

**Letter of Findings Number: 02-20090673**  
**Income Tax**  
**For Tax Years 2003-2005**

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**ISSUES**

**I. Adjusted Gross Income Tax—Apportionment Sales Factor: "Retail Sales."**

**Authority:** IC § 6-8.1-5-1; [45 IAC 3.1-1-50](#); [45 IAC 15-3-2](#); Treas. Reg. § 1.471-1; *Mirant Sugar Creek, LLC v. Indiana Dep't of State Revenue*, 930 N.E.2d 697 (Ind. Tax Ct. 2010).

Taxpayer protests the imposition of income tax based on adjustments to its sales factor.

**II. Adjusted Gross Income Tax—Apportionment Sales Factor: "Rebates."**

**Authority:** IC § 6-8.1-5-1.

Taxpayer protests the imposition of income tax based upon adjustments to its sales factor.

**III. Tax Administration—Penalty.**

**Authority:** IC § 6-3-4-4.1.

Taxpayer protests the imposition of penalty.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state corporation doing business in Indiana. Taxpayer provides specialized services to clients throughout the United States. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the fiscal year end August 19, 2003, (hereafter "2003 tax year"), the short tax year August 20, 2003 to December 27, 2003, (hereafter "the short year 2003"), the fiscal year end December 24, 2004, (hereafter "the 2004 tax year") and the fiscal year end December 31, 2005 (hereafter "the 2005 tax year"). As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional adjusted gross income tax for the short tax 2003, the 2004 tax year, and the 2005 tax year. The Department determined that Taxpayer had not properly reported the receipts in its sales factor for the tax years in question. Taxpayer protested the assessments. An administrative hearing was held, and this Letter of Findings results. Further facts will be supplied as required.

**I. Adjusted Gross Income Tax—Apportionment Sales Factor: "Retail Sales."**

**DISCUSSION**

Taxpayer protests the imposition of adjusted gross income tax for the short year 2003, the 2004 tax year, and the 2005 tax year. The Department recalculated Taxpayer's Indiana sales factor and apportionment percentages which resulted in additional Indiana adjusted gross income tax assessments for these years. Taxpayer asserts that the Department incorrectly added sales to the numerator of its Indiana sales factor formula. Taxpayer believes that these adjustments to its Indiana sales are incorrect and that no additional Indiana adjusted gross income tax is due. In addition, Taxpayer requests that its apportionment factors not be returned to what was originally filed on its returns, but for the apportionment factor to be calculated differently asserting that a refund of adjusted gross income tax would then be due. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

Taxpayer not only protests the assessments, but requests adjustments to the Taxpayer's original returns and a refund of adjusted gross income tax—without having filed amended returns/refund requests. Taxpayer asserts that these proposed adjustments are warranted based upon language taken from two advisory letters that were written by a Department employee for a tax professional that is neither the Taxpayer's current representative nor an employee of the Taxpayer's representative's employer.

Notwithstanding that Taxpayer has not filed the requisite amended returns requesting these adjustments and refunds, these advisory letters are not the type of documents that are binding on the Department. The requests for advisory letters did not disclose a specific taxpayer—i.e., were for anonymous taxpayers—and were not published in the Indiana Register, therefore, cannot be considered rulings. See [45 IAC 15-3-2\(e\)](#) (stating that letters written "based upon general inquiries and correspondence... are advisory in nature only... [,] are not to be considered rulings by the department and will not be binding.") See also [45 IAC 15-3-2\(d\)\(1\)](#) (stating that "[t]he department will not issue a ruling based upon... a written request from an anonymous taxpayer"). See also *Mirant Sugar Creek, LLC v. Indiana Dep't of State Revenue*, 930 N.E.2d 697, 701 (Ind. Tax Ct. 2010) (finding that the Department's emails, which were not published in the Indiana Register were non-binding advisory letters and were not rulings.) The Department disputes that these advisory letters are dispositive Taxpayer's situation due to factual and legal issues, but declines to address the issues because the issues are now moot as previously stated.

The Department will now address Taxpayer's protest of the Department's determination to adjust Taxpayer's apportionment factors by increasing the amount of gross receipts in Taxpayer's sales factor numerator for the short year 2003 and the 2005 tax year to include the receipts made from Indiana "retail sales." Taxpayer's original return filings for the 2003 tax year and the 2004 tax year included these receipts in the sales factor numerator.

Taxpayer argues that its involvement in the "retail sales" consists of the provision of a service and that it has no interest in the products provided to the insurance company customers.

Taxpayer further asserts that these receipts—in which it has no interest because it has no interest in the goods—are service receipts and are included in only the sales factor denominator as the services are performed outside of Indiana.

However, Taxpayer is mistaken. For the receipts to be receipts as a result of providing a service, Taxpayer would need to be a mere conduit collecting from the insurance company the same amount that it pays to the retail stores for the goods provided to the insurance company customers. Moreover, if a taxpayer were a service provider with receipts and costs of goods for which it has no interest, that taxpayer would neither include such receipts as part of the taxpayer's business receipts nor use such receipts to calculate the apportionment factor—i.e., the receipts would not be included in the numerator or denominator of the sales factor. In effect, Taxpayer wishes to live in the "best of both worlds" where Taxpayer collects receipts for which it has no interest, but at the same time claims the receipts are business income receipts to be reported in the denominator of the sales factor.

In fact, Taxpayer's "retail sales" result from two types of contractual arrangements. Taxpayer contracts with various insurance companies to "procure" products for the insurance company's customers. Then, the insurance company pays Taxpayer a certain contract rate for each product provided to the insurance company customers. Taxpayer also then contracts with a network of retail stores for the retail stores to provide the products to the insurance company customers, and Taxpayer pays the retail stores a specific amount for each of the products provided to the insurance company customers. The contractually agreed amounts that Taxpayer pays to the retail stores for the products provided to the insurance company customers are not the same contractually agreed amounts that Taxpayer receives from the insurance company for the products given to the insurance company's customers. Thus, these contractual arrangements do not result in a mere reimbursement where Taxpayer has no interest in the amounts received from the retail stores.

For illustrative purposes, Taxpayer's contract with the retail stores provides that Taxpayer will pay the retail store \$50 for the good provided to the insurance company customers. Then, Taxpayer's contract with the insurance company provides that the insurance company will pay Taxpayer \$60 for the good provided to the insurance company customer. Therefore, Taxpayer's contractual arrangements results in Taxpayer receiving a \$10 profit because of the transfer of the good.

Accordingly, these transactions result in Taxpayer making a profit on the procurement and transfer of goods. Thus, Taxpayer has an interest in the receipts and, therefore, an interest in the goods that are being transferred in retail transactions occurring in Indiana. Moreover, since these transactions are an "income-producing factor" in Taxpayer's business, the Internal Revenue Service requires Taxpayer to report these purchases as purchases of goods recorded as inventory of a taxpayer when the transactions are an "income-producing factor." See Treas. Reg. § 1.471-1. Taxpayer, in compliance with this regulation, has recorded its purchases of the products from the retail stores as inventory on its federal income tax returns. Since these receipts are received by Taxpayer for an interest in tangible personal property that was transferred in Indiana, the receipts from these transactions would be sourced to Indiana for purposes of the sales factor numerator as provided in [45 IAC 3.1-1-50](#). The Department's adjustments to the sales factor followed this provision.

Therefore, Taxpayer's protest to the Department's adjustments to the sales factor for the "retail sales" is denied.

#### FINDING

Taxpayer's protest is respectfully denied.

### II. Adjusted Gross Income Tax—Apportionment Sales Factor: "Rebates."

#### DISCUSSION

Taxpayer additionally protests the imposition of adjusted gross income tax resulting from the Department excluding the "rebates" from the sales factor. The Department removed the "rebates" from the sales factor because these items are reported as a reduction in the amount paid for the items reducing costs of goods sold and are not reported as income.

After making repeated requests, over a six month period, for Taxpayer's representative to provide further details, the Department received no response. Taxpayer has only made a general protest for this issue and has not provided any specific legal or factual reasons for its protests. Therefore, Taxpayer failed to provide sufficient information and has not met its burden of demonstrating that the original assessment was wrong. IC § 6-8.1-5-1(c).

#### FINDING

Taxpayer's protest to the imposition of adjusted gross income is denied.

### III. Tax Administration—Penalty.

### **DISCUSSION**

The Department found Taxpayer was subject to the underpayment penalty under IC § 6-3-4-4.1(d) for the 2004 tax year and issued an assessment. Taxpayer protests the imposition of the underpayment penalty. IC § 6-3-4-4.1(d) provides:

(d) Every corporation subject to the adjusted gross income tax liability imposed by this article shall be required to report and pay an estimated tax equal to twenty-five percent (25 [percent]) of such corporation's estimated adjusted gross income tax liability for the taxable year. A taxpayer who uses a taxable year that ends on December 31 shall file the taxpayer's estimated adjusted gross income tax returns and pay the tax to the department on or before April 20, June 20, September 20, and December 20 of the taxable year. If a taxpayer uses a taxable year that does not end on December 31, the due dates for filing estimated adjusted gross income tax returns and paying the tax are on or before the twentieth day of the fourth, sixth, ninth, and twelfth months of the taxpayer's taxable year. The department shall prescribe the manner and forms for such reporting and payment.

Taxpayer has provided sufficient documentation demonstrating that the imposition of the underpayment is not appropriate. Accordingly, Taxpayer's protest to the imposition of the underpayment of estimated tax penalty is sustained.

### **FINDING**

Taxpayer's protest to the imposition of the penalty is sustained.

### **SUMMARY**

Taxpayer's protest to the imposition of adjusted gross income tax resulting from the Department adjustment to sales factor numerator is denied, as discussed in Issue I. Taxpayer's protest to the imposition of adjusted gross income tax resulting from the Department excluding the "rebates" from the sales factor is denied, as discussed in Issue II. Taxpayer's protest to the imposition of the penalty is sustained, as discussed in Issue III.

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