DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 07-0243
Sales and Use Tax
For Tax Years 2003, 2004

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ISSUE

I. Tax Administration–Refunds and Interest Calculations.

Authority: IC § 6-2.5-6-10; IC § 6-8.1-3-3; IC § 6-8.1-6-1; IC § 6-8.1-9-1; IC § 6-8.1-10-1; 45 IAC 2.2-3-9; P.L. 28-1997, § 27; H.B. 1784, 109th Gen. Assem., First Sess. (Ind. 1997); P.L. 111-2006, § 10; *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399 (1991); *Northern Indiana Public Service Co. v. Citizens Action Coalition of Indiana, Inc.,* 548 N.E.2d 153, 159 (Ind. 1989)(*NIPSCO*); *Chicago and Erie R.R. Co. v. Luddington,* 175 Ind. 35, 42, 91 N.E. 939, reh'g denied, (Ind. 1910); *O'Laughlin v. Barton*, 582 N.E.2d 817 (Ind. 1991).

Taxpayer alleges that the refund amounts are erroneous due to absence of interest.

STATEMENT OF FACTS

Taxpayer is a fully integrated steel mill operation. During an audit commencing in June, 2005 for the 2003 and 2004 tax years, the auditor and taxpayer agreed to use a sample of the taxpayer's invoices in order to compute sales and use tax, due to the large volume of invoices filed at taxpayer's facilities. The sample period covered the fiscal year that ended on 4/30/2004. The audit resulted in overpayment determinations for each of the subject tax years, meaning that refunds were due to the taxpayer. The Department completed the audit in February 2007, and issued refund checks to the taxpayer in March, 2007. The refund checks did not include any interest on the refunded amounts.

After inquiring about the missing interest, the taxpayer claims that the Department responded by advising that the Department would not pay interest on the refund amounts due to amendments made to IC § 6-8.1-9-2 by P.L. 111-2006, § 10, effective January 1, 2007. Taxpayer filed a protest against the Department's position with respect to interest on refund amounts. An administrative hearing was held, in which taxpayer again protested the Department's disallowance of interest on the refund amounts.

Taxpayer argues that the Department's failure to pay interest is a misapplication of the taxpayer's common law right to interest; IC § 6-8.1-9-2 as in effect through December 31, 2006; the amendments made to IC § 6-8.1-9-2(c) by P.L. 111-2006, § 10; and the commitments as set forth in an Agreement to Extension of Time executed between taxpayer and the Department for the year 2003.

IC § 6-8.1-9-2(c), as amended, provides that:

> An excess tax payment that is not refunded or credited against a current or future tax liability within ninety (90) days after the date the refund claim is filed, the date the tax payment was due, or the date the tax was paid, whichever is latest, accrues interest from the date the refund claim is filed at the rate established under IC 6-8.1-10-1 until a date, determined by the department, that does not precede by more than thirty (30) days, the date on which the refund or credit is made.

Taxpayer correctly points out the absence of language addressing determination of overpayment resulting from an audit. Taxpayer also argues that statutes are to be applied prospectively only, and not retroactively, absent unambiguous and unequivocal language that a retroactive effect is intended. *O'Laughlin v. Barton*, 582 N.E.2d 817 (Ind. 1991).

Prior to amendment, IC § 6-8.1-9-2(c) provided that:

> An excess tax payment that is not refunded or credited against a current or future tax liability within ninety (90) days after the date the refund claim is filed, the date the tax payment was due, or the date the tax was paid, whichever is latest, accrues interest from the date the tax payment was due or the date the tax was paid, whichever is later at the rate established under IC 6-8.1-10-1 until a date, determined by the department, that does not precede by more than thirty (30) days, the date on which the refund or credit is made.

This former version of IC § 6-8.1-9-2(c) also does not address the determination of an overpayment resulting from an audit. However, IC § 6-8.1-9-2(d) specifies that "as used in [IC § 6-8.1-9-2](c), 'refund claim' includes an amended return that indicates an overpayment of tax." The legislative history pursuant to IC § 6-8.1-9-2 indicates that subsection (d) was added by P.L.28-1997, § 27, an amendment effective January 1, 1998. That history also indicates that H.B. 1784, 109th Gen. Assem., First Sess. (Ind. 1997)–the bill subsequently made law as P.L. 28-1997–introduced IC § 6-8.1-9-2(c) as follows:

> An excess tax payment that is not refunded or credited against a current or future tax liability within ninety (90) days after the date the refund claim is filed**, the date the audit is completed**, the date the tax payment was due, or the date the tax was paid, whichever is latest, accrues interest from the latest of these dates at the rate

established under IC 6-8.1-10-1 until a date, determined by the department, that does not precede by more than thirty (30) days, the date on which the refund or credit is made. (**emphasis added**)

Contrary to taxpayer's argument, the Department argues that the General Assembly's addition of subsection (d) indicates, by implication, that while an amended return constitutes a "refund claim" under IC § 6-8.1-9-2(c), an overpayment resulting from an audit does not. The General Assembly's language, as amended, in subsection (c) explicitly indicates a purposeful exclusion of "the date the audit is completed" as a possible demarcation in the condition precedent; that, by implication, while the General Assembly intended to broaden the scope of subsection (c), it did not intend for subsection (c) to include overpayment as the result of an audit.

Taxpayer principally relies on *General Motors Corp. v. Indiana Dep't. of State Revenue*, 578 N.E.2d 399 (Ind. Tax Ct. 1991) as the basis for its protest. That case provided an analysis based upon legislative silence regarding the accrual of refund interest on excess deficiency interest payments. *Id*. "It is well settled that 'the legislature does not intend by a statute to make any change in the common law beyond what it declares either in express terms or by unmistakable implication.'" *Id*. at 406 (quoting *Northern Indiana Public Service Co. v. Citizens Action Coalition of Indiana, Inc.*, 548 N.E.2d 153, 159 (Ind. 1989)(*NIPSCO*)(quoting *Chicago and Erie R.R. Co. v. Luddington*, 175 Ind. 35, 42, 91 N.E. 939, reh'g denied, (Ind. 1910)). Subsection (d) was added in 1997, six years after *General Motors*. Contrary to taxpayer's argument, the Department asserts that the General Assembly's decision to exclude "the date the audit is completed" from subsection (c), and add subsection (d)–to add "amended returns" to the scope of subsection (c)'s coverage–displays, by unmistakable implication, the General Assembly's intent to clarify the applicable statute, without broadening its scope to include "overpayments resulting from an audit." In fact, the legislative history demonstrates anything but legislative silence, as H.B. 1784 as introduced included the word "audit," but was amended in an explicit display of the Assembly's intent to exclude that word and circumstance. These revisions and additions represented significant changes, coupled with the continued absence of language regarding overpayments as the result of an audit.

Regardless of statutory interpretation, or the presence or absence of the Department's statutory authority to pay interest on tax overpayments, the taxpayer asserts its common law right to such interest. Taxpayer claims that the Department's obligation to pay interest from the date that the prior returns were due is merely compensation because the Department had the use of that money for the intervening period, and the taxpayer did not. However, taxpayer fails to explain why the Department had the use of that money for the intervening period, and taxpayer did not. Taxpayer did not have use of the money during the intervening period because taxpayer had not yet acquired a legal right to that money. The Department had the use of the money because, until the date the Department's audit determined otherwise, the Department had a right to the money. It would offend common sense to suggest that the legislature enacted a statute to require the Department to pay interest to taxpayers such as subject taxpayer on money for periods in which the taxpayers had yet to acquire a legal right to the money. The Department also asserts it unlikely that the legislature intended for taxpayers to use the state as an investment opportunity in the way contemplated by this taxpayer. Taxpayer puts major emphasis on the conclusory result of IC § 6-8.1-9-2(c) without satisfying the condition precedent. The taxpayer did not file a refund claim. Neither the Department nor the Taxpayer knew of Taxpayer's overpayment until the Department issued, and Taxpayer received, the Department's proposed assessment, on or about February 2, 2007. The Department issued refund checks representing the overpayments on or about March 22, 2007, significantly less than the ninety days specified in IC § 6-8.1-9-2(c).

The taxpayer also asserts an alleged effect of an agreement to extension of time issued in September 2006 for the 2003 tax year. That agreement cites IC § 6-8.1-9-2 as controlling with respect to any disbursements regarding interest. That agreement also provides that "[t]he time limitation prescribed by I.C. 6-8.1-9-1 **to file refund claims** is extended by this agreement." (**emphasis added**). As presented herein, the Department asserts that any determination of taxpayer's unpaid taxes or overpayment of taxes would not occur until the completion of the Department's audit. Not obligated under IC § 6-8.1-9-2 or the circumstances presented to do otherwise, the Department did not pay interest on the amounts due, and paid, to the taxpayer as a result of the audit completed in February 2007.

FINDING

The taxpayer's protest against the exclusion of interest on refunded amounts is respectfully denied.

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