INDIANA DEPARTMENT OF HOMELAND SECURITY
DIVISION OF FIRE AND BUILDING SAFETY

Title: Interpretation of Section R602.10.5 of the **2005 Indiana Residential Code (675 IAC 14-4.3)**
Date: March 10, 2006
Purpose: To assist code enforcement officials, design professionals and the general public in accurately interpreting the intent of Section R602.10.5 of the 2005 Indiana Residential Code.
Interpretation: The agency interprets Section R602.10.5 of the 2005 Indiana Residential Code such that all sheathable areas of all exterior walls are not required to be sheathed with wood structural panels in order to perform construction that complies with this section. This interpretation will be codified in the 2005 Indiana Residential Code via an amendment published as proposed rule LSA Doc. 05-348.

DEPARTMENT OF STATE REVENUE

02980523.SLOF

SUPPLEMENTAL LETTER OF FINDINGS: 98-0523
Indiana Adjusted Gross Income Tax
For Tax Years 1993 and 1994

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 It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register.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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Adjusted Gross Income Tax: Business/Non-Business Income and I.R.C. § 338(h)(10) Elections

Authority: I.R.C. §338(h)(10); IC 6-8.1-5-1(f); IC 6-3-1-20; 45 IAC 15-5-5; 45 IAC 3.1-1-37; 26 Ind. Reg. 580 (Ind. Dept. of Revenue 2002); May Dept. Stores Co. v. Indiana Dept. of State Revenue, 749 N.E.2d 651 (Ind. Tax Ct. 2001); McVean & Barlow v. New Mexico Bureau of Revenue, 543 P.2d 489 (N.M. Ct. App. 1975); Laurel Pipe Line Co. v. Board of Fin. & Revenue, 642 A.2d 472 (Pa. 1994); Polaroid Corp. v. Offerman, 507 S.E.2d 284 (N.C. 1998); Lenox Inc. v. Offerman, 538 S.E.2d 203 (N.C. Ct. App. 2000); Lenox, Inc. v. Tolson, 548 S.E.2d 513 (N.C. 2001); Kemppel v. Zaino, 746 N.E.2d 1073 (Ohio 2001); Blessing/White Inc. v. Zehnder, 768 N.E.2d 332 (Ill. App. Ct. 2002); Texaco-Cities Serv. Pipeline Co. v. McGaw, 695 N.E.2d 481 (Ill. 1998); Welded Tube Co. v. Commonwealth, 515 A.2d 988 (Pa. Commw. Ct. 1986).

Taxpayer protests the characterization of gain derived from a deemed asset sale as business income.

STATEMENT OF FACTS

AC (Acquiring Corporation) purchased the stock of TC (Target Corporation) from PC (Parent Corporation of Target). AC and PC made an I.R.C. §338(h)(10) election for federal income tax purposes. By making the election, AC and PC could treat the sale of TC stock as a sale of TC's assets, with TC recognizing a taxable gain. The Department characterized the gain as business income subject to 45 IAC 3.1-1-37 formulary apportionment rules. TC (our taxpayer) took the position the Department should properly characterize the gain as allocable non-business income.

Taxpayer's ensuing protest proved unsuccessful. See 26 Ind. Reg. 580 (Ind. Dept. of Revenue 2002). Pursuant to IC 6-8.1-5-1(f) and 45 IAC 15-5-5, taxpayer requested and the Department granted a rehearing. The results of which now follow.

DISCUSSION

I. Adjusted Gross Income Tax: Business/Non-Business Income and I.R.C. § 338(h)(10) Elections

Taxpayer summarized the Department's position in its Request for Rehearing as:

> In 26 Ind. Reg. 580 (Ind. Dept. of Revenue 2002), the Department held that the gain recognized on the deemed sale of Taxpayer's assets as a result of an I.R.C. §338(h)(10) election is properly classified as business income subject to apportionment under the functional test set forth in IC 6-3-1-20….

Taxpayer previously argued the Department improperly classified the "gain" in question as business income subject to formulary apportionment. The taxpayer explained:

> [T]he deemed sale of its assets was an extraordinary, non-recurring event that was neither a necessary nor an essential part of [t]axpayer's regular trade or business operations. The [deemed asset sales] transaction could not be a necessary and essential part of [t]axpayer's regular trade or business operations…because the [deemed] disposition of the assets…terminated [taxpayer's business operations]. As a result of this [I.R.C. § 338(h)(10)] election between the [] Buyer and [] Seller, Taxpayer is deemed to sell all of its assets in liquidation of its business and immediately distribute the proceeds from the deemed sale to its parent corporation in liquidation of its corporate existence. Under the construct of I.R.C. §338(h)(10), the funds are treated as if they were distributed in liquidation because the funds are in fact received by…the actual seller.

Taxpayer now argues that "[t]he disposition of [an] entire business cannot be considered an integral part of the taxpayer's regular trade or business." To support its conclusion, the taxpayer directs the Department's attention to other jurisdictions. According to the taxpayer, there exists a line of cases which stand for the proposition that proceeds derived from the complete liquidation of an entire business and proceeds derived from the liquidation of a "separate and distinct aspect" of a business represent nonbusiness income if such proceeds are distributed to shareholders. See McVean & Barlow v. New Mexico Bureau of Revenue, 543 P.2d 489 (N.M. Ct. App. 1975); Laurel Pipe Line Co. v. Board of Fin. & Revenue, 642 A.2d 472 (Pa. 1994); Polaroid Corp. v. Offerman, 507 S.E.2d 284 (N.C. 1998); Lenox Inc. v. Offerman, 538 S.E.2d 203 (N.C. Ct. App. 2000); Lenox, Inc. v. Tolson, 548 S.E.2d 513 (N.C. 2001); Kemppel v. Zaino, 746 N.E.2d 1073 (Ohio 2001); Blessing/White Inc. v. Zehnder, 768 N.E.2d 332 (Ill. App. Ct. 2002); *But c.f.*, Texaco-Cities Serv. Pipeline Co. v. McGaw, 695 N.E.2d 481 (Ill. 1998) (proceeds derived from partial liquidation deemed business income because sale did not result in cessation of any particular line of business and sale proceeds were reinvested in the company); Welded Tube Co. v. Commonwealth, 515 A.2d 988 (Pa. Commw. Ct. 1986) (proceeds from sale of manufacturing facility characterized as business income under the functional test because the closing of the facility did not lead to a cessation of taxpayer's manufacturing operations and the "[g]ain from the sale was invested in on-going operations").

Taxpayer further argues "[t]here is no basis in law or logic for treating a deemed liquidation under §338(h)(10) differently from an actual liquidation." Taxpayer explains:

> The target [TC] is treated, under §338(h)(10), as if it sold all of its assets, went out of business, and liquidated. This is precisely the type of liquidation contemplated by the court cases. Whether the buyer continues the business or uses the assets in another business is of no consequence. The point is that taxpayer has liquidated its business.

Therefore, since the "[t]axpayer is treated as liquidating its corporate existence for all income tax purposes as a result of the I.R.C. §338(h)(10) election," the gain from the deemed sale of assets, fails to qualify as business income under the functional test.

The Issue:

At issue is whether TC's gain is taxable under I.C. 6-3-1-20. Taxpayer argues the income derived from the "deemed" asset sale represents allocable non-business income. The Department, on the other hand, contends this income represents business income subject to apportionment. Both parties agree resolution of the legal issue depends on whether the income derived from an I.R.C. §338(h)(10) transaction meets the IC 6-3-1-20 definition of "business income." Specifically, resolution depends on whether the aforementioned income qualifies as business income under the functional test.

Indiana "business income":

IC 6-3-1-20 provides "[t]he term "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." The Indiana Tax Court recognized the language of IC 6-3-1-20 to include both a "transactional" and a "functional" test. The court in May Dept. Stores Co. v. Indiana Dept. of State Revenue, 749 N.E.2d 651, 665 (Ind. Tax Ct. 2001) stated:

> The language and structure of IND.CODE § 6-3-1-20 supports the conclusion that the [Indiana] General Assembly intended to define business income via application of both a transactional and functional test. The Court agrees with the Oregon Supreme Court [see Willamette Indus. v. Department of Revenue, 15 P.3d 18 (Or. 2000)] that the functional test requires that the disposition of the assets at issue must, along with their acquisition and management, constitute an integral part of the taxpayer's regular trade or business operations.

The May court explained that business income includes both: (1) income derived from transactions conducted in the regular course of taxpayer's trade or business; and/or (2) income derived from the acquisition, management, and disposition of the property that constitutes integral parts of the taxpayer's regular trade or business operations." Id. at 655. The former represents the transactional test and the latter, the functional test.

Using the functional test, the May court held:

> Associated [predecessor of taxpayer] divested an entire division for the benefit of a competitor pursuant to a court order. This divestiture was not an essential part of its department store retailing operations. Associated [predecessor of taxpayer], through all of its divisions, including Horne, was engaged in the business of department store retailing. The *disposition* of Horne's assets was neither a necessary nor an essential part of Associated's department store retailing business operations. Horne was unquestionably an integral part of Associated's business operations. Indeed, Horne was being expanded at the time May [taxpayer] acquired Associated's stock. ***However, pursuant to the [Stipulation and] Order, the divestiture of Horne's assets was for the benefit of a competitor and not for the benefit of Associated. Under these circumstances, this divestiture (or disposition of assets) could not have constituted an integral part of Associated's regular trade or business operations***. See Laurel PipeLine Co v Board of Fin. & Revenue., 642 A.2d 472, 475-476 (Pa. 1994) (citing McVean & Barlow v. New Mexico Bureau of Revenue, 543 P.2d 489 (N.M. Ct. App. 1975). ***Therefore, the gains from the sale of Horne's assets did not qualify as business income under the functional test.*** Id. at 665. (Emphasis added.)

The Court further reasoned, "it is not enough that the property was used to generate business income for the taxpayer prior to its disposition. The disposition must be an integral part of the taxpayer's regular trade or business operations." Id. at 664.

Legal Analysis:

Taxpayer presumes Indiana recognizes the validity of the proposition that income derived from a sale of assets previously used to generate apportionable business income is allocable non-business income, in the context of a complete or partial liquidation. Nothing in IC 6-3-1-20 or the May case suggest such a presumption. Under May, the language of IC 6-3-1-20 establishes two tests to determine whether income is "business income". A third test does not exist. The Department only justifies the characterization of income as "business income" when the transactional test or the functional test is met.

Income qualifies as "business income" for the functional test when the income originates from tangible and intangible property, and the acquisition, management, and disposition of such property represent "integral parts of the taxpayer's regular trade or business operations". IC 6-3-1-20. "[I]t is not enough that the property was used to generate business income for the taxpayer prior to its disposition." May Dept. Stores Co. at 664. "The disposition too must be an integral part of the taxpayer's regular trade or business operations." Id. at 664.

Using this language, the Department must consider three factors in its determination of whether a taxpayer's income qualifies as "business income" under the functional test. The three factors are: (1) whether the acquisition, management, and disposition of the property generated income; (2) whether a disposition occurred; and (3) whether the acquisition, management, and disposition of the property constituted an integral part of the taxpayer's trade or business.

The first factor of the functional test involves examining whether the taxpayer, prior to the sale, used the transferred property in its business to produce income. Before the sale, the taxpayer's assets generated business expenses, deductions, and produced substantial income. After the disposition, the assets retained these business characteristics. The taxpayer continued using the assets and the assets continued generating expenses, deductions, and income.

The second factor of the functional test involves looking at the intent of the taxpayer with respect to the disposition. In May, the court examined the taxpayer's intent with respect to the disposition by making note of the following facts:

(1) **The Stipulation and Order (Order) required** May to "divest all of the assets and interests" of Horne.

(2) Associated (prior to its merger into May) **divested** an entire division for the benefit of a competitor ***pursuant to a court order***.

(3) **Pursuant to the Order**, the divestiture of Horne's assets was for the benefit of a competitor and not for the benefit of Associated.

Id. at 654, and 665. (Emphasis added.) Utilizing these facts, May held that the taxpayer's disposition of business assets were not "an integral [part] of the taxpayer's regular trade or business operations" because the disposition was legally compelled and not a volitional act. Distinguishing this case from the current taxpayer, the taxpayer's motive in the disposition of the property was for business reasons and not pursuant to an administrative, legislative, or judicial decision. The taxpayer's decision to sell its stock, make an I.R.C. §338(h)(10) election, and treat the stock sale as a "deemed asset" sale were all volitional acts. Thus, from these facts it is clear that the taxpayer's intent was to cause a disposition of the property.

The third factor of the functional test involves looking at the end result of the transaction. By examining the end result of the transaction, the Department can confirm whether the disposed property constituted an integral part of the taxpayer's business. In May, the court remarked:

> *[T]he divestiture of Horne's assets was for the benefit of a competitor and not for the benefit of Associated.* Under these circumstances, the divesture (or disposition of assets) could not have constituted an integral part of Associated's regular trade or business operations."

Id. at 665. (Emphasis added.) Comparing the analysis used in May to this taxpayer, the taxpayer utilized the proceeds of the asset disposition to further the seller's (Parent Corporation) ongoing business operations. That is, the seller (Parent Corporation) reinvested the proceeds in its ongoing business. The seller (Parent Corporation) used (and still uses) the tax attributes (basis adjustment) associated with the disposition to reduce the taxpayer's—and indirectly, the Purchaser's—apportionable business income subject to Indiana adjusted gross income tax. Thus, using an analysis similar to the May court, the disposition benefited the taxpayer and not the purchaser; and therefore, the disposition of the property constituted an integral part of the taxpayer's business operations.

For all the aforementioned reasons, the Department properly characterized the income derived from taxpayer's I.R.C. §338(h)(10) deemed asset sale as IC 6-3-1-20 "business income".

FINDING

The Department denies the Taxpayer's protest.

DEPARTMENT OF STATE REVENUE

02-20020276.LOF

LETTER OF FINDINGS NUMBER: 02-0276
Gross Income Tax
For the Year 1996-1999

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.

ISSUES

I. Gross Income Tax -- Leasing income

Authority: Ind. Code § 6-2.1-2-2; 45 IAC 1-1-162 (repealed effective January 1, 1999); 45 IAC 1.1-3-13; *First National Leasing v. Ind. Dep't of State Revenue*, 598 N.E.2d 640 (Ind. Tax 1992).

Taxpayer protests the imposition of gross income tax with respect to lease income received from a trust.

II. Tax Administration -- Negligence Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the assessment of a negligence penalty.

STATEMENT OF FACTS

Taxpayer is engaged in a variety of businesses, including the leasing of tangible personal property, operated through a grantor trust. During the years in question, the trust engaged in two types of leases. The first type, "M Leases," generally covered ordinary tangible personal property, some fixtures, and construction equipment. The second type, "R Leases," covered larger, mobile items of tangible personal property, as well as plant equipment and power plant generators.

During the years in question, Taxpayer did not report its income from the trusts on its corporate income tax return. However, as a result of a Department audit, the Department assessed additional tax with respect to the income generated from the leases. In addition, the Department assessed a negligence penalty of ten percent. Taxpayer has protested the assessments of both tax and penalty.

I. Gross Income Tax -- Leasing Income

DISCUSSION

In general, the gross income of a non-resident taxpayer derived from activities or businesses in Indiana was subject to a gross income tax prior to January 1, 2003. Ind. Code § 6-2.1-2-2. Trusts that resembled corporations in form and carried the purpose of conducting a trade or business were subject to tax as corporations. 45 IAC 1-1-162 (repealed effective January 1, 1999); *see also* 45 IAC 1.1-3-13 (effective January 1, 1999). Based on the facts of this case--inasmuch as the lease income was constructively received by Taxpayer--the Department appears to have actually underassessed tax rather than overassess tax against Taxpayer.

Taxpayer argues that its income derived from R Leases is not subject to gross income tax due to Taxpayer's (and the property's) lack of nexus with Indiana, and the fact that its power plants would not generate net income for several years. Taxpayer cites *First National Leasing v. Ind. Dep't of State Revenue*, 598 N.E.2d 640 (Ind. Tax Ct. 1992) for the proposition that its income from the leases should be exempt from gross income tax. In *First National Leasing*, First National leased equipment used by Hulcher, a wholly-owned subsidiary of First National. Some of the equipment leased by Hulcher was located at a Hulcher base located in Indiana. The companies negotiated their leases outside Indiana, and First National did not control the location of the property that it leased. The court held that First National's income from leasing was not derived from Indiana sources.

First, Taxpayer's net income, rather than its gross income, appears to have been taxed. Second, with respect to its nexus argument based on *First National Leasing,* Taxpayer has not sufficiently developed this argument to show whether its activities were exempt from tax, and accordingly is denied.

FINDING

Taxpayer's protest is denied.

II. Tax Administration -- Negligence Penalty

DISCUSSION

The Department may impose a ten percent negligence penalty. IC 6-8.1-10-2.1 and 45 IAC 15-11-2. Generally, a taxpayer's failure to pay taxes determined by a Department audit will result in penalty assessment. IC 6-8.1-10-2.1(a)(3). However, the Department may waive this penalty if the taxpayer can establish that its failure to file "was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c). A taxpayer may demonstrate reasonable cause by showing "that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed…." *Id*. With respect to the penalty, Taxpayer has not provided sufficient information to permit penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

02-20030062.LOF

LETTER OF FINDINGS NUMBER: 03-0062
Adjusted Gross Income Tax
For the Years 1996-1999

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.

ISSUES

I. Business / Non-business Classification – Adjusted Gross Income Tax.

Authority: Ind. Code § 6-3-1-20; Ind. Code § 6-3-1-21; Ind. Code § 6-3-2-2; *May Dep't Stores Co. v. Indiana Dep't of State Revenue*, 749 N.E.2d 651 (Ind. Tax 2001); *Hoechst Celanese Corp. v. Franchise Tax Board*, 22 P.3d 324 (Cal. 2001); *Jim Beam Brands Corp. v. Franchise Tax Board*, 34 Cal. Rptr. 3d 874 (Cal. Ct. App. 1st Dist. 2005); *Times Mirror Co. v. Franchise Tax Board*, 162 Cal. Rptr. 630 (Cal. Ct. App 2nd Dist. 1980)

STATEMENT OF FACTS

Taxpayer is a corporation which filed a unitary tax return on behalf of several affiliates. During 1996, Taxpayer sold several businesses. The largest dollar amount was realized from the sale of Group W, which itself consisted of several subsidiaries.

In addition, an affiliate of Taxpayer, Sub A, sold an interest in Unrelated S, a business whose subsidiary, Unrelated N, was engaged in management of environmental emergencies on behalf of Sub A. Sub A owned options and participation options in Unrelated S. In 1996, Sub A exercised its options in shares of Unrelated S. Sub A then sold its shares of Unrelated S. While Sub A contracted with Unrelated N to provide federally mandated services on behalf of Sub A, Sub A never owned or even had the right to own more than twenty percent of Unrelated S.

Further, Taxpayer sold an interest in an Austrian partnership that it had purchased, apparently for the sole purpose of allowing Taxpayer's chairman to obtain an Austrian passport. Finally, Taxpayer purchased shares of several corporations that Taxpayer considered to be possible takeover targets; however, Taxpayer purchased less than a five percent interest in the targets. As a result of owning shares in these takeover targets, Taxpayer received dividends from the target corporations.

Meanwhile, Taxpayer also owned Group E and stock in Sub C, a company designed to manage Taxpayer's health care liabilities. Group E consisted of several subsidiaries. In 1996, the operations of Group E were reorganized into an LLC. As a result of the reorganization and a subsequent distribution of the LLC to Company R, Taxpayer incurred a significant loss. Also in 1996, ten percent of the stock of Sub C was sold to an unrelated third party. The sale of Sub C stock resulted in a substantial loss.

In 1997, another company, Sub G, sold its remaining gas contracts, terminating its gas marketing business activities, incurring a substantial gain. Taxpayer received additional dividends from potential takeover targets.

On its Indiana tax returns for the years in question, Taxpayer reported all the income and losses in question as nonbusiness income. Upon Department audit, the Department determined that the items should have been classified as business income and assessed additional tax. Taxpayer filed a protest of the items that resulted in gains; however, as part of its protest, it stated that the items that resulted in losses were in fact business income. A hearing was held with respect to the protest.

I. Business / Non-business Classification – Adjusted Gross Income Tax

DISCUSSION

Ind. Code § 6-3-1-20 provides:

The term "business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitutes integral parts of the taxpayer's regular trade or business.

Conversely, Ind. Code § 6-3-1-21 provides that "nonbusiness income" means all income other than business income.

Under the provisions of Ind. Code § 6-3-2-2, business income of a corporation is subject to apportionment to Indiana, while nonbusiness income is generally allocable to the corporation's domicile.

In *May Dep't Stores Co. v. Indiana Dep't of State Revenue*, 749 N.E.2d 651 (Ind. Tax 2001), the court determined that the definition of business income encompassed two tests. The first test, the transactional test considers

(1) the frequency and regularity of similar transactions;

(2) the former practices of the business; and

(3) the taxpayer's subsequent use of the income.

Id. at 658-659.

In *May*, May Department Stores ("May") owned a several large department store chains purchased a rival department store chain. As a result of the purchase, an antitrust case was launched against May. In settlement of the antitrust claim, May sold the assets of one of its divisions, Home. As a result of Home's asset sale, May realized a gain that it treated as nonbusiness income, allocable to May's domicile; however, the Indiana Department of State Revenue determined that the income was business income apportionable to Indiana and other states. The court held that, because the sale of the assets was a one-time, extraordinary transaction, the sale did not meet the transactional test for business income. *Id.* at 664

Applying the test from *May,* the sales of Taxpayer's interests in various divisions and other companies generally did not meet the transactional test due to their extraordinary nature. However, with respect to the dividends received from the potential takeover target corporations, the dividends met the transactional test. As part of Taxpayer's regular business, Taxpayer bought (and

presumably sold) shares in potential takeover targets. The receipt of dividends from takeover targets- a consistent and ongoing activity of Taxpayer- was in contrast to May that sold the assets in one division as a one-time transaction. Accordingly, the dividends met the transactional test for business income.

The second test, the functional test, "dictates that acquisition, management, use or rental, *and* disposition of property must constitute integral parts of regular business operations." *Id.* at 660 (emphasis added). In *May,* the court noted that the sale of the assets of the division in question was done to benefit a competitor, rather than May. As a result, the sale could not have been an integral part of May's business, and therefore the sale failed to meet the functional agreement. *Id.* at 665.

First, with respect to the sale of Group W (and Sub G's gas contracts, which parallels Group W but will not be discussed separately), Taxpayer operated this business for several years as part of its core business of energy production. Taxpayer had used Group W for the production of business income and business deductions. Further, while Taxpayer was no longer engaged in the mining business in certain states, Taxpayer admits that it was engaged in the mining business in other parts of the country, and uses this argument to justify treating losses from its partial sale of Group E as *business* losses. While the Department acknowledges that different methods may be used to mine the coal in different regions of the United States, this does not change the fact that Group W, its management, its extraction of coal, and ultimately its sale were part of Taxpayer's regular business operations. Unlike May, which had to sell the assets of Home to benefit a competitor, Taxpayer sold Group W as part of a regular business decision to benefit itself. The operation and sale of Group W was an integral part of its overall business, unlike May that had to sell the assets of Home to *prevent* helping itself and, in fact, help its competition.

Finally, if Taxpayer's argument is to be understood, the sale of all of a business interest renders a gain a nonbusiness gain, while a sale of ten percent renders the sale a business gain (or loss, as occurs in this case). Apparently, somewhere in between these numbers exists a point where gains change their character, and an influx of income suddenly switches from one side of Taxpayer's tax ledger (business income) to the other side (nonbusiness income). Absent a clear statutory, regulatory or other guidance as to when this switch occurs, Taxpayer has not carried its burden of showing the error of the assessment. As such, the income from the sale of the Group W was business income within the meaning of Ind. Code § 6-3-1-20.

Furthermore, while Indiana has considered this issue in one particular set of circumstances, California has considered the issue with respect to the sale of subsidiaries in the normal course of a taxpayer's business. While California law is not binding authority in Indiana, California's constructions are noteworthy because its statutes and rulings formed the basis of the Uniform Division of Income for Tax Purposes Act (UDITPA), *Hoechst Celanese Corp. v. Franchise Tax Board*, 22 P.3d 324, 334-335 (Cal. 2001), and Indiana has generally based its corporate tax statutes on UDITPA. *May*, 749 N.E.2d at 651. In *Jim Beam Brands Corp. v. Franchise Tax Board*, 34 Cal. Rptr. 3d 874 (Cal. Ct. App. 1st Dist. 2005), Jim Beam owned all the shares of a subsidiary, Clear Spring, who in turn owned all the shares of yet another company, Taylor Foods. In 1987, Clear Spring sold its shares in Taylor Foods. The reason given for the sale was that Taylor Foods did not fit into Jim Beam's long-term plans. The proceeds were distributed from Clear Spring to Jim Beam and further to Jim Beam's parent. Jim Beam had classified the income as nonbusiness income allocable to Jim Beam's Kentucky domicile. Previously, Jim Beam had treated Taylor Foods as part of its unitary group and had treated its income and deductions as business income or deductions. However, California sought to treat the income as apportionable to California.

The court looked at the whether the property itself was used for the production of income as an integral part of Jim Beam's operation, rather than just the disposition of that property. The court held that Taylor Foods itself was used to produce business income, and as a result the disposition of Taylor Foods was business income. *See also Hoechst Celanese* 22 P.3d at 343 (distribution of excess pension funds to preclude use by other corporations possible takeovers resulted in business income when the corporation had claimed its payments into the fund as business deductions); *Times Mirror Co. v. Franchise Tax Board*, 162 Cal. Rptr. 630 (Cal. Ct. App 2nd Dist. 1980) (disposition of a wholly-owned subsidiary held to be business income).

Here- just as Taylor Foods was part of Jim Beam's unitary business in *Jim Beam*- Group W was part of Taxpayer's overall unitary operation. Similarly, even though Jim Beam did not even retain the funds from the sale of Taylor Foods or continue to operate Taylor Foods, Taxpayer did not continue to operate Group W. Nevertheless, Group W was a part of Taxpayer's overall business. That it was sold as a part of Taxpayer's overall business plan did not change the character of the property in question. It was business property and remained business property even in its ultimate disposition.

In addition, with respect to its dividends from potential takeover targets, Taxpayer used its stake in these companies to decide whether to expand its operations. It decided either to offer to take over the target corporation or to refuse to buy it. While the operation of the target corporations was not part of its unitary business, the buying and selling of the target corporations was clearly integral to its core operations.

Further, with respect to the sales (or deemed sale) of portions of Group E and Sub C, it is clear that these corporations were part of its overall unitary business. Accordingly, the losses are business losses. However, if it is subsequently determined that the gains from Group W was nonbusiness gains, it would stand to reason that the losses from Group E and Sub C are nonbusiness losses, notwithstanding that the businesses were operated by Taxpayer after the sales of shares of these companies.

However, with respect to the sale of Taxpayer's interests in the Austrian partnership and in Unrelated S, Taxpayer has provided sufficient information to conclude that the assets were not part of its regular business operations, and therefore Taxpayer's protest

is sustained on these issues.

FINDING

Taxpayer's protest is sustained with respect to its sale of Unrelated S and its interest in an Austrian partnership. Taxpayer's protest is otherwise denied.

DEPARTMENT OF STATE REVENUE

01-20030363.LOF, 04-20030364.LOF

LETTER OF FINDINGS NUMBERS: 03-0363, 03-0364
Sales/Use Tax and Personal Income Tax
For the Years 1999-2001

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ISSUES

I. Tax Administration - Best information available

Authority: Ind. Code § 6-8.1-5-1; Ind. Code § 6-8.1-5-4

Taxpayer protests the imposition of sales tax and income tax with respect to an increase in its receipts.

STATEMENT OF FACTS

Taxpayer is an individual engaged in the business of selling food items at local fairs and festivals around Indiana. Taxpayer was audited by the Department in 2002 for the years 1999-2001. The Department conducted an audit based on one of the 2002 fairs at which Taxpayer did business. As a result of the audit, Taxpayer was assessed additional sales and income taxes, penalty and interest based on an underreporting of receipts. Taxpayer filed a protest, and a hearing was held. Additional facts will be supplied as necessary.

I. Tax Administration - Best information available

DISCUSSION

Taxpayer argues several assumptions made by the auditor were incorrect. Assessments by the Department are presumed correct, and the burden of showing the incorrectness of any assessment rests with the taxpayer. Ind. Code § 6-8.1-5-1(a).

First, Taxpayer argues that the prices used by the auditor were incorrect. In particular, the Department used prices that Taxpayer charged at a county fair in 2002, while the audit period was for 1999-2001. Taxpayer argues that the prices used by the Department overstated Taxpayer's sales for the years in question. While some inflation took place, it cannot be said that Taxpayer has overcome the presumption of the correctness of the audit.

Second, Taxpayer admits that the Department's auditor incorrectly applied the waste factor. Taxpayer argues that, though its waste might have been higher than the fifteen percent used by the Department, that figure was reasonably close. Taxpayer does argue that significant waste does transpire due to the transient nature of Taxpayer's business and resulting issues with refrigeration, but this can be described as not sufficiently supported by Taxpayer.

However, Taxpayer argues that the waste factor was applied entirely to lunches (the meat item), while not applied at all to dinners (the meat item plus side dishes). In particular, Taxpayer argues that its food was cooked in advance, then served as lunches or dinners as the customers order their food. However, the audit stated that the dinners were cooked to order, and accordingly the waste factor was not applicable. The differences in methodology can best be described by the following example.

Taxpayer purchases 10,000 ribs. Seventy-five percent are sold as lunches, while twenty-five percent are sold as dinners. According to the auditor, 7,500 would be sold as lunches. However, fifteen percent would be wasted, resulting in 6,375 rib lunches sold. The remaining 2,500 would be sold as lunches. According to Taxpayer, 8,500 ribs are sold, for 6,375 lunches and 2,125 dinners.

Taxpayer has provided sufficient information to conclude that the auditor incorrectly applied the waste factor in is computation, and accordingly Taxpayer is sustained.

Third, Taxpayer argues that the percentages applied by the auditor to lunches and dinners as a percentage of overall sales, resulted in an excess percentage of sales being attributed to dinners. The auditor assessed tax based on a 75-25 split between lunches and dinners, while Taxpayer asserts that the breakdown was closer to 95-5. Taxpayer states that, when customers purchase items at the fairs at which Taxpayer did business, customers purchased only the meat, without anything else.

Here, Taxpayer's evidence, which consists of statements and not actual evidence of sales from fairs, either during the years of the audit or subsequent years, does not meet its statutory burden, and accordingly is denied.

Fourth, Taxpayer also argues that the auditor did not take into account other dispositions of ribs, such as promotional giveaways and discount or frozen sales. In particular, Taxpayer argues that certain sales made to qualifying groups (e.g., senior citizens) were

not taken into consideration. Further, Taxpayer argues, Taxpayer sold significant quantities of frozen ribs and pork chops to persons who wish to buy in bulk, at prices significantly reduced from their normal resale prices.

With respect to this argument, the auditor apparently did account for the bulk sales of frozen items in determining Taxpayer's sales at fairs. With respect to Taxpayer's arguments concerning promotional sales, Taxpayer has not provided sufficient documentation to rebut the auditor's assessment.

Fifth, Taxpayer argues that the auditor's underreporting assumptions were incorrect. The Department auditor estimated the underreporting of receipts for 2001, and then applied the same percentage to 1999 and 2000. Taxpayer argues that each year should stand alone. Other than the assertion that the auditor's method was incorrect, Taxpayer has not otherwise provided information to conclude that the auditor's methods were incorrect, and accordingly has not met its statutory burden of proof.

Sixth, Taxpayer argues that the auditor's assumption that Taxpayer's records were inadequate was incorrect. Ind. Code § 6-8.1-5-4 states:

(a) Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

(b) A person must retain the books and records described in subsection (a), and any state or federal tax return that the person has filed:

(1) for an unlimited period, if the person fails to file a return or receives notice from the department that the person has filed a suspected fraudulent return, or an unsigned or substantially blank return; or

(2) in all other cases, for a period of at least three (3) years after the date the final payment of the particular tax liability was due, unless after an audit, the department consents to earlier destruction. In addition, if the limitation on assessments provided in section 2 of this chapter is extended beyond three (3) years for a particular tax liability, the person must retain the books and records until the assessment period is over.

(c) A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times.

(d) A person must, on request by the department, furnish a copy of any federal returns that he has filed.

Taxpayer states, "[Indiana law] only requires the Taxpayer to keep such records as are necessary to make an accurate determination of the sales and income tax due." The Department agrees with the substance of this statement; the Department's disagreement is whether Taxpayer has kept those records. While taxpayers may have varying degrees of being able to keep records, the records of any taxpayer must be sufficient to permit the Department to reconstruct that taxpayer's business. Here, Taxpayer's records did not permit such a reconstruction, and accordingly Taxpayer did not rebut the correctness of the Department's assessment.

Taxpayer has further protested an income tax assessment with respect to added receipts. Taxpayer's adjusted gross income for the years in question is increased consistent with the discussion above for his additional sales.

FINDING

Taxpayer's protest is sustained in part and denied in part.

DEPARTMENT OF STATE REVENUE

02-20030478.LOF

LETTER OF FINDINGS NUMBER: 03-0478
Gross Income Tax and Adjusted Gross Income Tax
For the Year 1998-2000

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.

ISSUES

I. Gross Income Tax--Interstate Commerce

Authority: Ind. Code § 6-2.1-3-3; 45 IAC 1-1-120 (repealed effective January 1, 1999); 45 IAC 1.1-3-3; *Reynolds Metal Co. v. Indiana Dept. of State Revenue*, 433 N.E.2d 1 (Ind. Ct. App. 1982).

Taxpayer protests the imposition of gross income tax with respect to items that Taxpayer retains title to, though the items are stored at the seller's location.

II. Adjusted Gross Income Tax--Unitary filing

Authority: Ind. Code § 6-3-2-2.

Taxpayer protests the disallowance of unitary filing between Taxpayer and a related holding company.

III. Adjusted Gross Income Tax--Deductions
Authority: Ind. Code § 6-3-2-2.

Taxpayer protests the disallowance of a deduction for interest paid by Taxpayer to a related holding company.

IV. Adjusted Gross Income Tax--Net operating losses
Authority: Ind. Code § 6-3-2-2.6; I.R.C. § 382.

Taxpayer protests the disallowance of net operating loss carryforwards after Taxpayer had been acquired by another company.

V. Tax Administration--Negligence Penalty
Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the assessment of a negligence penalty.

STATEMENT OF FACTS

Taxpayer is a business engaged in making toothpaste tubes, primarily for a large toothpaste manufacturer. With respect to its operations, Taxpayer manufactures its tubes at its plant in another state. When Taxpayer manufactures its tubes, it puts the name of the company on the tubes it sends to the company's Indiana facility. Title to the toothpaste tubes remained with Taxpayer until such time as the tubes were filled by the company; however, as a matter of practice, the tubes were purchased by the company unless the tubes were not in compliance with the manufacturer's standards at the time of shipment. Taxpayer claimed that the sales were the result of interstate commerce; however, upon Department audit, the auditor determined that the taxpayer's sales were conducted in Indiana and thus subject to gross income tax.

In addition, Taxpayer had operated as part of a larger group of companies for several years but filed separate Indiana returns. In mid-1998, Taxpayer and its group were sold to another company. Later in 1998, Taxpayer was sold as a separate entity to yet another company. These sales created a limitation on net operating losses under the Internal Revenue Code. However, upon audit, the Department determined that the net operating losses could not be carried forward after 1998, and accordingly assessed additional tax on this basis.

In 2000, Taxpayer requested Department consent for it and the holding corporation that had acquired Taxpayer in 1998 ("holding company") to file unitary tax returns; however, Taxpayer did not request permission to include its foreign parent. The Department sent a standard letter permitting such filing subject to audit review. Taxpayer and the holding company proceeded to file unitary returns for two of the years in controversy. However, the Department's audit later determined that the two companies should have filed separately. Further, the audit denied a deduction for interest paid by Taxpayer to the holding company.

Finally, with respect to the assessments listed above, the Department assessed a negligence penalty of ten percent. Taxpayer has also protested this assessment.

I. Gross Income Tax—Interstate Commerce

DISCUSSION

Taxpayer's first point of contention is with respect to the imposition of gross income tax on its sales of toothpaste tubes to an Indiana facility. Taxpayer manufactures its tubes at its plant in another state. When Taxpayer manufactures its tubes, it puts the name of the company on the tubes it sends to the company's Indiana facility. Title to the toothpaste tubes remained with Taxpayer until such time as the tubes were filled by the company; however, as a matter of practice, the tubes were purchased by the company unless the tubes were non-compliant at the time of shipment.

Taxpayer argues that its sales really were between its manufacturing plant in another state and the company's Indiana facility. Accordingly, Taxpayer maintains that the sale should be characterized as one in interstate commerce, rather than an Indiana sale occurring at the location where the toothpaste tubes were stored, and accordingly exempt under Ind. Code § 6-2.1-3-3. In support of its contention, taxpayer cites to the case of *Reynolds Metal Co. v. Indiana Dept. of State Revenue*, 433 N.E.2d 1 (Ind. Ct. App. 1982). In that case, an aluminum producer entered into contracts with four distributors for the sale of the producer's products. The producer and distributor had entered into the contracts outside Indiana. As part of the contract, the producer would manufacture its products at an agreed-upon price, and then ship it to the distributors. Payments were made to the producer monthly, based on withdrawals from the distributor's inventory. The distributor assumed any risk of loss, had responsibility for insuring the products, and had responsibility for paying property taxes. The parties could agree to accept the return of non-salable goods, and the producer could demand return of their products if the distributor declared bankruptcy. *Id.* at 16. The Department argued that the relationship was a consignment and thus subject to tax, while the producer argued that the producer had only a security interest, and thus the sale was exempt as being in interstate commerce. The court noted that the relationship between the distributor and the producer more closely resembled a security interest in property rather than a consignment. Accordingly, the transaction between the producer and the distributor was treated as a sale, and thus treated as being in interstate commerce. *Id.* at 18.

Taxpayer argues that its inventory arrangement with the manufacturing plant was in reality a sale prior to the shipment of tubes to the manufacturing plant. Taxpayer has argued that it had limited rights to the inventory after it reached the manufacturing plant. Further, Taxpayer argues that the manufacturer only rejected defective tubes and continued to use older tubes (for instance, a different outer design) that Taxpayer had supplied, giving further evidence that the property in question was really a sale, title notwithstanding.

Here, 45 IAC 1.1-3-3(d)(6) and its pre-1999 counterpart, 45 IAC 1-1-120, is best applicable to this situation. That regulation

states that:

(d) Gross income derived from the sale of tangible personal property in interstate commerce is subject to the gross income tax if the sale is completed in Indiana. The following examples are situations where a sale is completed in Indiana prior to or after shipment in interstate commerce:

***

(6) A sale to an Indiana buyer by a nonresident seller after the goods are transported into Indiana.

Here, the title to the property changed when the manufacturer took the tubes and puts its toothpaste in the tubes. Further, unlike the producer in Reynolds who was treated as having a security interest in the metal, Taxpayer expressly does not have a security interest in the toothpaste tubes pursuant to paragraph 3 of the manufacturer's "Consignment Policy." Thus, the sales took place in Indiana after the tubes were shipped into Indiana. Accordingly, the income in question was Indiana gross income and properly subject to tax.

FINDING

Taxpayer's protest is denied.

II. Adjusted Gross Income Tax--Unitary filing

DISCUSSION

Taxpayer also protests the disallowance of unitary filing with a domestic holding company. In particular, Taxpayer notes that the two entities had the same owners and the same management. Further, Taxpayer notes that the holding company had no separate employees, and Taxpayer's staff handled the administrative functions of the domestic holding company.

One or more taxpayers may petition to file a combined (unitary) return if such request is made within thirty (30) days of the end of the taxpayer's taxable year, the companies subject to combined filing must show that the entities' income is such that the income does not fairly reflect income from Indiana sources per Ind. Code § 6-3-2-2(*l*), and that the inability to fairly reflect its Indiana income can be remedied by combined filing. Ind. Code § 6-3-2-2(q) Here, Taxpayer made a timely request for unitary filing with it and the holding company. The Department in turn sent a letter permitting Taxpayer and holding company to file as a unitary filer, subject to Department audit.

Under Ind. Code § 6-3-2-2(*l*):

If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(1) separate accounting;

(2) the exclusion of any one (1) or more of the factors;

(3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources within the state of Indiana; or

(4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

In effect, three criteria must be met under Indiana statutes for unitary filing. First, a taxpayer must show that it is a unitary business. Second, a taxpayer must show that its Indiana income on a separate company basis does not fairly reflect its Indiana source income. Third, the taxpayer must show, under Ind. Code § 6-3-2-2(*l*)(4), that its income can be remedied by unitary filing.

For the sake of this discussion, Taxpayer and its domestic holding company will be assumed to be unitary; however, the Department does not concede that Taxpayer and its domestic holding company were unitary. Unitary status does not automatically permit combined filing. Unitary filing *and* an inability to fairly reflect Indiana income permits unitary filing for Indiana. Ind. Code § 6-3-2-2(p). With respect to the inability to fairly reflect income, the domestic holding company pays financing debt. The domestic holding company is owned by yet another company based in a foreign country, and the domestic holding company must pay interest on the financing debt to the foreign holding company-- a debt that the foreign holding company created for the purpose of the acquisition of Taxpayer. Under Ind. Code § 6-3-2-2(*o*) and (q), it effectively becomes Taxpayer's option to include the foreign company. If Taxpayer, its domestic holding company and the foreign holding company were all included in the unitary return, this would have fairly reflected the overall Indiana income of Taxpayer's operations. However, by permitting Taxpayer the full scope of this deduction, while stating that the foreign company's income was not includible manages to accomplish two things. First, it fails to show that the Taxpayer's income, as determined on a separate company basis, does not fairly reflect Indiana income. Second, it created its own form of not fairly reflecting Indiana income, by allowing a deduction of interest on a debt created by a commonly-owned taxpayer, without the inclusion of the resulting income, diluting the income of the entire unitary entity claimed by Taxpayer.

Taxpayer has further argued that the Department may not rescind its permission to file unitary returns retroactively absent failure by Taxpayer to present material facts. However, the Department in its response to Taxpayer's request for unitary filing explicitly gave its permission to file the returns *subject to Department audit*. Thus, Taxpayer was permitted to file such returns, but the Department could audit the returns and determine whether the unitary filing was improper.

Taxpayer further protests the disallowance of consolidated filing with the same holding company. Taxpayer has conceded this issue, and thus is denied.

FINDING

Taxpayer's protest is denied.

III. Adjusted Gross Income Tax--Deductions

DISCUSSION

Taxpayer has also protested the disallowance of interest paid by it to the foreign holding company. In particular, when Taxpayer was purchased, its domestic holding company borrowed several million dollars from its foreign holding company. Then, after the purchase of Taxpayer was complete, the domestic holding company dropped down to Taxpayer roughly half of the debt that it incurred. The debt in question correlated to debt that was incurred in the first acquisition of Taxpayer and which was transferred from its first acquiring group to Taxpayer.

Ind. Code § 6-3-2-2 generally provides that a corporation's adjusted gross income begins with the corporation's taxable income for federal income tax purposes. Under Ind. Code § 6-3-2-2(*l*), the Department is permitted several powers, including the disallowance of deductions if the deductions result in a corporation's Indiana income not being fairly reflected.

Here, Taxpayer sought to deduct interest that reflected an artifice of Taxpayer's creation-namely, a loan from the foreign holding company to the domestic holding company to purchase Taxpayer. Alternatively, it can be viewed as debt that was incurred as a result of the first acquiring group's acquisition of Taxpayer. Either way, Taxpayer is effectively seeking the benefit of being able to deduct the interest paid by one hand to its other hand, without a resulting inclusion of income. Accordingly, Taxpayer's protest is denied.

FINDING

Taxpayer's protest is denied.

IV. Adjusted Gross Income Tax--Net Operating Losses

DISCUSSION

Taxpayer has also protested the disallowance of its net operating losses for Indiana purposes under Ind. Code § 6-3-2-2.6. In particular, the Department stated that "[t]he corporation did not calculate the section 382 limitation utilizing the value of the old corporation immediately before the first ownership change."

Under I.R.C. § 382, a corporate taxpayer is limited in certain instances in the amount of its net operating losses that it may use in years after an ownership change. In effect, the limitation is the lower of the net operating losses that it may have used prior to the ownership change or the amount as computed under § 382. If a taxpayer goes through multiple ownership changes, the lowest amount computed under § 382(b) is the amount that can be used.

Here, Taxpayer underwent two ownership changes during a short period of time. When it became part of the first acquiring company, a portion of the operating group's net operating losses became subject to a § 382 limitation of roughly $10,000,000 according to the taxpayer. When the second sale of Taxpayer to its current owner occurred, Taxpayer claimed a § 382 limitation of roughly $3,000,000.

The auditor's principal objection was that Taxpayer had not provided sufficient information to substantiate the second § 382 limitation, both in terms of actual carryover after the acquisition by its present owner and by not providing information with respect to two sales of property held by Taxpayer. Accordingly, the auditor interpreted this as meaning that the § 382 limitation was zero. However, Taxpayer has provided sufficient information, both with respect to the election to treat the first § 382 limitation as the amount claimed by Taxpayer and with respect to a subsequent audit of Taxpayer by the IRS, to conclude that the amount of its carryover is correct. However, the effects of such carryover must be determined by further audit review.

FINDING

Taxpayer's protest is sustained subject to audit review.

V. Tax Administration--Negligence Penalty

DISCUSSION

The Department may impose a ten percent negligence penalty. IC 6-8.1-10-2.1 and 45 IAC 15-11-2. Generally, a deficiency resulting from a Department audit will result in penalty assessment. IC 6-8.1-10-2.1(a)(3). However, the Department may waive this penalty if the taxpayer can establish that its failure to file "was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c). A taxpayer may demonstrate reasonable cause by showing "that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed…." *Id*.

With respect to the penalty, Taxpayer has not provided sufficient information to permit penalty waiver.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0320050502.LOF

LETTER OF FINDINGS NUMBER: 03-0502
Withholding Tax
For Tax Years 1998-01

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. Withholding Tax—Responsible Officer Liability

Authority: Indiana Department of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995); IC 6-3-4-8; IC 6-8.1-5-1

Taxpayer protests his classification as a responsible officer of a corporation.

STATEMENT OF FACTS

Taxpayer was listed as an officer for a corporation which failed to remit withholding taxes. After the corporation did not pay its liabilities, The Department of Revenue ("Department") shifted the responsibility for the liabilities to the officers of the corporation. Taxpayer states that he learned of the liabilities while applying for a residential mortgage. Taxpayer protests his classification as a responsible officer for the corporation. Further facts will be supplied as required.

I. Withholding Tax—Responsible Officer Liability

DISCUSSION

Taxpayer protests his classification as a responsible officer for the corporation in question. The withholding liabilities were personally assessed against taxpayer pursuant to IC 6-3-4-8(f), which provides that, "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties and interest." Also, under Indiana Department of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995), "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. The factors considered to determine whether a person has such authority are the following:

1. The person's position within the power structure of the Corporation.
2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

Id., at 273.

In the course of this protest, taxpayer has provided sufficient documentation to determine that he did not have a position within the power structure of the corporation. He had no authority under an employment contract since he was not employed by the corporation. Finally, he exercised no control over the finances of the business. Control of the bank account, signing checks and tax returns and determining when and in what order to pay creditors were the sole responsibilities of another individual.

Under IC 6-8.1-5-1(b), assessments issued by the Department of Revenue are prima facie evidence that the taxes are owed, and the burden of proving them wrong rests with the taxpayer. Taxpayer has provided sufficient documentation to prove the assessments wrong. Therefore, taxpayer has met his burden under IC 6-8.1-5(b).

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0220040006.LOF

LETTER OF FINDINGS NUMBER: 04-0006
Corporate Income Tax
Tax Period 2000-2002

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-Imposition

Authority: IC 6-8.1-5-1(b), IC 6-2.1-2-2, IC 6-2.1-2-1(c)(1)(A), IC 6-2.1-1-8, 45 IAC 1.1- 1-11, Indiana Department of State Revenue v. Boswell Oil Co., 148 Ind. App. 569, 268 N.E.2d 303 (1971).

The taxpayer protests the imposition of gross income tax.

STATEMENT OF FACTS

The taxpayer is a purchasing cooperative for hardware and building materials. The taxpayer filed an amended gross income tax return for the year ending June 30, 2000. With this amended return, the taxpayer requested a refund which the Indiana Department of Revenue, "department," issued. The department then audited the taxpayer for the years ending June 30, 2000, through June 30,

2002. As a result of the audit, the department recaptured the refund and assessed additional tax for the years of the audit. The taxpayer protested this assessment. A hearing was held and this Letter of Findings results.

I. Gross Income Tax-Imposition

DISCUSSION

Originally the taxpayer reported and paid gross income tax at the low rate on all of its transactions. In some of the wholesale sales, the taxpayer alleged that it actually acted as a broker negotiating sales between suppliers and members. In those sales, members place orders directly with the suppliers or with the taxpayer. In both of these situations, the taxpayer has pre-negotiated the price. The orders are drop shipped directly from suppliers to members. The suppliers invoice the taxpayer for the goods allowing discounts for early payment. The taxpayer invoices the members the same amount, the same discount and a variable adder. The amended returns indicated that the variable add-on was a commission subject to gross income tax at the high rate. The department assessed gross income tax on the gross receipts from the transactions as wholesale sales taxable at the low rate. The taxpayer protested this assessment.

The taxpayer classifies its sales into three categories. First is the classification where it purchases hardware supplies, stores them in its warehouse and sells them to cooperative members. The taxpayer agrees that these transactions are wholesale sales with the gross receipts subject to gross income tax at the low rate.

In the second type of transaction, the member places an order directly with one of the taxpayer's suppliers at prices pre-negotiated by the taxpayer. The suppliers ship the goods directly to the purchasers. The suppliers invoice the taxpayer for the purchases. The taxpayer then invoices the member at the pre-agreed price. Some suppliers pay the taxpayer a commission for arranging the sale, and members are invoiced at the same price that suppliers invoice the taxpayer. Other supplier agreements require the taxpayer to collect some or all of its commission from the purchasing member as an add-on to the price that the taxpayer charges the member. The taxpayer is only entitled to keep the add-on or commission. In all cases, the member and supplier have knowledge of the pricing arrangement.

The third method is for the member to notify the taxpayer that it wishes to purchase a certain amount of a particular product for delivery within a specified time period. The taxpayer purchasing agents shop the contract with qualified suppliers. When the contract terms are settled, the order is placed by the taxpayer on behalf of the member. The supplier invoices the taxpayer and the taxpayer invoices the member. The taxpayer may collect commissions from the supplier and/or the member, as in the second method. This method is used mostly for purchasing commodity products, such as dimensional lumber, that fluctuate in price too much to make the pre-negotiated pricing of the second method practical.

Indiana Department of Revenue assessments are prima facie evidence that the department's claim for unpaid taxes is valid**.** IC 6-8.1-5-1(b). The taxpayer has the burden of proving whether the department incorrectly imposed the assessment. Id.

IC 6-2.1-2-2 provides:

(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

The department and taxpayer are in agreement that the taxpayer is subject to the gross income tax on the receipts from each of the three types of transactions. They disagree, however, on what constitutes the taxable gross income is in the second and third types of transactions. The department considered the disputed sales as wholesale sales with the total receipts taxable at the low rate. The taxpayer contended that these transactions were not wholesale sales. Rather, the taxpayer argued that it actually acted as a broker in the last two types of transactions. As such, only the add on fees or commissions would be subject to the gross income tax. These receipts would be taxed at the high rate.

The issue to be determined in this case is whether the taxpayer is acting as a wholesaler or a broker in the last two scenarios.

The statute defines a "wholesale sale" at IC 6-2.1-2-1(c)(1)(A) as follows:

(A) Sales of tangible personal property (except capital assets or depreciable assets of the seller) for resale in the form in which it was purchased.

The income of brokers subject to the Indiana gross income tax is delineated at IC 6-2.1-1-8 as follows:

In the case of banks, national banks, trust companies, building and loan associations, investment companies regulated under the Federal Investment Company Act of 1940, as amended and in effect on January 1, 1977, brokers, dealers in securities, finance companies, dealers in commercial paper, and taxpayers engaged in the business of lending money or providing credit "gross income" means gross earning with respect to the businesses and activities enumerated in this section.

The Indiana Court of Appeals dealt with this issue in Indiana Department of State Revenue v. Boswell Oil Co., 148 Ind. App. 569, 268 N.E.2d 303 (1971). In that case, the department assessed Boswell as a wholesaler of fuel oil. Boswell argued that it was a broker or middleman who matched sellers with buyers. It contracted separately with the suppliers and purchasers in its own name. Boswell never took possession of the fuel oil or had any interest it. Rather, Boswell arranged for the fuel oil to be shipped from the suppliers directly to the purchasers. Boswell collected payment from the purchasers. It paid the suppliers directly and kept a service fee or commission for itself. The court found that, based upon its method of conducting business, Boswell met the definition of a

"broker." Therefore it was entitled to use the statutory gross earnings method and pay the gross income tax at the high rate on its commissions.

In considering the gross income tax liability of Boswell, the court described the situation as follows:

As we see it, Boswell meets [the] definition [of a broker] in that... it matches suppliers of residual fuel oil and consumers of such oil, negotiates fuel prices, causes the fuel oil to be transported directly from the refinery to the consumer, maintains no store of oil in Indiana for sale or investment, and the refiner and the consumer each know to whom the oil is sold and shipped. So far, Boswell has negotiated a "contract" between others and has dealt with contracting parties and has no interest in nor possession of the property. Thus, Boswell has performed the essential function of a broker, which is to negotiate contracts between others, and, unlike a factor, has not taken possession, management, or control of the goods.

268 N.E.2d at 306.

The department's regulations reflect the Court's determination in the Boswell case. 45 IAC 1.1-1-11 provides as follows:

(a) "Gross income of a broker" means the commissions earned from brokerage transactions without any deductions of any kind or character.

(b) As used in this section, "broker" includes a securities broker and a commodity broker. However, it does not include a taxpayer who purchases produce or otherwise acquires the ownership of a stock of commodities carried and handled for sale in its normal trade or business. The essential function of a broker is making a bargain for contracting parties without taking possession, management, control, or title of the goods involved. A broker cannot make a contract in its own name, except under the following circumstances:

(1) The contract is made with the knowledge and consent of the broker's principal.

(2) The contract is justified by the usages of trade of the particular business involved.

(c) As used in this section, "brokerage transaction" means a group of activities whereby a taxpayer is paid a commission for bringing a buyer and seller together and completing a sale of property.

(d) A taxpayer acting as a broker for goods and, at the same time, as a retail merchant for the same or similar type of goods, will report its gross income under subsection (a) only to the extent that its income is received from acting as a broker.

The taxpayer only meets the statutory qualifications of being a wholesaler by purchasing materials and reselling them in the same form in the first type of transaction. Therefore, that is the only instance of a wholesale sale with the all receipts being subject to the gross income tax at the low rate.

In the second and third types of transactions, the taxpayer does not take possession or title to the goods. Since the taxpayer does not take possession or title to the goods, it does not resell them. Rather, the taxpayer brings buyers and sellers together to assist in the completion of a sale. The product is shipped directly from the supplier to the buyer. The suppliers and purchasers know each other's identities and the identity of the broker. These transactions are analogous to the brokerage transactions in the Boswell case. The second and third methods of taxpayer's operations also meet the statutory and regulatory conditions for the taxpayer to be treated as a broker. Therefore, only the taxpayer's commissions or brokerage fees are subject to the Indiana gross income tax at the high rate.

FINDING

The taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0220040241.LOF

LETTER OF FINDINGS NUMBER: 04-0241
Corporate Income Tax
Tax Period 1999-2001

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

1. Corporate Income Tax- Unitary Relationship

Authority: IC 6-8.1-5-1(b); 45 IAC 3.1-1-153; Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992); Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983); F.W. Woolworth Co. v. Taxation and Revenue Dep't., 458 U.S. 354 (1982); ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982); Exxon Corp. v. Department. of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980).

Taxpayer protests the determination that one of the taxpayer's subsidiaries is not unitary.

STATEMENT OF FACTS

Taxpayer, a food manufacturer, files a consolidated Indiana return. Taxpayer has a business association with an unrelated

company. The two parties own a corn mill through a limited partnership. The parties indirectly share ownership in the limited partnership through subsidiary corporations. Taxpayer consists of the parent corporation and two subsidiaries.

The Department conducted an audit and included only the Taxpayer's consolidated group of companies that operated in or had a taxable nexus within Indiana as unitary for purposes of 45 IAC 3.1-1-153. As a result of this determination, the Taxpayer's taxable adjusted gross income increased significantly. The Taxpayer previously treated the income from all of its subsidiaries as unitary and apportioned the income. The taxpayer submitted a protest challenging the audit's determination. The Department held a hearing and now presents this Letter of Findings.

1. Corporate Income Tax- Unitary Relationship

DISCUSSION

To help identify the parties, the department will designate the two subsidiaries as "Subsidiary A" and "Subsidiary B". Both of the subsidiaries, Subsidiary A and Subsidiary B, own interest in a limited partnership. Subsidiary B is the general partner holding a 1 percent interest. Subsidiary A is a limited partner holding a 79.2 percent interest. An unrelated third company holds a 19.8 percent limited interest in the partnership. The limited partnership distributed its income to the partners based on the partner's ownership percentage.

On audit, the Department took the position that a unitary relationship does not flow through a corporate parent, but rather between the partnership and the corporate partners directly. Using this analysis, the audit review determined Subsidiary B and the limited partnership were unitary and apportioned the income Subsidiary B received from the limited partnership to Indiana. The audit review determined no unitary relationship existed between Subsidiary A and the limited partnership. This determination allowed the Department to allocate Subsidiary A's income from the limited partnership to Indiana in accordance to Subsidiary A's ownership percentage and the limited partnership's Indiana apportionment percentage. The audit review reached its decision, with respect to Subsidiary A, for these reasons: Subsidiary A only derived income from the partnership distributions; its only asset consisted of the limited partnership interest; and its only activity consisted of holding its investment in the partnership. The Department viewed these facts as consistent with a non-unitary business relationship.

Indiana Department of Revenue assessments are prima facie evidence that department's claim for unpaid taxes is valid. IC 6-8.1-5-1(b). The taxpayer has the burden of proving whether the department incorrectly imposed the assessment. Id. The determination of whether or not a unitary relationship exists depends on 45 IAC 3.1-1-153. 45 IAC 3.1-1-153 provides:

\ (a) A corporate partner's share of profit or loss from a partnership will be included in its federal taxable income and therefore generally subject to the same rules as any other adjusted gross income. (b) If the corporate partner's activities and the partnership's activities constitute a unitary business under established standards, disregarding ownership requirements, the business income of the unitary business attributable to Indiana shall be determined by a three (3) factor formula….

The Supreme Court established the factors to consider in a unitary business analysis. See Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992); Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983); F.W. Woolworth Co. v. Taxation and Revenue Dep't., 458 U.S. 354 (1982); ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982); Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980). The three factors are: functional integration; centralization of management; and economies of scale. Id. No single factor outweighs the other factors. Id. However, the showing of day-to-day operational control in the partnership indicates the existence of a unitary business relationship. See Allied-Signal, Inc., 504 U.S. at 768; Container Corp. of America, 463 U.S. at 166; ASARCO, Inc., 458 U.S. at 307.

The Taxpayer takes exception to the Department's determination. The taxpayer argues that under the common law definition of unitary business, the subsidiaries and the limited partnership are unitary because the combined group forms a vertically integrated business. According to the Taxpayer, common law defines "unitary business" as "vertically integrated business, either through affiliates or divisions that perform interdependent steps that lead to a finished product". Therefore, the taxpayer contends that if the Department viewed one member of the vertically integrated business as unitary, then all members of the combined group is unitary.

The taxpayer's interpretation of "unitary business" extends the definition too broadly for 45 IAC 3.1-1-153 purposes. The taxpayer provides no substantive cite for its reliance or use of the common law definition of "unitary business". However, using the analysis established by the Supreme Court cases, the Department must consider each partner in the partnership and determine whether the partner in question can exercise day-to-day operational control. Once the Department completes this examination, then it may apply the factors to further support the existence of a unitary business. Therefore, since Subsidiary A is a limited partner, a presumption exists that limited partners cannot exercise day-to-day operational control in a partnership. Thus, because the Taxpayer has not provided any evidence to rebut this presumption, the audit review correctly determined that Subsidiary A was not unitary with the partnership.

FINDING

For the reasons stated above, the department denies the taxpayer's protest.

DEPARTMENT OF STATE REVENUE

0220040267P.LOF

LETTER OF FINDINGS NUMBER: 04-0267P
Income Tax
For the Short Period ended February 28, 2002

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. Tax Administration – Penalty
Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2;

The taxpayer protests the late penalty.

STATEMENT OF FACTS

The late penalty was assessed on the late payment and filing of the Short Period return for the period ended February 28, 2002. The taxpayer is an Indiana company.

I. Tax Administration – Penalty

DISCUSSION

The taxpayer argues the penalty should be abated. The taxpayer's argument includes (1) the definition of inattention, (2) the fact that the IRS would abate the penalty, and (3) the compliance record.

With regard to the compliance record, the taxpayer has had three errors. One error occurred in the year 2000. Two errors occurred in the year 2001. The Department does not feel the taxpayer's compliance record would be a factor in the abatement of penalty.

With regard to IRS abatement, the Department does not follow IRS guidelines in the abatement of penalty.

With regard to the definition of inattention. Webster's Unabridged Dictionary states inattention is the failure to carryout, or perform, as a result of disregard. The Department feels the taxpayer demonstrated disregard of tax duties in that the taxpayer did not prepare for the tax ramifications of a planned IRS section 338 sale.

The regulation which controls the application of penalty is 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.

The Department finds the taxpayer was inattentive of tax duties. Inattention is negligence and negligence is subject to penalty. As such, the Department finds the penalty proper and denies the penalty protest.

FINDING

The taxpayer's penalty protest is denied.

DEPARTMENT OF STATE REVENUE

04-20040268.LOF

LETTER OF FINDINGS NUMBER: 04-0268
Use Tax and Penalty
For the Years 1998-2000

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.

ISSUES

I. Use Tax—Steel Uncoilers
Authority: Ind. Code § 6-2.5-2-1; Ind. Code § 6-2.5-3-1; Ind. Code § 6-2.5-5-3; Ind. Code § 6-8.1-5-1; 45 IAC 2.2-5-8; 45 IAC 15-5-3

Taxpayer protests the assessment of use tax on the purchase of steel uncoilers where no sales tax was paid at the point of

purchase.

II. Use Tax--Packaging

Authority: Ind. Code § 6-2.5-5-9; 45 IAC 2.2-5-16

Taxpayer protests the assessment of use tax on the purchasing of packaging paper where no sales tax was paid at the point of purchase.

III. Tax Administration--Negligence Penalty

Authority: Ind. Code § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the assessment of a negligence penalty.

STATEMENT OF FACTS

Taxpayer is in the business of manufacturing steel tubing. The production process consists of taking flat steel stock and forming, welding, and cutting it into steel tubing. Taxpayer purchased uncoilers, which unroll raw steel from a spool before the steel is loaded into machines that form the flat steel into tubes. Taxpayer paid no sales tax on the purchase of the uncoilers. Taxpayer had protested the same issue to the Department during a prior audit period; the Department denied that protest, and Taxpayer did not appeal that denial.

When shipping the tubing to its customers, Taxpayer uses paper packaging to absorb moisture that would otherwise harm the steel tubing's tensile strength and otherwise protect the steel tubes. Taxpayer paid no sales tax on the paper at the time of purchase. Taxpayer also protests the imposition of a negligence penalty.

Taxpayer supplemented their written protest with a video of their processes, which the Department viewed as part of the protest. Additional facts will be supplied as necessary.

I. Use Tax—Steel Uncoilers

DISCUSSION

Taxpayer protests the proposed assessment of use tax on the purchase of steel uncoilers where no gross retail tax was paid at the point of purchase. Taxpayer argues that the uncoilers perform the first step in the production process.

Pursuant to Ind. Code § 6-8.1-5-1(b) and 45 IAC 15-5-3(8), a "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the assessment is made." In general, a person is liable for sales tax at the time of purchase, unless an exemption applies. Ind. Code § 6-2.5-2-1. A parallel tax, the use tax, is also due for any tangible personal property stored, used, or consumed in Indiana. Ind. Code § 6-2.5-3-1. If sales tax was paid at the time of purchase, the amount paid is credited against the use tax. Ind. Code § 6-2.5-3-5. Further, if tangible personal property is purchased for an exempt purpose, the use of that property for the exempt purpose is also exempt from use tax. Ind. Code § 6-2.5-3-4.

Specifically, Ind. Code § 6-2.5-5-3(b) provides that "transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production... of other tangible personal property. The applicable regulation, 45 IAC 2.2-5-8, provides in relevant part:

(a) In general, all purchase of tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property are taxable. The exemption provided in this regulation [45 IAC 2.2] extends only to manufacturing machinery, tools, and equipment directly used by the purchaser in direct production.

(b) The state gross retail tax does not apply to sales of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property.

(c) The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

(d) Pre-production and post production activities. "Direct use in the production process" begins at the point of the first operation or activity constituting part of the integrated production process and ends at the point that the production has altered the item to its completed form, including packaging, if required.

Here, the uncoiler straightened the steel. While this was necessary to begin the process by which Taxpayer produced tangible personal property, the straightening of steel preceded the process in which the steel eventually became steel tubes. As such, the uncoiler did not have an immediate direct effect on the property in production, and thus did not constitute part of the production of other tangible personal property. Taxpayer also raises an argument with respect to the uncoiler being exempt as safety equipment. Taxpayer has not provided sufficient information to substantiate this secondary contention.

FINDING

Taxpayer's protest is denied.

II. Use Tax--Packaging

DISCUSSION

Taxpayer also protests the imposition of use tax for certain paper and cardboard items. In particular, Taxpayer argues that the

packaging materials placed in containers to preserve its character during shipping are exempt from tax.

Under Ind. Code § 6-2.5-5-9(d), "[s]ales of wrapping material and empty containers are exempt from the state gross retail tax if the person acquiring the material or containers acquires them for use as nonreturnable packages for selling the contents that he adds." In addition, 45 IAC 2.2-5-16 provides:

(a) The state gross retail tax shall not apply to sales of nonreturnable wrapping materials and empty containers to be used by the purchaser as enclosures or containers for selling contents to be added, and returnable containers containing contents sold in a sale constituting selling at retail and returnable containers sold empty for refilling.

(b) In general the gross proceeds from the sale of tangible personal property in a transaction of a retail merchant constituting selling at retail are taxable. This regulation *[45 IAC 2.2]* provided an exemption for wrapping materials and containers.

(c) General rule. The receipt from a sale by a retail merchant of the following types of tangible personal property are exempt from state gross retail tax:

(1) Nonreturnable containers and wrapping materials including steel strap and shipping pallets to be used by the purchaser as enclosures for selling tangible personal property.

* * *

(d) Application of general rule.

(1) Nonreturnable wrapping material and empty containers. To qualify for this exemption, nonreturnable wrapping materials and empty containers must be used by the purchaser in the following way:

(A) The purchaser must add contents to the containers purchased; and

(B) The purchaser must sell the contents added.

* * *

(e) Definitions.

(1) Returnable containers. As used in this regulation *[45 IAC 2.2]*, the term returnable container means containers customarily returned by the buyer of the contents for reuse as containers.

(2) Nonreturnable containers. As used in this regulation *[45 IAC 2.2]*, the term nonreturnable containers means all containers which are not returnable containers.

In this case, the issue was if the protective materials that Taxpayer provided constituted a "container" within the meaning of the statute and regulation. Based on the context of the statute as well as the ordinary definition of the term "container", the exemption applied to the outer casing or cover of the material, not to the inner packing materials designed to protect the product. Accordingly, Taxpayer has not met its burden and is denied.

FINDING

Taxpayer's protest is denied.

III. Tax Administration--Negligence Penalty

DISCUSSION

The Department may impose a ten (10) percent negligence penalty. Ind. Code § 6-8.1-10-2.1 and 45 IAC 15-11-2. Taxpayer's failure to pay the proper amount due as determined by Department audit, generally, will result in penalty assessment. Ind. Code § 6-8.1-10-2.1(a)(3). The Department, however, may waive this penalty if the taxpayer can establish that its failure to file "was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c). A taxpayer may demonstrate reasonable cause by showing "that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed…." *Id*.

Even if Taxpayer had been sustained on all issues in its protest, its error percentage would have been reduced from 13.17 percent to six percent of its gross receipts otherwise used to determine the proper amount of use tax. Further, Taxpayer failed to remit use tax on items for which it had previously been assessed tax by the Department, protested, and lost the protest. In light of the circumstances, Taxpayer has not met its burden of showing ordinary business care.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20040287.LOF

LETTER OF FINDINGS NUMBER: 04-0287
STATE GROSS RETAIL TAX
For Years 2000 AND 2001

NOTICE: Under Ind. Code § 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.

ISSUES

I. State Gross Retail Tax —Undefined protest

Authority: I.C. 6-8.1-5-1

Taxpayer protests the proposed assessments of Indiana's State Gross Retail tax.

STATEMENT OF FACTS

Taxpayer owned and operated a convenience store/gas station. An audit was conducted for the years under protest and the Department of Revenue made an assessment. Taxpayer protested and the field auditor conducted a supplemental review that resulted in a reduction of the original assessment. The supplemental review addressed the issue originally raised by the taxpayer. However taxpayer did not wish to forego the hearing, so a hearing was accordingly scheduled. Taxpayer did not contact the Department or attend the hearing, and the Department prepared a Letter of Findings based on the above information.

I. State Gross Retail Tax —Undefined protest

DISCUSSION

IC § 6-8.1-5-1 states in relevant part:

(a) If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

….

(i) The department shall demand payment, as provided in IC 6-8.1-8-2(a), of any part of the proposed tax assessment, interest, and penalties that it finds owing because:

…..

(2) the person requested a hearing but failed to appear at that hearing;

…..

Aside from the adjustments granted in the supplemental review of the original assessment, taxpayer failed to present any additional basis for overturning or reducing the remaining assessment. Taxpayer also failed to appear at the scheduled hearing. Based on taxpayer's failure to appear or participate in the scheduled hearing as required in IC § 6-8.1-5-1, taxpayer protest is denied.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0120040380.LOF

LETTER OF FINDINGS: 04-0380
Indiana Adjusted Gross Income Tax
For 1999 through 2001

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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Not-for-Profit Exemption – Individual Adjusted Gross Income Tax.

Authority: IC 6-8.1-5-1(b); IC 6-8.1-5-1(d) to (e); IC 6-8.1-5-1(f); IC 6-8.1-5-1(g) to (h); I.R.C. § 501; 26 CFR 301.6361-2(d); 26 CFR 301.6361-2(d)(2); Rev. Rul. 73-370, 1973-2 C.B. 184.

Taxpayer argues that he is not subject to Indiana Adjusted Gross Income Tax because any income he obtained was attributable to "not-for-profit activities."

STATEMENT OF FACTS

The Indiana Department of Revenue (Department) determined that taxpayer owed state adjusted gross income tax for 1999 through 2001 and sent taxpayer a notice of "Proposed Assessment" addressing his potential state tax liability for 1999. The Department prepared the notice on September 13, 2004. Taxpayer's representative responded in a letter dated September 22, 2004. Taxpayer's letter stated that he "is disputing the... tax liability and is requesting appeals consideration of said tax liability." In addition, taxpayer sent copies of correspondence with the IRS including an "Affidavit of Composite Return" which taxpayer cited as authority to "amend a previously filed 1040 return." On the ground that taxpayer was engaged in "Not-for-Profit Activities,"

taxpayer amended his original 1040 returns to reflect the assertion that his taxable income was reduced to "$0.00 on said 1040 return." Taxpayer arrived at this number by claiming a mandatory "not-for-profit deduction" equal to the amount of taxpayer income previously reported on the returns.

Despite taxpayer's assertion that "[t]he IRS Office of Appeals now has exclusive jurisdiction in this matter" and that any administrative decision the Department might make was "contrary to law," the Department assigned taxpayer's protest to a hearing office. The Hearing Officer contacted taxpayer's representative in a letter dated August 3, 2005. Taxpayer declined the invitation to participate in an administrative hearing or to present additional information. This Letter of Findings is based upon the taxpayer's original protest letter and his subsequent correspondence.

DISCUSSION

I. Not-for-Profit Exemption – Individual Adjusted Gross Income Tax.

A. Jurisdiction: As a threshold issue, taxpayer challenges the Department's authority to act upon taxpayer's protest. According to taxpayer, the IRS "has exclusive jurisdiction in this matter. Any determination [the Department] might make after the Administrative Protest and Request for Appeals Conference was filed is contrary to law." Taxpayer cites as authority 26 CFR 301.6361-2(d) which states that:

> General rule. Except as provided in subparagraphs (2) and (3) of this paragraph (d), the Federal Government shall appear on behalf of any State the qualified tax of which it collects (or did collect for the year in issue), and shall represent such State's interests in any administrative or judicial proceeding, either civil or criminal in nature, which relates to the administration and collection of such qualified tax, in the same manner as it represents the interests of the United States in corresponding proceedings involving Federal income tax matters.

Taxpayer interprets 26 CFR 301.6361-2(d) as requiring Indiana to accede to the federal government's representation in any civil or administrative proceeding stemming from taxpayer's protest. The Department must disagree with taxpayer's interpretation. 26 CFR 301.6361-2(d)(2) provides that:

> The Federal Government shall not so represent a State's interests either--
>
> (i) In proceedings in a State court involving the constitution of such State, to the extent of such constitutional issue, or
>
> (ii) In proceedings in any court involving the relationship between the United States and the State, to the extent of the issue pertaining to such relationship, if either:
>
> (A) The proceeding is one which is initiated by the United States against the State, or by the State against the United States, and no individual (except in his official capacity as a governmental official) is an original party to the proceeding, or
>
> (B) The proceeding is not one described in (A), *but the State elects to represent its own interests to the extent permissible under this subdivision*. (*Emphasis added*).

Indiana has chosen to provide taxpayers an administrative remedy by which the individual taxpayer may challenge a proposed assessment, air his or her grievances, and receive a written response to that challenge. *See* IC 6-8.1-5-1(d) to (e). If the aggrieved taxpayer is dissatisfied with the Department's written response, Indiana has provided a method may seek supplemental administrative review *See* IC 6-8.1-5-1(f). In addition to the administrative remedies otherwise available, Indiana has provided taxpayers a judicial remedy by means of the Indiana Tax Court. *See* IC 6-8.1-5-1(g) to (h). The Department acted well within its authority to address taxpayer's state income tax protest notwithstanding taxpayer's parallel effort to resolve the related federal tax issues.

B. Not-for-Profit: Taxpayer states that, "The underlying tax claim is a not-for-profit activity." Based on this assertion, taxpayer concludes that the 1999 income is not subject to the state's income tax.

Certain types of organizations are exempt from income tax. To qualify for exempt status, the taxpayer must be formed for a designated charitable, nonprofit purpose, and its status as a tax exempt entity must be determined by the District Director. I.R.C. § 501; Rev. Rul. 73-370, 1973-2 C.B. 184.

Although taxpayer suggests that he is not subject to Indiana income tax, he has provided no evidence to substantiate that proposal and fails to carry his burden of demonstrating that he is entitled to the exemption. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC 6-8.1-5-1(b). Because taxpayer failed to meet the statutory mandate, the Department must deny taxpayer's protest.

FINDING

Taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420040432P.LOF

LETTER OF FINDINGS NUMBER: 04-0432P
Sales Tax
For the Month of February 2004

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on the 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.

ISSUES

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2

The taxpayer protests the penalty assessed for failure to timely file a monthly sales tax return and remit the appropriate tax.

STATEMENT OF FACTS

The taxpayer filed its sales tax return for the month of February 2004 after the due date. The calculated amount of tax due was remitted with the return. Accordingly, the department assessed a penalty for the taxpayer's failure to timely remit its tax. In his correspondence, the taxpayer's representative requested that the penalty be abated due to reasonable cause.

I. Tax Administration – Penalty

The representative asserts that the taxpayer filed its return and remitted its tax late due to a combination of unfortunate problems all within an eight-week period. Among these problems were:

- Sales tax software failures
- People, computers, and files were moved to another floor for construction
- A new vice president of tax was appointed
- A new tax compliance manager was appointed
- Four new staff tax preparers were appointed
- Employee medical problems

The taxpayer asserts that any one of the circumstances by itself might not justify the waiver of penalty, but all of them considered together do justify the waiver of penalty. The department disagrees. Even though the taxpayer had several unfortunate circumstances occur at the same time, all of them were within the scope of what a reasonable person engaged in business might anticipate.

The taxpayer asserts that there are additional reasons that support the abatement of penalty:

- Despite its sales tax compliance problems, the taxpayer continued to file personal property tax returns, business license requirements, and income tax returns for its Indiana stores.
- The taxpayer pays in excess of $116,000 in annual property taxes
- The taxpayer is a community minded corporate citizen.

The department acknowledges the taxpayer's filing history, contribution to the Indiana economy, and generosity. However, this information is not relevant to proving the absence of negligence and the existence of reasonable cause.

Administrative Rule 45 IAC 15-11-2 (b) states the following:

"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.

The taxpayer has not established that its failure to timely file the return in question and pay the appropriate tax was due to reasonable cause and not due to negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

04-20040436.LOF

LETTER OF FINDINGS NUMBER: 04-0436
SALES AND USE TAX
FOR TAX YEARS 2000-2003

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. Sales and Use Tax: Fuel Sales

Authority: IC 6-8.1-5-1(b); IC 6-2.5-7-3.

Taxpayer protests the assessment of sales tax on fuel sold through metered pumps.

STATEMENT OF FACTS

Taxpayer owns and operates a convenience store and gas station. The taxpayer had an arrangement with another area retailer. The arrangement allowed the area retailer to provide fueling cards to its clients, whereby those clients could purchase fuel from the taxpayer's pumps. The taxpayer did not charge the clients at the pump, but rather billed the area retailer for the amount of fuel dispensed to their clients at the purchase price per gallon (including prepaid sales tax) plus five cents per gallon. The area retailer then in turn billed their clients. On audit, the Department assessed additional sales tax on the gasoline sold through the taxpayer's metered pumps. The taxpayer submitted a protest challenging the assessment. The Department held a hearing and now presents this Letter of Findings.

I. Sales and Use Tax: Gasoline Sales

DISCUSSION

The taxpayer argues the Department erred in assessing additional sales tax. The taxpayer contends the Department collected the sales tax when the area retailer bills its clients.

Indiana Department of Revenue assessments are prima facie evidence the department's claim for unpaid taxes is valid. IC 6-8.1-5-1(b). The taxpayer has the burden of proving whether the department incorrectly imposed the assessment. Id.

IC 6-2.5-7-3 provides as follows:

(a) With respect to the sale of gasoline which is dispensed from a metered pump, a retail merchant shall collect, for each unit of gasoline sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent ($.001), of:

(1) the price per unit before the addition of state and federal taxes; multiplied by

(2) six percent (6%).

The retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under IC 6-2.5-5.

The Department finds the transaction between the taxpayer and the area retailer is subject to the retail sales tax. Per IC 6-2.5-7-3, all gasoline sales are subject to sales tax. The statute requires the retail merchant, in this case the taxpayer, to collect and remit the sales tax. No exemption exists for selling fuel to another retailer or for allowing another retailer's clients to use a taxpayer's pump without charging the sales tax. The statute still requires the taxpayer to collect and remit the sales tax, regardless of who is actually billed for the fuel. Therefore, since the taxpayer allowed the area retailer's clients to dispense fuel and the taxpayer failed to collect and remit the sales tax on those transactions, the audit correctly assessed the additional sales tax.

FINDING

For the reasons stated above, the Department denies the taxpayer's protest.

DEPARTMENT OF STATE REVENUE

0420040444.LOF

LETTER OF FINDINGS: 04-0444
Gross Retail Tax
For 2001 through 2003

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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Purchase of Golf Simulators – Gross Retail Tax.

Authority: IC 6-2.5-1-21(a); IC 6-2.5-1-21(d); IC 6-2.5-2-1; IC 6-2.5-4-10; IC 6-2.5-5-8; IC 6-2.5-5-1 to 70; Black's Law Dictionary (7th ed. 1999).

Taxpayer challenges the Department of Revenue's decision to assess use tax on the purchase price of three golf simulators.

STATEMENT OF FACTS

Taxpayer owns and operates golf courses. Taxpayer earns money from the provision of services and the sale of items associated with the operation of the golf courses.

The Department of Revenue (Department) conducted an audit review of taxpayer's business records. The audit concluded that

taxpayer should have paid sales tax when it purchased three golf simulators. Because taxpayer did not pay sales tax, the Department assessed use tax.

Taxpayer disagreed, submitted a protest to that effect, an administrative hearing was conducted during which taxpayer's representative explained the basis for the protest, and this Letter of Findings results.

DISCUSSION

I. Purchase of Golf Simulators – Gross Retail Tax.

Taxpayer bought three golf simulators during 2002. The golf simulators were described in the audit report as "high tech driving range[s]."

Thereafter, taxpayer began to make the simulators available to its customers charging the customers an hourly rate for the privilege.

Because taxpayer did not pay sales tax after initially purchasing the simulators, the audit review assessed use tax. The audit did so on the ground that, "the golfer has no element of control when using the simulators, therefore the taxpayer is providing a service and the simulators are subject to use tax." Taxpayer disagreed with this determination arguing that its customers were renting the simulators. On the ground that the simulators were intended for rental purposes, taxpayer claimed the initial purchase was not subject to sales tax and that the audit's assessment of use tax was inappropriate. Based on this argument, taxpayer admits that it should have been collecting sales tax on the rental fees received each time it rented one of the simulators. Taxpayer admits that it failed to do so but concedes that sales tax on the rental fees is now due.

Indiana imposes a gross retail (sales) tax on retail transactions made in Indiana. IC 6-2.5-2-1. The legislature has provided a number of exemptions to the imposition of that tax. *See* IC 6-2.5-5-1 to 70. One of those exemptions is provided at IC 6-2.5-5-8. IC 6-2.5-5-8 provides, "Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property."

Under taxpayer's interpretation of the facts, it bought the three golf simulators because it wanted to rent the simulators to its customers. Because the simulators were bought for the purpose of "rental, or leasing in the ordinary course of [its] business," the purchase of the simulators was not subject to sales tax.

Under the audit's interpretation, taxpayer bought the simulators because taxpayer wanted to provide a service to and earn money from its customers. The audit disagrees with taxpayer's position because the customers do not exercise control over the simulators; the customers do not "rent" the simulators, they simply receive a service, enjoy the use of the simulators, and pay taxpayer for the privilege of doing so.

Taxpayer quotes from IC 6-2.5-1-21(a) which states in part: "'Lease' or 'rental' means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration and may include future options to purchase or extend." However, it should be noted that IC 6-2.5-1-21(d) states that, "This section applies only to leases or rentals entered into after June 30, 2003, and has no retroactive effect on leases or rentals entered into before July 1, 2003."

Assuming for the moment that that IC 6-2.5-1-21(a) applies to the specific transactions at issue, taxpayer points out that taxpayer's simulator customers exercise control over the simulators. Taxpayer states that the customers have exclusive use of the simulators for a defined period; the customers have the ability to determine the speed of the game; the customers have the right "to determine what type of entertainment to enjoy;" the customers have the right to determine who is allowed in the simulator; and the simulators are controlled by the customers from within the simulator booth.

The Department is unable to agree that taxpayer transfers "possession" of the simulators to its customers. "Possession" means, "The fact of having or holding property in one's power; the exercise of dominion over property." Black's Law Dictionary 1183 (7th ed. 1999). "Possession... is evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title." Id. The simulator customers do not take "possession" of the simulators, they merely have the right to use the simulators for a fixed period of time. In that sense, the simulators are analogous to the electronic games found in video arcades. The video game customer pays for the privilege of using the game without interference from other customers and controls the manner in which the game is played. The video game customer may have the exclusive right to use the video game for a short period, but the video game customer does not take "possession" of the device. Both taxpayer and the arcade owner would look askance at any customer who backed up a truck and attempted to take possession of either the simulator or the video game.

In contrast, a person who rents or leases a car is entitled to take possession of the car and to continue to exercise that possessory interest for a fixed period of time. The person who visits a local rental store and arranges to rent a lawn mower over the weekend, takes "possession" of the lawn mower for the weekend. The automobile rental business and the local rental store purchase the car and the lawn mower without paying sales tax pursuant to IC 6-2.5-5-8 but must thereafter collect sales tax from their customers each time the car or lawn mower is rented. (*See* IC 6-2.5-4-10).

Taxpayer is in the business of providing a service to its simulator customers; that service consists of permitting its customers to use – not truly possess – the golf simulators for a fixed period of time. Although the transitory "use" of the simulators possesses qualities which mimic the attributes of "possession," nevertheless, the simulator customers do not acquire uninhibited possession of

the simulators. Because taxpayer provides a service to its customers, taxpayer should have paid sales tax at the time it bought the simulators.

FINDING

Taxpayer's protest is respectfully denied.

DEPARTMENT OF STATE REVENUE

0420050013.SLOF

SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 05-0013
Sales and Use Tax
For Tax Years 1998-2001

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. Sales Tax—Liability for Unpaid Sales Tax
Authority: IC 6-2.5-9-3

Taxpayer protests imposition of sales tax.

STATEMENT OF FACTS

Taxpayer pleaded guilty in criminal court to failure to remit sales tax. The Department of Revenue ("Department") assessed liabilities for the base tax, penalties and interest. Taxpayer protests that she paid all that was due under the court order. Further facts will be supplied as required.

I. Sales Tax—Liability for Unpaid Sales Tax

DISCUSSION

Taxpayer pleaded guilty to failure to remit sales tax. The criminal court ordered taxpayer to perform community service, undergo probation and to pay the financial obligation. The Department's representative participated in a restitution hearing at which the amount of the obligation was determined.

The proposed sales tax liability was issued under IC 6-2.5-9-3, which provides:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

In the course of this protest, taxpayer provided sufficient documentation to establish that she paid her court ordered financial obligation to the Department in full. Since the Department participated in determining the amount of the financial obligation, and since taxpayer has paid the obligation in full, taxpayer owes no more sales tax, penalties or interest for this tax period for this business.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420050028P.LOF

LETTER OF FINDINGS NUMBER: 05-0028P
Sales Tax
For the Months of February and March 2004

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on the 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.

ISSUES

I. Tax Administration – Penalty
Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2

The taxpayer protests the penalty assessed for failure to timely file a monthly sales tax return and remit the appropriate tax.

STATEMENT OF FACTS

The taxpayer filed its sales tax returns for the months of February and March 2004 after their respective due dates. The calculated amounts of tax due were remitted with the returns. Accordingly, the department assessed penalties for the taxpayer's failure to timely remit its tax. In his correspondence, the taxpayer's representative requested that the penalties be abated due to reasonable cause.

I. Tax Administration – Penalty

The representative asserts that the taxpayer filed its returns and remitted its tax late due to a combination of unfortunate problems all within an eight-week period. Among these problems were:

- Sales tax software failures
- People, computers, and files were moved to another floor for construction
- A new vice president of tax was appointed
- A new tax compliance manager was appointed
- Four new staff tax preparers were appointed
- Employee medical problems

The taxpayer asserts that any one of the circumstances by itself might not justify the waiver of penalty, but all of them considered together do justify the waiver of penalty. The department disagrees. Even though the taxpayer had several unfortunate circumstances occur at the same time, all of them were within the scope of what a reasonable person engaged in business might anticipate.

The taxpayer asserts that there are additional reasons that support the abatement of penalty:

- Despite its sales tax compliance problems, the taxpayer continued to file personal property tax returns, business license requirements, and income tax returns for its Indiana stores.
- The taxpayer pays in excess of $116,000 in annual property taxes
- The taxpayer is a community minded corporate citizen.

The department acknowledges the taxpayer's filing history, contribution to the Indiana economy, and generosity. However, this information is not relevant to proving the absence of negligence and the existence of reasonable cause.

Administrative Rule 45 IAC 15-11-2 (b) states the following:

"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.

The taxpayer has not established that its failure to timely file the returns in question and pay the appropriate tax was due to reasonable cause and not due to negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420050160.LOF

LETTER OF FINDINGS NUMBER: 05-0160
Use Tax
For Tax Year 2003

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. Aircraft Rental—Use Tax

Authority: IC 6-2.5-5-8; IC 6-8.1-5-1; 45 IAC 2.2-4-8

Taxpayer protests imposition of use tax on the purchase of an aircraft.

STATEMENT OF FACTS

Taxpayer purchased an aircraft and did not pay sales tax on the purchase price. Taxpayer claimed an exemption for rental or

leasing. Upon review, the Indiana Department of Revenue ("Department") determined that taxpayer did not qualify for the claimed exemption and issued a proposed assessment use tax, penalty and interest. Taxpayer protests the imposition of tax. Further facts will be supplied as necessary.

I. Aircraft Rental—Use Tax

DISCUSSION

Taxpayer purchased an aircraft and claimed an exemption from sales tax on the purchase of the aircraft. Both taxpayer and the lessee corporation are owned by the same individual. The exemption at issue is found in IC 6-2.5-5-8, which states in relevant part:

Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property.

Taxpayer states that it purchased the aircraft for rental or lease to another corporation, and that this qualifies it for the exemption in IC 6-2.5-5-8.

The Department reviewed the claim for the exemption and determined that taxpayer did not qualify for the exemption. The Department reviewed taxpayer's 2002 payment of sales tax from its leasing activities and noted that an extremely high percentage of reported sales were listed as exempt sales. The Department considered this as evidence that taxpayer was not accurately collecting sales tax on its aircraft leasing activities. The Department then decided that, since taxpayer was not collecting sales tax on its aircraft leasing, it was not actually leasing the aircraft and so did not qualify for the exemption found in IC 6-2.5-5-8.

In the course of its protest, taxpayer provided documentation establishing that it was involved in several leasing activities, including rental of accommodations for more than thirty (30) days, which is an exempt activity under 45 IAC 2.2-4-8(b), which states:

In general, the gross receipts from renting or furnishing accommodations are taxable. An accommodation which is rented for more than thirty (30) days or more is not subject to the gross retail tax.

The documentation establishes that an extremely large percentage of taxpayer's rental sales were eligible for the exemption found in 45 IAC 2.2-4-8(b). This accounts for taxpayer's aircraft rental sales.

This new information clarifies taxpayer's activities and establishes that taxpayer did not claim the exempt sales to apply to its rental of the aircraft in question. Since taxpayer collected and remitted sales tax on the rental of the aircraft, it did rent the aircraft in the ordinary course of its business. Pursuant to IC 6-8.1-5-1(b), taxpayer has provided sufficient documentation to meet its burden of proving that the proposed assessment is wrong. Taxpayer qualified for the exemption found in IC 6-2.5-5-8.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE

0420050172.LOF

LETTER OF FINDINGS NUMBER: 05-0172
Sales and Use Tax
For the Years 2001-2003

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. Sales and Use Tax-Imposition

Authority: IC 6-8.1-5-1(b), IC 6-2.5-2-1(a), IC 6-2.5-1-2, IC 6-2.5-4-1.

The taxpayer protests the imposition of sales tax.

II. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2(b), 45 IAC 15-11-2(c).

The taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The taxpayer sells personal property from its facility, through vending machines and from other locations. After an audit, the Indiana Department of Revenue (hereinafter referred to as the "department") assessed additional sales and use tax, interest and penalty. The taxpayer protested the imposition of sales tax and penalty. A hearing was scheduled for January 12, 2006. The taxpayer failed to appear for the hearing. Therefore, this Letter of Findings is based on the documentation in the file.

I. Sales and Use Tax-Imposition

DISCUSSION

The taxpayer sells personal property through vending machines and commissaries in county jails. Prior to April, 2001, the

taxpayer provided lists of what was available in the commissary to the detainees who filled out order sheets. The taxpayer sorted the items and packed them in individual bags for each detainee. The bags were delivered to the Sheriffs who delivered them to the detainees. The taxpayer billed the sheriff on a monthly basis for the personal items ordered by the detainees. The county jail then issued a check to the taxpayer from the jail's commissary fund to pay the invoice. Essentially, the taxpayer sold the goods to the sheriff who then resold the goods to the detainees. Those sales were not subject to the Indiana sales tax.

In April 2001 the taxpayer began the changeover to a new debit card system. First, the taxpayer changed to the new debit card system for the vending machines. Then, in December 2002 it changed to the debit card system for the commissary. With this debit card system, the taxpayer sells debit cards to the detainees and their families. The debit cards are identified and coded for specific detainees. The sheriff stores the debit cards at all times except when the detainee is actually using the card. The detainees or their families apply money to the debit cards. The detainees use these cards to purchase items from the taxpayer's vending machines or the commissary. The taxpayer is required to maintain trust account records for each detainee and account for all vending machine and commissary charges made by each detainee. The audit assessed sales tax on the sales made after the changes to the debit card system. The taxpayer protested this assessment.

All tax assessments are presumed to be accurate. The taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1(b).

I.C. 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. A retail transaction is one that constitutes selling at retail. IC 6-2.5-1-2. "Selling at retail" is defined at IC 6-2.5-4-1 in pertinent part as follows:

(b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

(1) acquires tangible personal property for the purpose of resale: and

(2) transfers that property to another person for consideration.

As part of its regular course of business, the taxpayer acquires goods for resale and delivers ownership of those goods to the detainees in exchange for money. Under the debit card system, the detainees pay the taxpayer directly for the goods they purchase. The detainees purchase the goods from the taxpayer. These transactions constitute retail sales subject to the Indiana sales tax.

FINDING

The taxpayer's protest is denied.

II. Tax Administration- Ten Percent Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC 6-8.1-10-2.1. 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

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.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

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. Factors which may be considered in determining reasonable cause include, but are not limited to:

(1) the nature of the tax involved;

(2) judicial precedents set by Indiana courts;

(3) judicial precedents established in jurisdictions outside Indiana;

(4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;

(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The taxpayer provided substantial documentation to indicate that its failure to pay the assessed use tax was due to reasonable cause rather than negligence.

FINDING

The taxpayer's protest to the imposition of penalty is sustained.

DEPARTMENT OF STATE REVENUE

0420050293P.LOF

LETTER OF FINDINGS NUMBER: 05-0293P
Sales and Use Taxes
For the Calendar Year 2004

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on the 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.

ISSUES

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1; IC 6-8.1-3-17(c); 45 IAC 15-11-2

The taxpayer protests the penalty assessed for failure to timely file its annual sales tax return due by its due date and remit the appropriate tax.

STATEMENT OF FACTS

The taxpayer filed its annual return for sales and use taxes for calendar year 2004 after the due date. Accordingly, the department assessed a penalty for the taxpayer's failure to timely remit its tax. In his letter of protest, the taxpayer's controller requested that the penalty be abated due to reasonable cause.

I. Tax Administration – Penalty

The taxpayer makes two arguments in its request for waiver of the penalty:

- The department failed to provide the appropriate forms in a timely manner.
- Some taxpayers that truly were negligent had penalties and interest waived as part of the Indiana Tax Amnesty Program.

Following an audit by the department, the taxpayer believed the department would automatically mail the appropriate forms for reporting sales and use taxes. Apparently, this did not happen. Eventually, the taxpayer contacted the department, and the appropriate forms were obtained. While the department makes a reasonable effort to provide forms to taxpayers, it is not required to do so. Obtaining tax forms so that returns can be filed in a timely manner is the responsibility of the taxpayer.

Regarding the Indiana Tax Amnesty Program, IC 6-8.1-3-17(c) states, "The department shall establish an amnesty program for taxpayers having an unpaid tax liability for a listed tax that was due and payable for a tax period ending before July 1, 2004." The liability under protest is for the taxable period ending December 31, 2004; hence, it is not eligible for the amnesty program. While the department acknowledges the taxpayer's frustration, it is required to apply the statute as it was written.

Administrative Rule 45 IAC 15-11-2 (b) states the following:

> "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.

The taxpayer has not established that its failure to timely file the return in question and pay the appropriate tax was due to reasonable cause and not due to negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

03-20050331P.LOF

LETTER OF FINDINGS NUMBER: 05-0331P
Withholding Tax
For the Periods January 2004 Through November 2004

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on the 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.

ISSUES

I. Tax Administration – Penalty

Authority: IC 6-8.1-10-2.1; IC 6-3-4-8; 45 IAC 15-11-2

The taxpayer protests the penalties assessed for failure to timely file 11 withholding tax returns by their due dates and remit the appropriate tax.

STATEMENT OF FACTS

The taxpayer filed its withholding tax returns for the months of January through November 2004 after their due dates. The calculated amount of tax due for these months was remitted in February 2005. Accordingly, the department assessed penalties for the taxpayer's failure to timely remit its tax. In his letter of protest, the taxpayer's manager requested that the penalty be abated due to reasonable cause.

I. Tax Administration – Penalty

The returns in question were due 30 days following the end of each month. The taxpayer asserts that it opened for business in January 2004. However, the taxpayer's management personnel did not read the withholding tax information provided by the department until January 2005. Upon becoming aware of its withholding tax responsibility, the taxpayer remitted the appropriate tax. The taxpayer requests that the department reconsider the imposition of penalty because it was a newly-organized business and is struggling to survive. The department does not consider this to be reasonable cause.

IC 6-3-4-8(b) states in relevant part: "An employer shall pay taxes withheld under subsection (a) during a particular month to the department no later than thirty (30) days after the end of that month." The statute does not provide for any leniency based upon a taxpayer's being recently organized.

Administrative Rule 45 IAC 15-11-2 (b) states the following:

> "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.

The taxpayer has not established that its failure to timely file the returns in question and pay the appropriate tax was due to reasonable cause and not due to negligence.

FINDING

The taxpayer's protest is denied.

DEPARTMENT OF STATE REVENUE

0420060024.LOF

LETTER OF FINDINGS: 06-0024
Gross Retail and Use Tax
For the Tax Periods 2002 through 2004

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 the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Publication – Gross Retail and Use Tax.

Authority: IC 6-2.5-5-17; Carroll County Rural Electric Membership Corp. v. Ind. Dept. of Revenue, No. 49T10-0003-TA-32, 2005 Ind. Tax LEXIS 80 (Ind. Tax Ct. 2005); 45 IAC 2.2-5-26.

Taxpayer argues that the publication which it circulates monthly to its customers qualifies as a "newspaper" and is not subject to Indiana's gross retail tax.

STATEMENT OF FACT

Taxpayer is a not-for-profit rural electric cooperative organized to provide electric power to its member-owners. The Department of Revenue (Department) conducted an audit review of taxpayer's business records. The audit concluded that taxpayer owed additional sales and use tax. Taxpayer protested a portion of the assessment, the protest was assigned to a hearing officer, and this Letter of Findings results.

DISCUSSION

I. Publication – Gross Retail and Use Tax.

During the tax periods at issue, taxpayer purchased copies of a publication and circulated the copies to its member-owners. In the belief that the copies were exempt "newspapers," taxpayer did not pay sales tax when it bought the copies. On the ground that the publication was not a "newspaper," the audit disagreed and assessed taxpayer use tax. The audit did so based upon 45 IAC 2.2-5-

26 which states in part:

In general, sales of all publications irrespective of format are taxable. The exemption by this rule... is limited to sales of newspapers.... For purposes of the state gross retail tax, the term "newspaper" means only those publications which are:

(1) commonly understood to be newspapers;
(2) published for the dissemination of news of importance and of current interest to the general public, general news of the day, and information of current events;
(3) circulated among the general public;
(4) published at stated short intervals;
(5) entered or are qualified to be admitted and entered as second class mail at a post office in the county where published. *See* IC 6-2.5-5-17.

The issue raised by taxpayer was addressed by the Indiana Tax Court in Carroll County Rural Electric Membership Corp. v. Ind. Dept. of Revenue, No. 49T10-0003-TA-32, 2005 Ind. Tax LEXIS 80 (Ind. Tax Ct. 2005). In that case, the court found that the petitioner's publication – circulated to the petitioner's own member-owners – was "a newspaper because it is: (1) commonly understood to be a newspaper; (2) circulated among the general public; and (3) published at stated short intervals." Id. at *15. The court concluded that petitioner's purchase of its publication was "exempt from the sales tax pursuant to Indiana Code § 6-2.5-5-17." Id.

Taxpayer's protest is squarely on point with the facts and law set out in Carroll County and is nearly identical with that case in all material ways. Taxpayer's publication is the same publication purchased by the petitioner in Carroll County and is circulated to taxpayer's member-owners in the same manner as the publication considered by the court in that case.

The Department will, of course, defer to the Tax Court in its interpretation of what constitutes an exempt "newspaper" pursuant to IC 6-2.5-5-17. Taxpayer's publication is entitled to the same exempt status as that of the publication described in Carroll County.

FINDING

Taxpayer's protest is sustained.

DEPARTMENT OF STATE REVENUE
Repeal of Nonrule Policy Document
Revenue Ruling #2006-01IT
February 22, 2006

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 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.

Revenue Ruling #2005-02IT, printed at 28 IR 3124 is repealed.

Revenue Ruling #2006-02IT, supersedes repealed Revenue Ruling #2005-02IT.

DEPARTMENT OF STATE REVENUE
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ISSUES

Corporate Adjusted Gross Income Tax—Sourcing Business Receipts

Authority: IC 6-3-2-1; IC 6-3-2-2; 45 IAC 3.1-1-37; 45 IAC 3.1-1-55.

Taxpayer requests the Department to rule on the sourcing of business receipts.

1. Should taxpayer apply the personal services ratio to determine how much of its receipts from commissions received on sale of insurance coverage policies should be sourced to Indiana?
2. Should taxpayer apply the personal services ratio to determine how much of its receipts from management fees should be sourced to Indiana?

STATEMENT OF FACTS

Taxpayer is an Indiana corporation that specializes in marketing and writing property and casualty insurance. Taxpayer does

business and files income tax returns in Indiana and other states. Taxpayer's subsidiaries both are Indiana domiciled; they are licensed and sell insurance policies in all fifty states and all Canadian provinces. Revenue received from commissions for the solicitation and execution of insurance coverage policies and management fees represent approximately ninety percent (i.e., a principal source) of taxpayer's total net revenue as stated in taxpayer's audited financial statements. Taxpayer does not sell or lease intangible personal property.

DISCUSSION

IC 6-3-2-1 imposes on every corporation an income tax upon the adjusted gross income derived from sources within Indiana. For adjusted gross income tax purposes, a corporation must apportion its business income derived from sources within and without Indiana. *See*, IC 6-3-2-2. 45 IAC 3.1-1-37 states that business income is apportioned to Indiana based on the 3-factor formula named in IC 6-3-2-2(b). Business income derived from sources within Indiana is determined by multiplying all business income by a fraction; the numerator of the fraction is the property factor plus the payroll factor plus twice the sales factor; the denominator of the fraction is four. *Id.*

45 IAC 3.1-1-55, **Attribution of sales to state**, interprets IC 6-3-2-2. The regulation states that gross receipts from transactions other than sales of tangible personal property are included in the numerator of the sales factor if the income-producing activity which gave rise to the receipts is performed wholly within Indiana. If the income producing activity is performed within and without Indiana, those receipts are attributed to Indiana based on whether or not the receipts constitute a principal source of income. *Id*. Income producing activity is deemed performed at the situs of real, tangible, and intangible personal property or the place where personal services are rendered. *Id*. The situs of intangible personal property is the commercial domicile of the taxpayer (i.e., the principal place from which trade or business of the taxpayer is directed or managed). *Id*.

Commission Revenue on Sale of Insurance Policies

Taxpayer states that the performance of services for customers across the United States are split between Indiana and the resident state of the insured. Taxpayer's employees travel into the various states and execute an insurance coverage application in the resident state of the insured. Prior to a quote being provided, Taxpayer's employees perform loss prevention services, which occurs in the home office located in the state of the prospective customer. Subsequent to the execution of the sale and loss prevention services, the insurance policy is underwritten by a taxpayer subsidiary. Once the policy is underwritten, it is delivered to the insured in their home state. Taxpayer receives a commission for the solicitation and execution of the sale.

Taxpayer's commission revenue constitutes a principal source of business income, therefore, Taxpayer's commission revenue is sourced in this manner. Services are rendered both within and without Indiana, 45 IAC 3.1-1-55(d) states that the gross business income receipts shall be attributed to Indiana based upon the ratio which the time spent performing services in Indiana bears to the total time spent in performing such services everywhere.

Management Fee Revenue

Taxpayer serves as a third-party administrator for many customers of self-insurance policies sold by one of its subsidiaries. Using its employees located in Indiana, Taxpayer provides services to process insurance claims for self-insurance customers. Taxpayer's employees supervise the handling and settlement of these claims, including hiring outside adjustors and attorneys. As well, Taxpayer's employees conduct many claim processing services, such as inspection, interviews, and documentation of insurance claims in the resident state of the insured or in the state where the accident occurred. Following the services rendered by the adjustors and attorneys, Taxpayer issues a claim report to the self-insured to the policy holder's resident state. A claims management fee is charged to each policyholder selecting Taxpayer as its third-party administrator. The fee is paid directly to taxpayer by the policyholder.

Taxpayer's management fee revenue constitutes a principal source of business income, therefore Taxpayer's management fee revenue is sourced in this manner. Services are rendered both within and without Indiana. 45 IAC 3.1-1-55(d) states that the gross business income receipts shall be attributed to Indiana based upon the ratio which the time spent performing services in Indiana bears to the total time spent in performing such services everywhere.

RULING

The Department rules that the commission revenue and the management fee revenue is earned for services rendered both within and without Indiana. The gross business income receipts shall be attributed to Indiana based upon the ratio which the time spent performing services in Indiana bears to the total time spent in performing such services everywhere.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.