**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER: 05-0516**
**Gross Income Tax**
**For Tax Years 2001-02**

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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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

## ISSUE

**I. Gross Income Tax—Corporate**

**Authority:** IC § 6-2.1-2-2; IC § 6-8.1-5-1; 45 IAC 1.1-1-3

Taxpayer protests the assessment of corporate 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 a nondomiciliary corporation doing business in Indiana and nationwide. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had gross income tax liabilities and issued assessments for the tax years 2001 and 2002. Taxpayer protests these assessments. An administrative hearing was scheduled and Taxpayer failed to attend. Further facts will be provided as required.

**I. Gross Income Tax—Corporate**

## DISCUSSION

Taxpayer protests gross income tax assessments for 2001 and 2002. Under IC § 6-8.1-5-1(b), the taxpayer bears the burden of proving a proposed assessment wrong. The Indiana gross income tax was in effect during the tax years 2001 and 2002. IC § 6-2.1-2-2 stated in relevant part:

> (a) An income tax, known as the gross income tax, is imposed upon the receipt of:
>
> (1) the entire taxable gross income of a taxpayer who is a resident or a domiciliary of Indiana; and
>
> (2) the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana.

The Department based its assessments on 45 IAC 1.1-1-3(a), which stated:

> A "business situs" arises where possession and control of a property right have been localized in some business or investment activity away from the owner's domicile.

The Department determined that Taxpayer had a business situs due to payroll payments.

Taxpayer protests this determination. The regulation in effect at the time, 45 IAC 1.1-1-3, stated:

> (a) A "business situs" arises where possession and control of a property right have been localized in some business or investment activity away from the owner's domicile.
> (b) A taxpayer may establish a business situs in ways, including, but not limited to, the following:
> (1) Use, occupancy, or operation of an office, shop, construction site, store, warehouse, factory, agency route, or other place where the taxpayer's affairs are conducted.
> (2) Performance of services.
> (3) Maintenance of an inventory or stocks of goods for sale, distribution, or manufacture.
> (4) Sale or distribution of merchandise from company-owned vehicles where title to the goods passes at the time of sale or distribution.
> (5) Acceptance of orders without the right of approval or rejection in another state.
> (6) Ownership, leasing, rental, or other business activities connected with income-producing property (real or personal).
> (7) Ownership (in whole or part) of a partnership doing business in Indiana unless the ownership is that of a limited partner who does not participate in the control of the business.
> (8) Other business or investment activities, other than de minimis, performed on behalf of the taxpayer by an employee of the taxpayer. These activities shall be considered together, not in isolation, in deciding if they are de minimis.

The information available provides no indication that taxpayer's business activities in Indiana rose beyond the de minimis level. As 45 IAC 1.1-1-3(b)(8) explains, de minimis activities do not establish a business situs in Indiana. Therefore, Taxpayer has no business situs in Indiana

from which gross income flowed. IC § 6-2.1-2-2 imposed gross income tax on the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana. There is no indication in the file that Taxpayer had any income derived from Indiana activities or sources during the tax years at issue. Therefore, Taxpayer was not subject to Indiana gross income tax during the tax years at issue.

**FINDING**

Taxpayer's protest is sustained.

**II. Tax Administration—Penalty**

**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.

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 did not incur a deficiency which was due to negligence under 45 IAC 15-11-2(b), and so was not subject to a penalty under IC § 6-8.1-10-2.1(a). Taxpayer has affirmatively established that there was no failure to pay the deficiency and so there was no negligence, as required by 45 IAC 15-11-2(c).

## **FINDING**

Taxpayer's protest is sustained.

WL/BK/DK April 17, 2007