty

DISCUSSION

Taxpayer protests the imposition of penalties under Ind. Code § 6-8.1-10-2.1 for failure to make sufficient estimated payments of tax, as required by Ind. Code § 6-3-4-4.1. Taxpayer argues that the failure to make estimated payments of tax due based on the amount of tax determined due by the Department. Other than an assertion that the penalty is the imposition of a "double penalty," Taxpayer has not sufficiently developed this argument, and accordingly is denied.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420050523.LOF

LETTER OF FINDINGS: 05-0523
USE TAX
FOR TAX YEARS 2003-2004

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

ISSUE

I. Use Tax: Collection Letters

Authority: IC 6-8.1-5-1(b); IC 6-2.5-1-1; IC 6-2.5-1-2; IC 6-2.5-4-1; 45 IAC 2.2-1-1; 45 IAC 2.2-4-2; Cowden & Sons Trucking, Inc. v, Indiana Dep't of Revenue, 575 N.E.2d 718 (Ind. Tax Ct. 1991); Chrome Deposit Corporation v. Indiana Dep't of Revenue, 557 N.E.2d 1110 (Ind. Tax Ct. 1990), aff'd, 578 N.E.2d 643 (Ind. 1991); Galligan v. Indiana Dep't of Revenue, 825 N.E. 2d 467, 481 (Ind. Tax Ct. 2005); Commissioner's Directive Number 21 (January 2004).

Taxpayer protests the assessment of use tax on purchases of collection letters made from an out of state company.

STATEMENT OF FACTS

Taxpayer is an Indiana collection agency that collects delinquent accounts receivables from patients of various healthcare providers. The taxpayer utilizes a combination of standardized mailings and telephoning techniques to make collections. To produce its monthly letters, the taxpayer sends self-composed text and its database of accounts receivable to an out of state company ("Company") via the internet. The Company produces and mails a specified quantity of custom letters to ninety-nine percent (99%) of taxpayer's Indiana addresses. On a monthly basis, the Company bills the taxpayer and itemizes its invoices by quantities multiplied by units of product types. The Indiana Department of Revenue ("Department") conducted an audit review and assessed use tax on the taxpayer's purchases from the Company. 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.

DISCUSSION

I. Use Tax: Collection Letters

The audit review viewed the taxpayer's purchase of collection letters as part of a retail unitary transaction and subject to use tax under the provisions of 45 IAC 2.2-1-1. 45 IAC 2.2-1-1(a) provides:

For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction….

I.C. 6-2.5-1-2(b) defines a retail unitary transaction as "a unitary transaction that is also a retail transaction." A unitary transaction is "all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." IC 6.2.5-1-1(a). A retail transaction is "a transaction of a retail merchant that constitutes selling at retail as described in IC 6-2.5-4-1…." IC 6-2.5-1-2(a). IC 6-2.5-4-1 states:

(b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

(1) acquires tangible personal property for the purpose of resale; and

(2) transfers that property to another person for consideration.

(c) For purposes of determining what constitutes selling at retail, it does not matter whether:

(1) the property is transferred in the same form as when it was acquired;

(2) the property is transferred alone or in conjunction with other property or services; or

(3) the property is transferred conditionally or otherwise.

(d) Notwithstanding subsection (b), a person is not selling at retail if he is making a wholesale sale as described in section 2 of this chapter.

(e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

(1) the price of the property transferred, without the rendition of any services, and

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

The audit review additionally determined that because the cost of delivery was included in the unit cost charged to the taxpayer, the sales and use tax also applied to the delivery charges for the 2004 tax year. Commissioner's Directive Number 21 (January 2004) clarified the IC 6-2.5-4-1 definition of "selling at retail" to include:

delivery charges in gross retail income and charges by the seller for the preparation and delivery of the property to a location designated by the purchaser, including but not limited to transportation, shipping, postage, handling, crating and packing.

Indiana Department of Revenue assessments are prima facie evidence the department's claim for unpaid taxes is valid. IC 6-8.1-5-1(b). The taxpayer has the burden of proving whether the department incorrectly imposed the assessment. Id.

The taxpayer explains in its protest letter that "many transactions involve the exchange of a mix of services and tangible personal property for consideration. These so call[ed] 'mixed transactions' are considered transactions of retail merchants selling at retail and are therefore subject to gross retail/use tax." However, if the transaction satisfies 45 IAC 2.2-4-2(a)(1)-(4), collectively referred to as the "true object" test, the transaction is not subject to gross retail/use taxes. Cowden & Sons Trucking, Inc. v. Indiana Dep't of Revenue, 575 N.E.2d 718, 724 (Ind. Tax Ct. 1991).

The taxpayer contends its transaction with the Company satisfied the "true object" test for the following reasons: 1) the transaction was with a professional data processing service provider that processed information into custom letters; 2) the paper and reply envelopes were necessary because the Company could not produce the custom letters without consuming paper and envelopes; 3) taking out the cost of paper and envelopes, the items of tangible personal property only accounted for six percent of the total fees charged by the Company and was inconsequential (did not exceed ten percent) compared with the service charge; and 4) the Company paid sales and use tax on the tangible personal property at the time it acquired the property. The taxpayer further contends its transaction is not subject to use tax under the "but for" test. The "but for" test considers the intent of the parties to determine whether a mixed transaction is one for services or for the sales of goods. Chrome Deposit Corporation v. Indiana Dep't of Revenue, 557 N.E.2d 1110, 1114 (Ind. Tax Ct. 1990), aff'd, 578 N.E.2d 643 (Ind. 1991).

However, based on case law, this is not a persuasive argument. The tax court has previously questioned the validity of regulation 45 IAC 2.2-4-2. Galligan. v. Indiana Dep't of Revenue, 825 N.E. 2d 467, 480 n.16 (Ind. Tax Ct. 2005). The court in Galligan stated:

Services rendered in retail unitary transactions are taxable only ***if the transfer of the property and the rendition of services are inextricable and indivisible***. See Howland, 790 N.E.2d at 629 (citation omitted). Generally, the transfer of property and the rendition of services are inextricable and indivisible when the services are performed before the property was transferred to the transferee… Services provided after a transfer of property, however, indicate a divisible transaction in which the sale is taxed but the services are not… The Court must look to other factors to determine whether the transaction is inextricable and indivisible, such as the service-provider's records, the overall nature of its business, as well as the nature of the unitary transactions themselves…. Based on the… evidence… th[e] Court [must] find that [the service provider] ***intended to treat the transfer of property and the provisions of its services separately***…

Id. at 481 (emphasis added). Using this analysis, the determination of whether a mixed transaction is taxable hinges on whether the rendition of the services is inextricable and indivisible. Moreover, the determination of whether a service is inextricable and indivisible involves determining the intent of the service provider.

The audit review was correct to conclude that the taxpayer's purchases from the Company were part of a retail unitary transaction. The fact that the Company bills the taxpayer by itemizing the invoices by quantities multiplied by the product types, confirms that the Company did not intend to treat the transfer of property and services separately. Moreover, the fact that the Company supplied information breaking into percentages the component parts of how it billed the taxpayer does not affect the nature or taxability of the original transaction. The majority of the components represent postage and tangible property. Therefore, the audit review correctly treated the purchases as a retail unitary transaction subject to use tax.

FINDING

The Department denies the taxpayer's protest.

DEPARTMENT OF STATE REVENUE

0420050528.LOF

LETTER OF FINDINGS NUMBER: 05-0528
Sales and Use Tax
For Tax Year 2002

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

ISSUE

I. Sales and Use—Aircraft Purchase

Authority: IC 6-2.5-5-8; IC 6-8.1-5-1; 45 IAC 2.2-5-15

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

STATEMENT OF FACTS

Taxpayer 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—Aircraft Purchase

DISCUSSION

Taxpayer protests the denial of a claim for exemption on the purchase of a helicopter. Taxpayer purchased the helicopter in May of 2002, and did not pay sales tax on the purchase. Taxpayer filed a claim for exemption since the helicopter would be leased or rented to others. The exemption for rental and leasing is found at IC 6-2.5-5-8(b), which states:

Transactions involving tangible personal property other than a new motor vehicle 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 the person's business without changing the form of the property.

Also of relevance is 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.

The Department of Revenue examined taxpayer's claim for the rental and leasing exemption. After examining the information available to it, the Department determined that taxpayer did not qualify for the exemption. The information indicated that taxpayer was not occupationally engaged in the business of renting or leasing the helicopter to others. As a result of this determination, the Department issued a proposed assessment for tax on the purchase of the helicopter.

Taxpayer protested the proposed assessment. The protest letter is little more than a bare statement of protest and an assertion that the Department is wrong. Taxpayer has provided no new documentation and no explanation or analysis of why it does qualify for the rental and leasing exemption.

The Department refers to IC 6-8.1-5-1(b), which states that the taxpayer bears the burden of proving a proposed assessment wrong. As previously explained, taxpayer has not even provided a reason why the Department may be wrong, let alone proven the proposed assessment wrong. Taxpayer has not met the burden imposed by IC 6-8.1-5-1(b).

In conclusion, the Department determined that taxpayer did not qualify for the exemption found in IC 6-2.5-5-8(b). Taxpayer was not renting or leasing the helicopter to others as required by 45 IAC 2.2-5-15. Taxpayer has not met the burden of proving the proposed assessment wrong, as required by IC 6-8.1-5-1(b).

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420050529.LOF

LETTER OF FINDINGS NUMBER: 05-0529
Sales and Use Tax
For Tax Years 2004

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

ISSUE

I. Sales and Use—Aircraft Purchase

Authority: Gregory v. Helvering, 293 U.S. 465 (1935); IC 6-2.5-2-1; IC 6-2.5-5-27; IC 6-6-6.5-9; IC 6-8.1-5-1; 45 IAC 2.2-5-15; 45 IAC 2.2-4-27; Horn v. Commissioner of Internal Revenue, 968 f.2d 1229 (D.C. Cir. 1992); Commissioner v. Transp. Trading and Terminal Corp., 176 F.2d 570 (2nd Cir. 1949); Black's Law Dictionary (7th ed. 1999)

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

STATEMENT OF FACTS

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

I. Sales and Use—Aircraft Purchase

DISCUSSION

Taxpayer purchased an aircraft for one million, three hundred twenty five thousand dollars ($1,325,000.00) and claimed a sales tax exemption. The Department examined the claim for exemption and determined that taxpayer was not renting the aircraft and denied the exemption. Taxpayer protests the denial.

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

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

…

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

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

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

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

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

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

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

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

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

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

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

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

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

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

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

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

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

(c) Application of general rule.

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

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

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

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

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

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

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

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

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

In conclusion, taxpayer's reference to IC 6-6-6.5-9(a)(4) is inapplicable since it deals with aircraft licensing tax rather than sales tax. Taxpayer was not directly providing public transportation and was not eligible for the exemption described in IC 6-2.5-5-27. Taxpayer was not occupationally engaged in renting to others and does not qualify for the exemption found in 45 IAC 2.2-5-15. It is irrelevant if the leasing corporation was formed to shield taxpayer from liability in the event of a crash, since that would have no influence on the rental rate. Taxpayer was not collecting sales tax on the consideration it received from its customer when the customer paid for insurance, hangar, fuel, maintenance and crew, as required by 45 IAC 2.2-4-27(d). Taxpayer's relationship with its customer was too close and the terms of the rental agreement too generous to establish an arms-length business relationship. The rental/lease arrangement between taxpayer and its customer constitutes a "sham transaction" entered into for the sole purpose of avoiding taxes, as established in Gregory v. Helvering. Without a valid rental/lease agreement, taxpayer is ineligible for the rental exemption on the purchase of the aircraft. The Department notes that IC 6-8.1-5-1(b) places the burden of proving an assessment wrong rests with the taxpayer. In this case, the taxpayer has failed to provide any documentation supporting its case and has failed to prove the assessment wrong.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

4320050539.LOF

LETTER OF FINDINGS NUMBER: 05-0539
Underground Storage Tank Fee
For the Years 1991-1995

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

ISSUE

I. Underground Storage Tank Fee-Imposition

Authority: IC §13-23-12-1, IC §13-12-12-4, IC § 6-8.1-1-1, IC § 6-8.1-5-1 (b).

The taxpayer protests the imposition of the underground storage tank fees.

STATEMENT OF FACTS

The taxpayer owns a convenience store with underground storage tanks. The Indiana Department of Environmental Management (IDEM) determined that the fees had not been paid for the years 1991-1995. The Indiana Department of Revenue (department) assessed the additional underground storage tank fees, interest, and penalty. The taxpayer protested the imposition of the fees, interest, and penalty. A hearing was held and this Letter of Findings results.

I. Underground Storage Tank Fee- Imposition

DISCUSSION

IC §13-23-12-1 imposes a fee on underground storage tanks. Although IDEM administers the state regulation of underground storage tanks, IC §13-12-12-4 mandates that the department collect and deposit the underground storage tank fees. IC § 6-8.1-1-1 defines "listed tax" to include "any other tax or fee that the department is required to collect or administer." Since the department, pursuant to statute, must collect the underground storage tank fees, these fees constitute listed taxes. All of the laws and regulations concerning the department's collection of listed taxes apply to the department's collection of the underground storage tank fees. All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1 (b).

The fee on underground storage tanks is imposed at IC §13-23-12-1 as follows:

(a) Each year the owner of an underground storage tank that has not been closed before July 1 of any year under:

(1) rules adopted under IC §13-23-1-2; or

(2) a requirement imposed by the commissioner before the adoption of rules under IC 13-23-1-2;

shall pay to the department of state revenue an annual registration fee.

Pursuant to the imposition statute, the underground storage tank fee is imposed on all underground storage tanks open and available for use on July 1 of the year. The party who owns the property during the tax period is the person liable for payment of the underground storage tank fees.

The taxpayer produced documentation substantiating that he purchased the convenience store property including the underground storage tanks on which the fees were assessed on January 21, 1999. The taxpayer was not the owner of the underground storage tanks during the tax period 1991-1995. Therefore the taxpayer is not responsible for the payment of the underground storage tank fees due for the years 1991-1995.

FINDING

The taxpayer's protest to the assessment of the underground storage tank fees is sustained.

The taxpayer is admonished that if the underground storage tank fees are not paid in full, the taxpayer will not be eligible for full payments from the Excess Liability Trust Fund in the event that there is a gasoline spill or other environmental problem resulting from the taxpayer's underground storage tanks.

DEPARTMENT OF STATE REVENUE

0320060013P.LOF

LETTER OF FINDINGS NUMBER: 06-0013P
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. 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

0320060016P.LOF

LETTER OF FINDINGS NUMBER: 06-0016P
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 W2s for the calendar year 2004. The W2s were received by the Department five months late. The taxpayer is an Indiana company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer requests the penalty be abated as the W2s were mailed timely.

The Department did not receive the W2s until August 3, 2005, almost five months late. State tax regulations state the burden of proof is on the taxpayer as to why the W2s were received late by the Department. As the taxpayer has given no explanation, the taxpayer is deemed to be inattentive in the mailing of the W2s.

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

0320060017P.LOF

LETTER OF FINDINGS NUMBER: 06-0017P
Withholding Tax
For the Calendar Year 2004

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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

0120060038.LOF

LETTER OF FINDINGS: 06-0038
Individual Income Tax
For the Years 1995 through 2004

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

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

ISSUES

I. Proposed Assessment.

Authority: IC 6-3-1-3.5(a); IC 6-8.1-5-1(b); 45 IAC 3.1-1-1; I.R.C. § 61; I.R.C. § 61(a); I.R.C. § 62(a); I.R.C. § 7701(a)(26).

Arguing that the proposed assessments of individual income taxes were erroneous because the Department of Revenue relied upon incorrect information received from the Internal Revenue Service.

II. Gross Income – Adjusted Gross Income Tax.

Authority: IC 6-3-1-3.5(a)(3); IC 6-3-1-3.5(a)(4); IC 6-3-4-1.

Taxpayer maintains that he was not required to file state income tax returns during 1995 through 2004 because he did not receive taxable gross income.

STATEMENT OF FACT

Taxpayer is an Indiana resident who did not file state income tax returns for 1995 through 2004. The Department of Revenue (Department) asked that the taxpayer supply additional information. Afterwards, the Department requested copies of taxpayer's federal returns from the IRS. Based on the information contained within the returns, the Department determined that taxpayer should have been paying state income during the ten years and issued proposed assessments.

Taxpayer responded by sending letters to various state officials including officials at the Department. The Department concluded that taxpayer was protesting the assessments and submitted the matter to a hearing officer. Taxpayer was contacted by letter and offered the opportunity to explain his protest during an administrative hearing. Taxpayer declined the opportunity but provided additional written information purporting to establish that the proposed assessments were erroneous. This Letter of Findings results.

DISCUSSION

I. Proposed Assessment.

As a threshold issue, taxpayer challenges any assertion that he has participated in an "abusive tax scheme." This Letter of Findings takes no position on whether taxpayer's failure to pay Indiana income tax for 10 years is the consequence of a "scheme" because the issues raised in taxpayer's protest can be addressed by duly considering the relevant state and federal law.

Taxpayer maintains that the proposed assessments are incorrect because the assessments were based upon federal returns which are "incorrect and disputed." Taxpayer states that he did not receive a payment of "gains, profits, or income" during the course of a "trade or business" as defined in I.R.C. § 7701(a)(26).

The Department is unable to understand the significance of taxpayer's citation to I.R.C. § 7701(a)(26). In full, the IRC section states that, "The term 'trade or business' includes the performance of the functions of a public office." There is nothing in the information which indicates that the Department proposed the assessments because it believed that taxpayer earned money from performing "the functions of a public office." The Department must conclude that taxpayer's reliance on I.R.C. § 7701(a)(26) is ill-considered because the particular code section on which taxpayer relies is irrelevant.

The Indiana code relies upon federal adjusted gross income as the starting point for calculating the individual taxpayer's Indiana adjusted gross income.

IC 6-3-1-3.5 states as follows: "When used in IC 6-3, the term 'adjusted gross income' shall mean the following: (a) In the case of all individuals 'adjusted gross income' (as defined in Section 62 of the Internal Revenue Code)...." IC 6-3-1-3.5(a). Thereafter, the Indiana statute defines specific addbacks and deductions peculiar to Indiana which modify the federal adjusted gross income amount. The Department's regulation restates this formulation. 45 IAC 3.1-1-1 defines individual adjusted gross income as follows:

> Adjusted Gross Income for Individuals Defined. For Individual, "Adjusted Gross Income" is Adjusted Gross Income as defined in Internal Revenue Code § 62 modified as follows:
>
> (1) Begin with gross income as defined in section 61 of the Internal Revenue Code.
> (2) Subtract any deductions allowed by section 62 of the Internal Revenue Code.
> (3) Make all modifications required by IC 6-3-1-3.5(a).

Both the statute, IC 6-3-1-3.5, and the accompanying regulation, 45 IAC 3.1-1-1, require an Indiana taxpayer use the federal adjusted gross income calculation – as determined under I.R.C. § 62 – as the starting point for determining that taxpayer's Indiana adjusted gross income. Federal "adjusted gross income" is determined by starting with the taxpayer's "gross income" and subtracting the allowable deductions under the federal tax code. I.R.C. § 62(a).

For federal income tax purposes, "gross income" means all income from whatever source and includes compensation for services. I.R.C. § 61. That portion of I.R.C. § 61 relevant to determining taxpayer's "gross income" states as follows:

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived including (but not limited to) the following items:
>
> (1) Compensation for services including fees, commissions, fringe benefits, and similar items;

(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

Taxpayer's "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made." IC 6-8.1-5-1(b). Taxpayer has failed to provide a substantive, legal basis upon which to determine that the taxpayers income during the 10 years at issue fall outside the purview of I.R.C. § 62 or that this income should not be counted as part of the taxpayer's gross income under 45 IAC 3.1-1-2.

Taxpayer vigorously asserts that he did not receive "gains, profits, or income" during the course of "trade or business." In support of this assertion, taxpayer states that he has "provided [his] sworn testimony to refute the erroneous information the IRS used in preparing the returns. [Taxpayer] reaffirms that testimony."

However, taxpayer's argument misses the mark. The Department concluded that – based upon the information contained within taxpayer's federal returns – taxpayer had received "gross income;" taxpayer received income which fell within the definition of "all income from whatever source derived...." I.R.C. § 61(a). The Department then concluded that there were no grounds for deducting any amounts of taxpayer's "gross income" to arrive at a figure called "adjusted gross income" which was subject to Indiana's personal income tax.

The Department has no reason to doubt taxpayer's sincerity or good faith but taxpayer's "sworn testimony" is insufficient to establish that the proposed assessments were incorrect. The "sworn testimony" does not meet taxpayer's burden under IC 6-8.1-5-1(b) of proving that the proposed assessments were incorrect.

FINDING

Taxpayer's protest is denied.

II. Gross Income.

Taxpayer explains that he was not required to file Indiana tax returns under IC 6-3-4-1. Specifically, taxpayer cites to the language found at IC 6-3-4-1 which states that "Returns with respect imposed by [the adjusted gross income act] shall be made by the following: (1) Every resident individual having for the taxable year gross income in an amount greater than the modifications provided under IC 6-3-1-3.5(a)(3) and IC 6-3-1-3.5(a)(4)."

In calculating an Indiana taxpayer's adjusted gross income, IC 6-3-1-3.5(a)(3) permits the Indiana taxpayer to "Subtract one thousand ($1,000), or in the case of a joint return filed by a husband and wife, subtract for each spouse one thousand dollars ($1,000)." In calculating *Indiana* adjusted gross income, taxpayer subtracts a standard deduction from the amount of *federal* adjusted gross income.

In calculating an Indiana taxpayer's adjusted gross income, IC 6-3-1-3.5(a)(4) allows the Indiana taxpayer to "subtract one thousand dollars ($1,000) for.... each of the exemptions provided by Section 151(c) of the Internal Revenue Code... each additional amount allowable under Section 63(f) of the Internal Revenue Code; and... the spouse of the taxpayer if a separate return is made by the taxpayer, and if the spouse, for the calendar year in which the taxable year of the taxpayer begins, has no gross income and is not the dependent of another taxpayer." IC 6-3-1-3.5(a)(4) is a provision allowing the taxpayer to make certain, specific deductions from the *federal* adjusted gross income amount to arrive at *Indiana* adjusted gross income.

Taxpayer states that he has "submitted sworn testimony as to his lawful and legal requirement to make returns. [Taxpayer] reaffirms that testimony." Even considering taxpayer's sworn testimony to the contrary, there is nothing to substantiate taxpayer's claim that he was not required to file Indiana tax returns during 1995 through 2004. Even a cursory review of the information provided by the IRS unmistakably demonstrates that taxpayer was a "resident individual having for the taxable year gross income in an amount greater than the modifications provided under IC 6-3-1-3.5(a)(3) and IC 6-3-1-3.5(a)(4)." IC 6-3-4-1. Taxpayer's "sworn testimony" is insufficient to overcome the plain fact that taxpayer received an amount of income which required him to file Indiana income tax returns from 1995 through 2004 and to correctly report his income on those returns.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420060043.LOF

LETTER OF FINDINGS NUMBER: 06-0043
Sales and Use Tax
For Tax Periods December 2004, February 2005, June 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. Sales and Use Tax-Late Payment Penalty and Interest

Authority: IC § 6-2.5-6-1, IC § 6-8.1-10-2.1(a)(2), IC § 6-8.1-5-1(b), IC § 6-8.1-5-4, IC § 6-8.1-10-1(e).

The taxpayer protests the imposition of the late payment penalty and interest.

STATEMENT OF FACTS

The taxpayer operates an auto repair business. The Indiana Department of Revenue imposed late payment penalties and interest on the taxpayer's sales tax payments for December 2004, February 2005, and June 2005. The taxpayer protested these assessments. A telephone hearing was held. This Letter of Findings results.

I. Sales and Use Tax-Late Payment Penalty and Interest

DISCUSSION

The taxpayer's sales tax returns are due to the department on the 20th of the month following the tax period. IC § 6-2.5-6-1. The taxpayer's sales tax returns for the months in question all were postmarked and arrived at the department significantly later than the due dates. The department assessed a late payment penalty on the late payments under authority of IC § 6-8.1-10-2.1(a)(2). The taxpayer argued that penalties were improperly imposed because the returns were mailed on time and misdelivered by the post office.

All tax assessments are presumed to be accurate and taxpayers bear the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(b). Taxpayers are required to maintain adequate records to allow the department to later determine the taxpayer's proper liability by reviewing those records. IC § 6-8.1-5-4. The taxpayer was unable to produce any documentation to demonstrate that the returns were actually mailed at the proper times.

The taxpayer did not sustain its burden of proving that the late payment penalties were improperly imposed.

The taxpayer also protested the imposition of interest on the late payments. The department does not have the authority to waive the interest imposed on late payments. IC § 6-8.1-1-10(e).

FINDING

The taxpayer's protests to the imposition of the penalties and interest are denied.

DEPARTMENT OF STATE REVENUE

02-20060054P.LOF

LETTER OF FINDINGS NUMBER: 06-0054P
Corporate Income 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 the date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1; IC 6-8.1-3-17(c); 45 IAC 15-11-2

The taxpayer protests the penalty assessed for failure to file its corporate income tax return and remit the tax due by the appropriate date.

STATEMENT OF FACTS

The taxpayer filed its corporate income tax return for the calendar year 2004 after the due date. The calculated amount of tax due was remitted with the return. Accordingly, the department assessed a penalty for the taxpayer's failure to timely remit its tax. In the letter of protest, the taxpayer requested that the penalty be abated due to reasonable cause.

I. Tax Administration – Penalty

The return in question was due on April 15, 2005. It was filed on November 10, 2005. The taxpayer asserts that the penalty should be waived because the return was filed during the period of the Indiana Tax Amnesty Program. IC 6-8.1-3-17(c) states:

The department shall establish an amnesty program for taxpayers having an unpaid tax liability for a listed tax that was due and payable for a tax period ending before July 1, 2004.

Taxes due for calendar year 2004 were not eligible for inclusion in the Amnesty Program Hence, reasonable cause has not been established.

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

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

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

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

4520060056P.LOF

LETTER OF FINDINGS NUMBER: 06-0056
Gaming Card Excise Tax
Tax Period 2001-2004

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. Gaming Card Excise Tax-Imposition

Authority: IC § 6-8.1-5-1(b), IC § 4-32-15-1, IC § 4-3-2-20(a), IC § 4-32-15-2, IC § 6-8.1-5-4, 45 IAC 18-4-2.

The taxpayer protested the imposition of gaming card excise tax.

II. Tax Administration- Ten Percent Negligence Penalty

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

The taxpayer protested the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The taxpayer is a distributor of gaming paraphernalia such as bingo supplies, pull tabs, punchboards, tip boards, ticket masters (dispensers of pull-tabs), and various games of chance. The taxpayer sold its products from a traditional location and over the internet to both qualified and non qualified organizations. After an audit, the Indiana Department of Revenue (department) assessed additional gaming card excise tax, penalty, and interest against the taxpayer for the years 2001-2004. The taxpayer protested this assessment. A hearing was held and this Letter of Findings results.

I. Gaming Card Excise Tax-Imposition

DISCUSSION

Indiana imposes a gaming card excise tax at IC § 4-32-15-1 as follows:

An excise tax is imposed on the distribution of pull tabs, punchboards, and tip boards in the amount of ten percent (10[percent]) of the price paid by the qualified organization that purchases the pull tabs, punchboards, and tip boards.

A "qualified organization" is defined at IC § 4-3-2-20(a) as follows:

(1) a bona fide religious, educational, senior citizens, veterans, or civic organization operating in Indiana that:

(A) operates without profit to the organization's members;

(B) is exempt from taxation under Section 501 of the Internal Revenue Code; and

(C) has been continuously in existence in Indiana for at least five (5) years or is affiliated with a parent organization that has been in existence in Indiana for at least five (5) years; income (as defined in Section 527 of the Internal Revenue Code).or

The gaming card excise tax is imposed at the time of the distribution of the gaming devices. IC § 4-32-15-2.

Notices of proposed assessments are prima facie evidence that the department's claim for unpaid taxes is valid**.** IC § 6-8.1-5-

1(b). The taxpayer has the burden of proving that the department incorrectly imposed the assessment. id. Taxpayers are required to keep adequate books and records so that the department can determine the proper tax owed to the state. IC § 6-8.1-5-4.

The department set out the records that distributors are required to keep for the gaming excise tax at 45 IAC 18-4-2 as follows:

(a) An entity licensed as a manufacturer or distributor must keep records satisfactory to the department. The records must include the following:

(1) Sales invoices, including the following:

(A) Each licensee must use a general sales invoice which is:

(i) numbered consecutively; and

(ii) prepared in at least two (2) parts, one being issued to the customer and the other retained in an invoice file.

(B) Each licensee must use a general sales invoice which sets out the following information:

(i) The date of the sale.

(ii) The customer name and business address.

(iii) A full description of each item sold, including the serial numbers of the products sold.

(iv) The quantity and sales price of each item.

(v) The manufacturer's or distributor's license number.

(vi) The customer's license number.

(vii) The gaming card excise tax due on the sale.

(2) Credit memoranda prepared in the same detail as sales invoices.

(3) A sales journal containing at least the following, by calendar month:

(A) The date of sale.

(B) The invoice number of the sale.

(C) The customer name or account number.

(D) The total amount of the invoice.

(E) The total amount of the gaming card excise tax due on the sale.

(4) A complete list of the persons representing the licensee.

(5) Purchase records documenting that all bingo supplies, equipment, pull-tabs, punchboards, and tip boards were purchased from either a licensed manufacturer or another licensed distributor.

(b) A serial number printed on an item sold must be identifiable with the sales invoice reflecting the sale of the specific item.

(c) The gross amount of sales to each customer must be kept on a calendar month basis.

(d) Records are required to be maintained until the later of the following:

(1) Four (4) years after the year in which they are created.

(2) The end of the audit if such records are under audit.

The taxpayer's books and records were not in conformity with the law. The books and records were not adequate to allow the department to determine the correct amount of tax. Therefore, the department had no option but to prepare an estimate based upon the best information available. The taxpayer did not produce any documentation to substantiate its contention that the department's estimate was inaccurate.

FINDING

The taxpayer's protest is denied.

II. Tax Administration- Ten Percent Negligence Penalty

DISCUSSION

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

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

During the period of the audit, the taxpayer ignored the law and departmental instructions for the payment of gaming card excise tax. The taxpayer's written protest indicated that the taxpayer knew of his duty to collect and remit the gaming card excise tax during the tax period. The taxpayer's inattention to this duty resulted in the tax assessment. This breach of the taxpayer's duty constituted negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320060089.LOF

LETTER OF FINDINGS NUMBER 06-0089
RESPONSIBLE OFFICER
WITHHOLDING TAX
For Tax Period July 2005-October 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 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 him as a responsible officer.

STATEMENT OF FACTS

The taxpayer was an officer of a corporation that did not remit withholding taxes to Indiana for the tax period July 2005 through October 2005. The Indiana Department of Revenue 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 did not dispute that he was a party responsible for remittance of corporate trust taxes to the state. He argued that there was no corporate liability for withholding taxes. The taxpayer offered adequate documentation to sustain his burden of proving that the corporation's last payroll was paid on May 20, 2005. Since the corporation did not collect any withholding taxes after May 20, 2005, it had no obligation to remit withholding taxes to the state for tax periods after that date.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0320060092.LOF

LETTER OF FINDINGS NUMBER 06-0092
RESPONSIBLE OFFICER
WITHHOLDING AND SALES TAX
For Tax Period March 2005-December 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 specific issues.

ISSUE

I. Withholding and Sales 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 withholding and sales taxes against her as a responsible officer.

STATEMENT OF FACTS

The taxpayer was an officer of a corporation that did not remit sales and withholding taxes to Indiana for the tax period March 2005 through December 2005. The Indiana Department of Revenue assessed the outstanding corporate withholding taxes, sales taxes, and penalty against the taxpayer personally. The taxpayer protested the assessment and a hearing was scheduled. The taxpayer failed to appear. This Letter of Findings is based upon the documentation in the file.

I. Withholding and Sales 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 did not dispute that she was a party responsible for remittance of corporate sales and withholding trust taxes to the state. She argued that there was no corporate liability for withholding or sales taxes. The taxpayer argued that the corporation ceased operations on February 28, 2005. Since the corporation did not collect any withholding or sales trust taxes after February 28, 2005, it had no obligation to remit trust taxes to the state for tax periods after that date. The taxpayer did not provide adequate documentation to substantiate her contention that the corporation ceased operations on February 28, 2005. Therefore, the department properly assessed the sales and withholding trust taxes for March 2005 through December 2005 against the taxpayer.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420060102.LOF

LETTER OF FINDINGS NUMBER: 06-0102
Sales Tax - Responsible Officer
For the Tax Period 2002

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

ISSUE

1. Sales and Withholding Tax-Responsible Officer Liability

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

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

STATEMENT OF FACTS

The taxpayer was co-owner of a business that did not remit the proper amount of sales taxes during the tax period 2002. The Indiana Department of Revenue assessed the unpaid sales taxes, interest, and penalty against the taxpayer as a responsible officer of that business. The taxpayer protested that she was no longer involved with the business after November of 2002. A hearing was held and this Letter of Findings results.

1. Sales and Withholding Tax-Responsible Officer Liability

DISCUSSION

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

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

An individual who:

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

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

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

The taxpayer produced substantial documentation that she had no duty to collect and remit sales taxes to the state for any periods after November of 2002. Therefore, she is not personally responsible for the payment of the corporate sales taxes for any periods after November of 2002.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420060115P.LOF

LETTER OF FINDINGS NUMBER: 06-0115P
Sales and Use Tax
For the Years 2003-2005

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- Ten Per Cent Negligence Penalty

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

The taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The taxpayer is in the business of selling and financing used cars. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use tax, interest, and penalty. The taxpayer protested the imposition of the ten percent negligence penalty. A telephone hearing was held and this Letter of Findings results.

I. Tax Administration- Ten Percent Negligence Penalty

DISCUSSION

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

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

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

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.

The taxpayer affirmatively established that in this particular situation its failure to pay the proper amount of sales and use tax was due to reasonable cause rather than negligence.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2006-02ST
April 20, 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 publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

Sales/Use Tax – Public Transportation

Authority: IC 6-2.5-5-27, 45 IAC 2.2-5-61

Taxpayer #1 requests the Department to rule whether taxpayer #2's purchase of vehicle leases, repairs, fuel and other tangible personal property directly used in Indiana in its provision of transportation services to taxpayer #1 is exempt from sales/use tax.

STATEMENT OF FACTS

Taxpayer #1 is a retailer. It currently sells and delivers its product using company-leased trucks and employee drivers. For business reasons taxpayer #1 is considering a transfer of its transportation operations to a for-profit, wholly-owned limited liability company ("taxpayer #2") that will operate as a for-hire transportation company. All leases currently in the name of taxpayer #1 would be re-executed in taxpayer #2's name. Taxpayer #2 would obtain proper operating authorities with state and federal government to provide transportation services. Taxpayer #2 would charge taxpayer #1 and/or other clients an arms length rate for transportation services and other administrative services, on a periodic basis as agreed to by both parties. Drivers would remain with the taxpayer #1 and be leased to taxpayer #2. Taxpayer #2 will maintain a separate bank account and accounting system.

DISCUSSION

IC 6-2.5-5-27 provides:

"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."

45 IAC 2.2-5-61(b), interpreting IC 6-2.5-5-27, states:

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

It is clear then, for a taxpayer to qualify for the public transportation exemption the taxpayer must transport non-owned property for consideration ("consideration" is defined as reasonable charges compared with industry standards) and be operating under the proper governmental authority if so required. From the information submitted by taxpayer #1, taxpayer #2 satisfies the above requirements for the public transportation exemption.

RULING

The Department rules taxpayer #2's purchase of vehicle leases, repairs, fuel and other tangible personal property directly used in Indiana in its provision of transportation services to taxpayer #1 is exempt from sales/use tax.

CAVEAT

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

Indiana Department of State Revenue