

**Letter of Findings: 01-20160593
Individual Income Tax
For the Years 2011 and 2012**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

The Department declined to abate 2011 and 2012 individual income tax assessments based on the "best information available" to the Department; Individual was required to file IT-40PNR returns fully accounting for income derived from conducting a fraudulent biofuel business within this state and for the benefits which accrued to the Individual from the sale of the Indiana biofuel business to a second, acquiring company.

ISSUE

I. Individual Income Tax - Best Information Available Assessment.

Authority: IC § 6-3-2-1; IC § 6-3-2-1(a); IC § 6-3-2-2; IC § 6-3-2-2(a)(3); IC § 6-8.1-5-1(c); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Black's Law Dictionary (7th ed. 1999).

Taxpayers argue that the Department erred when it assessed them additional 2011 and 2012 Indiana income tax.

STATEMENT OF FACTS

Taxpayers (husband and wife) are former Indiana residents now living in Oregon.

Acting upon information provided by the Office of the U.S. Attorney for the Southern District of Indiana, the Indiana Department of Revenue ("Department") issued Taxpayers "Proposed Assessments" of additional Indiana income tax for the years 2011 and 2012. The tax assessments totaled approximately \$400,000. With penalties and interest, the liability is now approximately \$500,000.

Taxpayers disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayers' representatives explained the basis for the protest. This Letter of Finding results.

Since the assessment is based exclusively on husband's alleged activity, for simplicity's sake this Letter of Findings will refer simply to "Taxpayer," but the Letter of Findings addresses the joint liability of Taxpayers, husband and wife.

I. Individual Income Tax - Best Information Available Assessment.

DISCUSSION

Taxpayer was named in a federal indictment charging several individuals with operating an Indiana biofuel company engaged in illegal activities which enriched the participants. Taxpayer was named as the biofuel company's "Director of Sales" in that indictment.

The Indiana biofuel company was eventually purchased by another company. In exchange for their ownership interest in the Indiana company, each of the named defendants - along with Taxpayer - received two million shares of stock in the acquiring company and a \$3,750,000 promissory note. After the biofuel company was

acquired, Taxpayer and each of the defendants continued to serve as "paid officers, managers or consultants for [Indiana Company]."

The federal indictment charged the defendants with fraud, conspiracy, wire fraud, making false statements, obstruction of justice, engaging in prohibited financial transactions, and claiming federal biofuel credits to which they were not entitled. The defendants were charged with selling more than 35 million gallons of fuel and seeking and obtaining credits from the federal government - to which it was not entitled - in excess of \$35,000,000. Although not a named defendant in the biofuel scam, the indictment stated that Taxpayer was aware that the Indiana company was not entitled to claim the federal credits. The federal prosecutors stated that the participants engaged in one of the "largest tax and securities fraud schemes in Indiana history."

As the company's "Director of Sales" Taxpayer was paid \$.015 for each gallon of biofuel fuel sold and - as previously noted - benefited from the sale of the Indiana biofuel company to the acquiring company.

The defendants named in the original federal indictment eventually pled guilty to "conspiracy, filing false claims with the IRS, wire fraud, and 'lying to the EPA and the IRS.'"

Taxpayer eventually entered into a separate "plea agreement" with the federal prosecutors. Among other charges, Taxpayer pled guilty to "executing a scheme and artifice to defraud, and for obtaining money, and property by means of false and fraudulent pretenses." Taxpayer pled guilty to making "false fictitious, and fraudulent claims to the IRS." Taxpayer was fined \$250,000 and sentenced to five years in prison for his participation in the biofuel scam. As part of the plea agreement, Taxpayer was ordered to pay full restitution to the victims of the offenses and was ordered to pay \$350,000 "partial restitution" on the sentencing date. In addition, Taxpayer was ordered to forfeit personal property seized during the search of his home. (Emphasis added).

The Department issued Taxpayer a notice of "Proposed Assessment of Reported Adjusted Gross Income" based on "information [the Department] obtained from the office of U.S. Attorney for the Southern District of Indiana." The Department assessed Taxpayer approximately \$500,000 in additional tax, interest, and penalties for the years 2011 and 2012.

Taxpayer disagrees with the Indiana assessment. Under this state's law, Taxpayer bears the responsibility of establishing that the \$500,000 assessment is wrong. The \$500,000 assessment constitutes evidence that the Department's claim for the unpaid tax is valid, and each taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). In reviewing a taxpayer's argument, the Indiana Supreme Court has held, that when it examines a statute that an agency is "charged with enforcing . . . we defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party." Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014).

Taxpayer argues that he - and his wife - were "not residents of Indiana at any time in 2011 and 2012 and did not conduct any business in Indiana." To that end, Taxpayer provided copies of Oregon income tax returns. On those returns, Taxpayer reported 2011 federal adjusted gross income of approximately \$574,000 and \$5,819,000 in federal adjusted gross income during 2012. Those amounts were confirmed independently in documents obtained directly from the IRS.

Taxpayer has provided nothing which would establish the source of the 2011 and 2012 income. However, the federal indictment clearly stated that Taxpayer - along with the other biofuel conspirators - continued to function as "paid officers, managers or consultants for [Indiana Company]" and that Taxpayer "continued to sell product for [Indiana Company]" and received a "commission on all [Indiana Company] sales."

IC § 6-3-2-1 provides in part as follows:

- (a) Each taxable year, a tax at the following rate 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:
 - (1) For taxable years beginning before January 1, 2015, three and four-tenths percent (3.4[percent]).
 - (2) For taxable years beginning after December 31, 2014, and before January 1, 2017, three and

three-tenths percent (3.3[percent]).

(3) For taxable years beginning after December 31, 2016, three and twenty-three hundredths percent (3.23[percent]).

(Emphasis added).

IC § 6-3-2-2 provides in part:

(a) With regard to corporations and nonresident persons, "adjusted gross income derived from sources within Indiana", for the purposes of this article, shall mean and include:

- (1) income from real or tangible personal property located in this state;
- (2) income from doing business in this state;
- (3) income from a trade or profession conducted in this state;
- (4) compensation for labor or services rendered within this state; and
- (5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property to the extent that the income is apportioned to Indiana under this section or if the income is allocated to Indiana or considered to be derived from sources within Indiana under this section.

(Emphasis added).

Taxpayer has provided evidence that he now lives in Oregon, that he started a second company in that state, and that he reported and paid Oregon income tax. However, the Department takes note of the fact that Taxpayer, in his plea agreement, agreed to pay restitution to the victims of the Indiana biofuel company machinations. The nature of "restitution" is that it is "[c]ompensation for benefits derived from a wrong done to another." Black's Law Dictionary 1315 (7th ed. 1999). Without evidence to the contrary, the Department reasonably concludes that these "benefits" constitute "adjusted gross income derived from sources within Indiana . . ." as specified under IC § 6-3-2-1(a).

Taxpayer - as a "nonresident person" has not adequately accounted for the "adjusted gross income derived from sources within Indiana . . ." IC § 6-3-2-1(a). The documentation provided establishes that Taxpayer was receiving "income from doing business in this state" (IC § 6-3-2-2(a)(3)) because he was being paid to sell fuel by either (or both) the Indiana biofuel company or the company that acquired the biofuel company.

In addition, Taxpayer has not adequately accounted to Indiana for the benefits which accrued to him when the Indiana biofuel company was sold to the acquiring company. As mentioned at the outset, those benefits included his portion of the "two million shares of stock in the acquiring company and a \$3,750,000 promissory note."

The Department concludes that Taxpayer is required - at a minimum - to file fully documented IT-40PNR, Indiana Part-Year or Full Year Nonresident Individual Income Tax Returns, for the years 2011 and 2012 which account for the adjusted gross income noted above. Filing those returns - and paying any tax, interest, and penalties - is a necessary prerequisite to any adjustment of the pending 2011 and 2012 assessments currently based on the "best information available" to the Department.

FINDING

Taxpayer's protest is denied.

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