

**Letter of Findings: 09-0753
Individual Income Tax
For the Year 2007**

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ISSUE

I. Individual Income Tax – Imposition.

Authority: IC § 6-8.1-5-1; § 6-3-2-2.2; *Riverboat Development, Inc. v. Ind. Dep't of State Revenue*, 881 N.E.2d 107 (Ind. Tax Ct. 2008); *Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Commissioner's Directive 38 (October 2009).

Taxpayer protests the denial of its claim for refund based on *Riverboat Development, Inc. v. Indiana Department of State Revenue*.

STATEMENT OF FACTS

Taxpayer is a Florida resident who is a shareholder in two Indiana S corporations and several LLCs. The LLCs were created and managed by an Indiana investment advisory firm. The S corporations and the LLCs are unrelated. Taxpayer received K-1s from the S corporations and LLCs. Taxpayer reported his income from the S corporations on a 2007 IT-40PNR and does not dispute that Indiana taxes were rightly paid on his distributive share of income from the S corporations. The Indiana Department of Revenue ("Department") determined that Taxpayer had underreported his income on the IT-40PNR by not including income allocated to Taxpayer on the K-1s of the LLCs and therefore assessed additional individual income tax and interest, but no penalty.

Taxpayer paid the additional tax assessed under protest and now claims refund of those monies. A hearing was held and this Final Order ensues. Taxpayer files jointly with his spouse, therefore the proposed assessment associated with this protest relates to 2007 individual income tax of both Taxpayer and his spouse. Additional facts will be provided as necessary.

I. Adjusted Gross Income Tax – Imposition.

DISCUSSION

The Department notes that 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), (c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer argues that income allocated to him on the LLCs' 2007 K-1s was not reported on the 2007 IT-40PNR because the income was "investment" income. In a May 5, 2009, letter to the Department, Taxpayer explains:

We did not include these K-1s in the tax return because the income is investment income that happens to come from an LLC. On February 22, 2008, the Indiana Tax Court ruled in the court case *Riverboat Development, Inc. v. Department of Revenue*, [...], that an LLC interest is an intangible asset. Based on the fact that the LLC interest is an intangible asset, we look at Indiana Code 6-3-2-2.2, ["receipts in the form of dividends from investments are attributable to this state of the taxpayer's commercial domicile is in Indiana."] The income *Riverboat Development, Inc.*, a Kentucky corporation, received from an LLC membership interest that operated in Indiana was held to not be income derived from sources within Indiana. Applying this decision, [Taxpayer]'s domicile is located in Florida and his membership interest in the LLCs would not be taxable in Indiana as the investment is an intangible asset and income received from an intangible asset is taxed in Indiana if the taxpayer's domicile is in Indiana.

In a subsequent letter dated December 2, 2009, Taxpayer further argues:

The LLC entities have investment income – interest, dividends, and capital gains/losses – similar to that of major investment companies like Merrill Lynch or Citi/Smith Barney, who also do business in Indiana. Individuals invested in Merrill Lynch or Citi/Smith Barney report the income from those investments to the state in which they are domiciled. Per [IC 6-3-2-2\(i\)\(3\)](#) and [IC 6-3-2-2\(j\)](#), capital gains and losses, interest, and dividends are allocated to Indiana if the taxpayer is domiciled in Indiana.

It is not entirely clear what Taxpayer's role is relative to the entities at issue in this protest. Apart from being a member of the LLCs at issue, Taxpayer is also a member of the LLC's management company's board of directors, therefore, Taxpayer is not a mere investor in these LLCs.

In the same letter, Taxpayer states that the Indiana Tax Court determined in *Riverboat Development* that an interest in an Indiana LLC is intangible personal property and therefore IC § 6-3-2-2.2 attributes "receipts in the form of dividends from investments" to Indiana if the taxpayer's commercial domicile is in Indiana. In *Riverboat Development* the LLC's income was not considered to be income derived from sources within Indiana because

the recipient S corporation's domicile was not Indiana.

Prior to the hearing, and in response to questions from Taxpayer, Taxpayer was referred to Commissioner's Directive 38 (October 2009) ("the Directive") as guidance for how the Department was handling and evaluating claims for refund based on Riverboat Development. Taxpayer was encouraged to present additional documentation in support of its protest.

Commissioner's Directive 38 (October 2009) provides guidance on refund eligibility and procedures for taxpayers who are similarly situated to the taxpayers involved in Riverboat Development. To receive a refund the taxpayer must file a GA-110L Claim for Refund with the following information:

- (1) in the explanation section of the GA-110L, reference "Riverboat Development, Inc. v. Ind. Dep't of Revenue";
- (2) a list of tax years for which the overpayment applies;
- (3) the amount of the overpayment;
- (4) the date of the original payment;
- (5) the Indiana amended return(s) for the tax years to which the claim for refund applies;
- (6) copies of the Indiana K-1s and/or WH-18 verifying the amount of the distributive share of income for each year; and
- (7) copies of filed returns in the home state or jurisdiction of the person proving that the income subject to the credit or refund was reported as income attributable to that state or jurisdiction. (Subject to verification by the home state jurisdiction).

Furthermore, the Directive explicitly states that certain claims for refund will be denied. The Directive states: A nonresident shareholder/member/partner of an Indiana pass-through entity is not eligible for a refund or credit if there is not an intermediate out-of-state pass-through entity in which the individual is a shareholder/member/partner.

A shareholder/member/partner who resides in a state that does not impose an income tax on the distribution from a pass-through entity is not eligible for a refund because the person has not reported income to the state of residence. States that do not have an income tax include Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming. . .

Taxpayer, a nonresident, claimed an ownership interest in several different Indiana pass-through entities. In this instance, there is no intermediate out-of-state pass-through entity in which Taxpayer is a non-resident shareholder, member, or partner. Taxpayer's ownership interest is in the Indiana LLCs directly. In addition, Taxpayer is not subject to income tax in his home jurisdiction because Taxpayer resides in a state that does not impose an income tax.

Taxpayer has not provided sufficient information to show that he qualifies for refund of income tax based on Riverboat Development or otherwise.

FINDING

Taxpayer's protest of the denial of its claim for refund is respectfully denied.

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