Indiana Tax Developments — Fall 2021

Dentons SALT Insights

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I. Selected New Legislation

Electronic Cigarette Tax (HEA 1001, Sec. 119)

House Enrolled Act 1001, Section 119, creates a new chapter of the Indiana Code at IC 6-7-4 which imposes an electronic cigarette tax. The tax is imposed on the retail sale of consumable material and vapor products in Indiana at a rate of 15% on the gross retail income received by the retail dealer. The person who acquires consumable material or vapor products in a retail transaction is liable for the tax on the transaction, typically paid to the retail dealer as a separate added amount to the consideration in the transaction.

Consumable material and vapor products do not include a "closed system cartridge," defined as "a sealed, prefilled, and disposable container of consumable material in which the container is inserted directly into a vapor product, and is not intended to be opened or accessible through customary or reasonably foreseeable handling or use." HEA 1001, Sec. 101. Instead, closed system cartridges are deemed taxable products under the existing statutes governing cigarette tax. HEA 1001, Sec. 104.

A retail dealer will be required to have a valid electronic cigarette retail dealer's certificate issued by the Indiana Department of Revenue.

This legislation becomes effective July 1, 2022.

Public Safety Equipment Exemption (SEA 383, Sec. 5)

Senate Enrolled Act 383, Section 5, creates a new statute (IC 6-2.5-5-55) to codify previous guidance that provides an exemption from state gross retail tax if the equipment or material is predominately used by the purchaser to protect the general public and workers during the purchaser's performance of public works construction or maintenance. Examples include concrete or metal barriers; barrels; materials to construct temporary traffic lanes, roads, and bridges; and static and electronic signage and signals. However, transactions involving hard hats, safety glasses, safety vests, pest control, or other personal protective equipment used or worn by employees of the construction contractor or subcontractors are excluded from this exemption.

This legislation became effective July 1, 2021.

II. Select Administrative and Case Updates

A. Income Tax

Letter of Findings Number: 02-20210018, et al. (June 4, 2021) (Corporate Income Tax) – Research and Expense Credit; Documentation

Taxpayer, in the business of providing its customers electric contracting and on-demand electrical support services, claimed that it incurred approximately $9,000,000 in qualified research expenses entitling it to claim approximately $460,000 in Indiana labor research expense tax credits ("RECs" or "REC") for the years 2016 and 2017.

Without conceding Taxpayer's arguments as to whether the projects at issue constituted "qualified research," the Letter of Findings focused on the documentation issue. A taxpayer who claims the tax credit is required to retain records necessary to substantiate a claimed credit. Indiana and federal law require that a taxpayer maintain and produce contemporaneous records sufficient to verify those credits. See Treas. Reg. § 1.41-4(d). (See also IC § 6-8.1-5-4(a) which requires that taxpayers keep records).

Taxpayer relied on the job titles and job descriptions in concluding that the Taxpayer paid its employees approximately $9,000,000 to research and develop methodologies necessary to satisfy their customers' requirements. Qualifying for the REC is more than simply a tax and calculation issue, and the Department was unaware of instances in which tax issues are resolved by means of job titles, estimates, surveys, or employee interviews. The Department was unable to agree that Taxpayer presented documentation of qualifying activities which clearly and plainly established that it was entitled to the $460,000 in credits originally claimed. Thus, Taxpayer's protest was denied.

Letter of Findings Number: 02-20200382; (Jan. 12, 2021) (Composite Tax) - Real Estate Investment Trust Dividends

Taxpayer is an out-of-state investment partnership which earns money from Indiana sources. According to Taxpayer, it is 97 percent owned by two partners which are, in turn, owned by two Real Estate Investment Trusts (REITs). Taxpayer's income passes through to its partners which subsequently distribute the income to the REITs. Taxpayer filed an Indiana 2019 Indiana Partnership Return (Form IT-65 Indiana Partnership Return). Taxpayer initially reported its net income prior to payment of dividends but claimed a deduction for income apportioned to the two REITs. The Department subsequently reviewed the return and reversed the deduction which resulted in an assessment of additional tax on income distributed to its nonresident shareholders.

Taxpayer explained that it is owned in large part (97 percent) by two nonresident partners. In turn, one partner is 98 percent owned by a REIT designated here as "Investor." The other partner is 97 percent owned by a second REIT designated as "Realty."

Under IC § 6-3-4-12(i): "A partnership shall file a composite adjusted gross income tax return on behalf of all nonresident partners. The composite return must include each nonresident partner regardless of whether or not the nonresident partner has other Indiana source income."

Taxpayer, however, pointed to 45 IAC 3.1-1-107(a)(2) as justifying the manner in which Taxpayer originally reported its Indiana income. The regulation provides: "For a partner other than an individual partner, the income tax withheld may be calculated using any reasonable method designed to reflect the ultimate tax liability due Indiana because of the partnership's activities."

Taxpayer explained that the REITs' federal and Indiana taxable income calculations include a deduction for dividends paid, which must be paid annually for the REIT entities (Investor and Realty) to maintain their REIT status. Consequently, federal and Indiana tax is not ultimately due on the REITs' distributive share of Indiana income from lower-tiered partnership entities such as Taxpayer.

Taxpayer pointed out that less than 3 percent of the Taxpayer's Indiana distributive share will be recognized by non-REIT owners and that both Investor and Realty receive a deduction for the dividends that the Investor and Realty pay its shareholders pursuant to I.R.C. § 857. Under I.R.C. § 857, the dividends-paid deduction essentially eliminates federal/Indiana taxable income for the two REIT entities.

Based on the narrow circumstances in which an ultimate taxpayer (the REITs) is effectively exempt and the Taxpayer has provided documentation establishing as much, the Department agreed that Taxpayer, pursuant to 45 IAC 3.1-1-107(a)(2), correctly reported its Indiana source income because Taxpayer unequivocally established that the manner in which it reported the tax was "a reasonable method designed to reflect the ultimate tax liability due Indiana because of the partnership's activities."

Letter of Findings Number: 02-20200378 (Dec. 8, 2020) (Corporate Income Tax) – Net Operating Loss Carryover

Taxpayer is a multinational company doing business in Indiana. Taxpayer files Indiana Corporate Income Tax returns (IT-20 forms), reporting its apportioned income or losses subject to Indiana income tax. Prior to 2015, Taxpayer incurred some net operating losses ("NOLs"). Taxpayer carried over those NOLs and had completely utilized all its NOLs on the 2015 return.

Subsequently, Taxpayer and its affiliates were reorganized. One of Taxpayer's subsidiaries ("Sub EF") merged into Taxpayer. Beginning January 1, 2016, Taxpayer and "Sub EF" started filing their Indiana Corporate Income Tax returns as a single entity together under Taxpayer's name, reporting their income or losses subject to Indiana income tax.

Taxpayer carried over and claimed $3,421,165 NOLs on their 2016 IT-20 return. Taxpayer then carried over and claimed $2,482,134 NOLs on their 2017 IT-20 return. Taxpayer subsequently filed their 2018 IT-20 return, claiming $879,296 NOLs to be carried over to 2018.

The Department reviewed Taxpayer's 2018 tax filing and determined that Taxpayer had zero NOLs. The Department thus assessed Taxpayer additional income tax, interest, and penalty. Taxpayer timely protested.

Taxpayer's 2016 IT-20 return contained the following footnotes: "Effective January 1, 2016 [Sub EF] a wholly owned subsidiary of Taxpayer merged with and into Taxpayer . . . The Merger qualifies as a tax-free reorganization pursuant to code section 368(A). . . . Effective January 1, 2016, [Sub EF] merged with and into [Taxpayer] in a carryover basis transaction . . . ."

Therefore, according to Taxpayer's 2016 filing and the Department's records, although Sub EF had losses from 2004 through 2015, Sub EF carried the 2004 loss back to 2002 ($105,076 NOLs claimed) and 2003 ($122,394 NOLs claimed). Thus, beginning January 1, 2016, Taxpayer was allowed to carry over the remaining $6,557,100 NOLs available from Sub EF.

Taxpayer carried over and claimed $3,421,165 NOLs on their 2016 IT-20 return. Taxpayer then carried over and claimed $2,482,134 NOLs on their 2017 IT-20 return. As such, Taxpayer was entitled to claim $653,801 NOLs in 2018.

Letter of Findings Number: 02-20200332 (Nov. 17, 2020) (Adjusted Gross Income Tax) – Qualified Research Expense Projects

Taxpayer is an Indiana manufacturing company in the business of developing casting and milling processes, machine tooling, aluminum castings used in mold-making, and heat-treating processes for aluminum products. During the years 2011, 2012, 2013, and 2014, Taxpayer reported approximately $7,640,000 in qualifying research expenses ("QREs") and claimed approximately $521,000 in Indiana Research Expense Credits ("RECs") for the four years at issue. These credits were originally calculated by an independent third-party consulting company ("Consultant") which completed an REC study for Taxpayer.

Under the version of IC § 6-3.1-4-1 in effect for the taxable years in question: "'Indiana qualified research expense' means qualified research expense that is incurred for research conducted in Indiana. 'Qualified research expense' means qualified research (as defined in Section 41(b) of the Internal Revenue Code as in effect on January 1, 2001)."

Taxpayer stated that it utilizes computer software to design and develop a variety of components and produces a variety of pattern equipment through alternative casting and milling processes. In addition, Taxpayer designs and develops high-quality aluminum casting for use in sand, semi-permanent, and permanent molds. Finally, Taxpayer stated it develops innovative heat-treating processes for aluminum products. Taxpayer emphasized the sophistication and precision involved in the development and production of these items.

However, Taxpayer can point to nothing it does to discover and develop a "new or improved business component" incorporated into or necessary to the production of the business's products. Taxpayer pointed to nothing which advances upon or adds to the common knowledge of other similar lines of business. Moreover, Taxpayer has not established that its business fundamentally expanded upon the "common knowledge" using variations of long-standing techniques or expanded the "existing level of information in [Taxpayer's] field of science or engineering." Treas. Reg. § 1.41-4(a)(3)(ii).

Even if Taxpayer's activity did lead to the "discovery" of new products, it did not necessarily represent "a methodical plan involving a series of trials to test a hypothesis, analyze the data, refine the hypothesis, and retest the hypothesis so that it constitutes experimentation in the scientific sense."

Taxpayer did not argue that it maintained a system of project accounting in order to accurately quantify the research expenses. Instead, Taxpayer relied on employee surveys, job titles, wage statements, and project descriptions in concluding that Taxpayer paid its employees approximately $7.64 million dollars to conduct experimentation on components eventually incorporated into or made part of Taxpayer's products.

Every taxpayer's claim against any tax must be supported by records necessary to substantiate the claimed credits, and those records are required to be kept before or during the early stages of the research project. The Department considered two questions. First, did Taxpayer narrowly define its additional activities which lead to the development of individual components which are themselves the results of a methodical, systematic, experimental process? Second, did Taxpayer keep and retain contemporaneous documentation of those qualifying activities which clearly and plainly established that it was entitled to the $521,000 in credits originally claimed? As to these questions, the Department was unable to agree with Taxpayer that it did so within the "exact letter of the law." Thus, Taxpayer's protest was denied.

Revenue Ruling Number: 2020-04ST (Oct. 29, 2020) (Sales and Use Tax) – Acetone Used for Cleaning Equipment Used and Consumed in Manufacturing

Company is a manufacturer of fiberglass reinforced plastic (FRP) panels for the Recreational Vehicle (RV) industry with an operating plant in Indiana. Company requested the Department to issue a Ruling regarding the application of Indiana sales and use tax to purchases of acetone used and consumed in its production process.

Acetone is used to flush the spray guns every 5th mold during the production process to prevent the gun tips and lines from clogging. This allows for a continuous and uninterrupted production process and an even

and uniform spray on the parts. Acetone is used and consumed in the lamination and gel coat processes to manually clean the spray gun tips and the pump parts. Manual cleaning of the spray tips includes continuously dipping the spray guns into buckets of acetone. This prevents the gun tips and lines from clogging during the production process. Acetone is used and consumed in the gel coating process for color flushing. The color flushing occurs anytime there is a change in color and occurs during the direct and integrated production process. Acetone is used to clean the auto-rollers, which are machines designed to press chopped glass fibers into the resin to insure good adhesion to the layer below before the next layer is applied. The rollers are removed every 4th mold (approximately every 20 minutes) and clean rolls are immediately installed for a continuous production process. The dirty rollers are then cleaned with acetone and made ready to be put back into production 20 minutes later. This must be completed while production is running.

Under 45 IAC 2.2-5-12(c), "The state gross retail tax does not apply to purchases of materials to be directly consumed in the production process or in mining, provided that such materials are directly used in the production process; i.e., they have an immediate effect on the article being produced. The 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."

The Department held that the consumption of acetone in the following instances is exempt:

(1) To clean and flush spray guns and spray gun lines after every fifth mold.

(2) To manually clean spray gun tips and parts during the production process to prevent the gun tips from clogging.

(3) To clean gel coating equipment after each color change.

(4) To clean the auto rollers after 20 minutes of use.

All four of the above uses of acetone has an immediate effect on the article being produced. It is consumed in such a way that it is an essential and integral part of an integrated process which produces tangible personal property. All of the equipment listed above are themselves directly used in direct production under IC 6-2.5-5-3, and this equipment would not function properly without the consumption of the acetone during production. When used in those circumstances, the consumption of the acetone is exempt under IC 6-2.5-5-5.1.

However, the acetone is not exempt when it is used for other purposes, even with regard to the equipment described above when it is not being used in production or when production is shut down.

B. Sales and Use

Revenue Ruling Number: 2020-14ST (July 22, 2021) (Sales and Use Tax) – Web-Based Platform and Free Mobile Application

The taxpayer ("Company") provides web-based fleet management service for handling the administration, management, and record-keeping of motor vehicle fleets. Company provides its services via a "Software as a Service" ("SaaS") model.

Under this model, the prewritten computer software resides exclusively on the vendor's server and is accessed by the customer via the Internet. Customers cannot install, download, or transfer the application software to their own computers. Company owns, operates, and maintains the software applications, as well as the servers that support the application software. Company's customers have no control over the network, servers, operating systems, storage, or software capabilities.

In 2016, Company developed an application which it provides to its customers for free. Customers have the option of downloading the application to a personal device, such as a phone, tablet, etc., which the customer can then use to more easily upload vehicle information necessary for fleet management. Company does not provide the customer with the personal device for use with the application; nor does it provide any other tangible personal property. In addition, Company's pricing did not change for the services performed after the application was made available to its customers.

As an individual transaction, Company's prewritten computer software is not subject to sales tax pursuant to IC 6-2.5-4-16.7(b). Concerning the mobile application, the Department has stated in Sales Tax Information Bulletin #8 (Dec. 2019) that prewritten computer software delivered electronically includes "mobile apps;" however, the Department has also advised in the bulletin that "as many mobile apps are offered for free, those mobile apps where there is no charge for downloading the apps are not retail transactions and no sales tax would be collected from the customer." Because Company offers the mobile application to its customers free of charge, it therefore is not subject to sales and use tax.

Individually, company's service component, remotely accessed software, and free mobile application would not be subject to sales tax. Although the service component and remotely accessed software are included in the same transaction, none of the items individually would be subject to sales tax, and therefore it would not constitute a taxable bundled transaction. Therefore, Company's provision of fleet management services via a SaaS model are not subject to Indiana sales and use tax, and any tangible personal property provided for free would not be subject to sales tax either.

Letter of Findings Number: 04-20210007, et al. (June 22, 2021) (Gross Retail and Use Tax) – Utilities Consumed in Preparing Food

Taxpayers own and operate chains of fast-food restaurants located throughout the state of Indiana. The issue was whether Taxpayer had met its burden of proof needed to establish that certain equipment was, in fact, directly used in preparing Taxpayer's food products and that - as a result - utilities consumed by that equipment were exempt from sales and use tax.

Under Indiana Tax Court precedent, the exempt equipment must "change the individual food items into new, marketable products that [have] a character and form different from the food items first acquired." See *Aztec Partners, LLC v. Indiana Dep't of State Revenue*, 35 N.E.3d 320, 322 (Ind. Tax Ct. 2015). The Department agreed that the convection ovens used by Taxpayer met the requisite tests. These ovens cook roast beef and other items for sandwich and item preparation. The manufacturer describes the convection oven as a "Heavy-Duty Countertop Convection Oven" used for baking.

However, the utilities consumed by freezers, walk-in coolers and evaporators, holding cabinets, heat lamps, and microwaves were not held to be exempt. These devices are used to maintain food in its present state and do not change the food item into a new and different food item.

Taxpayer's protest was sustained as it pertained to the convection ovens, but denied as to the other items of equipment.

Letter of Findings Number: 04-20200377 (April 21, 2021) (Gross Retail Tax) – Exempt Services

Taxpayer is an Indiana aircraft dealer, repair facility, and aviation fuel station. The Department conducted a sales and use tax audit of Taxpayer's business records and tax returns. The audit assessed additional sales tax on Taxpayer's purchases from a number of vendors. Taxpayer paid its vendor, Millennium Technologies, for the installation and subsequent use of a broadband Internet line located at the Taxpayer's business headquarters. According to Taxpayer, this access allows its customers to transmit credit card, debit card, and other financial information to credit and debit card processing networks.

Taxpayer explained that it sends its data to financial institutions outside Indiana. Since Taxpayer is located in Indiana and - according to Taxpayer - its Internet traffic is directed solely to and from Florida - Taxpayer concluded that the charges are exempt under IC § 6-2.5-1-20.3 which states: "'Intrastate telecommunications service'" means a telecommunications service that originates in a particular state, territory, or possession of the United States and terminates in that same state, territory, or possession." Taxpayer argued that since the Millennium Internet line connects its Indiana location and a specific Florida location, the Millennium charges should be exempt from sales tax.

However, there is nothing in the Millennium contract or the documents provided that establish that Taxpayer's Millennium Internet service operates on a private, dedicated line between a location in Indiana and a location in another state. In addition, the agreement with Millennium also calls for it to provide Taxpayer tangible personal property such as a router, category 5 wire, wall jack, "appropriate cable," and other "minor materials" to complete the installation. As provided for in IC § 6-2.5-4-6(c), the undifferentiated bundling together of taxable charges and exempt charges "are subject to taxation . . . ."

Accordingly, the Department found that the Millennium charges were subject to Indiana gross retail tax.

Memorandum of Decision Number: 04-20200059R (March 23, 2021) (Sales and Use Tax) –Manufacturing Exemption; Environmental Quality Compliance Exemption

Taxpayer operates a solid waste landfill in Indiana to collect waste from the community in Indiana. In addition to waste management, Taxpayer collects landfill gas - a natural byproduct of the decomposition of organic material in landfills - and turns a small portion of it into usable energy. Taxpayer also engages in the manufacture of de-moisturized landfill gas for resale where the composition of the landfill gas is changed slightly by removing excess moisture.

Taxpayer claimed that it was entitled to statutory exemptions, including an exemption for environmental quality compliance, on various tangible personal property it purchased and used in its landfill operation, such as bulldozers, compactors, and crawler tractors; the leachate collection system, which contains various layers of clay, sand, gravel, and geosynthetic liners, pipes, pumps, meters and valves; and a Gas Collection System consisting of piping, pumps, valves, meters, wellheads, and condensate knockouts.

For the manufacturing exemption, the capital equipment "in order to be exempt, (1) must be directly used by the purchaser and (2) be used in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of tangible personal property." See *Indiana Dep't. of State Revenue v. Cave Stone, Inc.*, 457 N.E.2d 520, 525 (Ind. 1983); IC § 6-2.5-5-3(b).

An environmental quality compliance exemption is available under IC § 6-2.5-5-30(a) if "(1) the property constitutes, is incorporated into, or is consumed in the operation of, a device, facility, or structure predominantly used and acquired for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards; and (2) the person acquiring the property is engaged in the business of manufacturing, processing, refining, mining, recycling ..., or agriculture." Under case law interpreting this statute, the claimant must meet (1) the production requirement and (2) the environmental compliance requirement. To meet the production requirement, a taxpayer must engage in the business of production resulting in a marketable good.

Taxpayer has been operating the landfill since 1995 to collect solid waste from the community in Indiana. As such, the business purpose of Taxpayer's landfill is to serve as a waste disposal facility. Landfill gas is a natural byproduct of the decomposition of organic material in landfills. Since landfill gas naturally occurs when operating landfills, in order to become a certified Indiana landfill operator, Taxpayer must first comply with the state environmental regulations to properly construct, maintain, monitor, manage, and close the landfills - every step along the way throughout the landfill operation. As such, gas extraction is one of the statutorily required responsibilities of waste management when Taxpayer began to operate the landfills. Regardless of whether the gas is sold, the collection of the gas is required as a condition of landfill operation. Thus, the Department was not able to agree that Taxpayer's landfill met the production requirement.

Taxpayer's documentation failed to demonstrate that its landfill operation was "in connection with" its production. As such, Taxpayer's purchases and use of the items for its landfill operation did not qualify for the above-mentioned exemptions.

However, the Department agreed that Taxpayer's gas processing constitutes a production process, even though Taxpayer's landfill operations do not constitute any part of a production process. Therefore, tangible personal property ("TPP") associated with the gas processing was exempt under IC § 6-2.5-5-3(b), while TPP associated with landfill operations was not exempt in any manner.

Here, the Gas Collection System was used for both landfill operations and for gas processing, meaning that it was partially used in an exempt manner and partially used in a taxable manner. The Department concluded that Taxpayer's refund claim will be granted with respect to the Gas Collection System equipment in the same percentage that Taxpayer uses the collected gas in its gas processing; and that the refund will be denied in the same percentage that Taxpayer uses the collected gas in its landfill gas control operations.

Letter of Findings Number: 04-20200338 (Feb. 23, 2021) (Use Tax) – Manufacturing Exemption

Taxpayer is a trucking and excavating company based in Indiana. As the result of an audit, the Department assessed use tax on several items purchased by Taxpayer. Taxpayer protested only the use tax assessed on the purchase of a lowboy trailer.

Taxpayer uses the trailer to transport Taxpayer's wood grinder to local sawmills and other sites where the grinding process for mulch production begins. Taxpayer grinds the logs down to large chips and then the chips are hauled back to Taxpayer's facilities. The grinder never leaves the lowboy and cannot be transported to the sawmills and other sites without the lowboy.

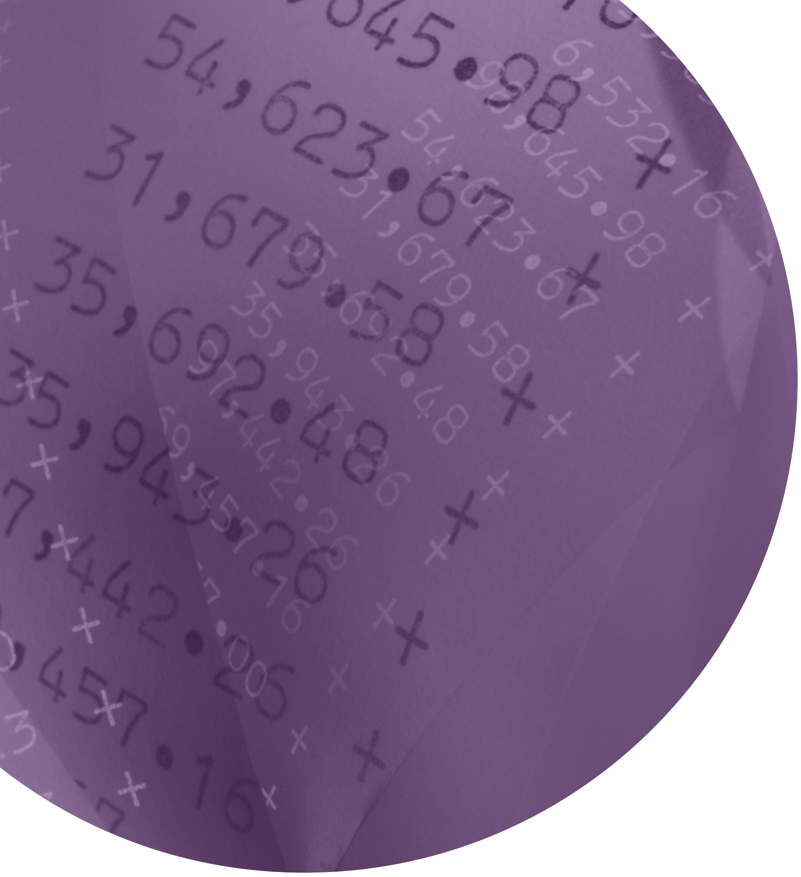
Under 45 IAC 2.2-5-8(c), "[t]he state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they 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." Under Indiana case law interpreting the exemption, equipment (1) used in an integrated operation, (2) to transport unfinished work in process, (3) from one production step to another is exempt.

Taxpayer argued that the lowboy is essential and integral because the grinder cannot be used without it and thus the trees cannot be ground. However, the lowboy is not used to transport the unfinished product. While it does transport a machine that is integral to the production of a product, the lowboy itself has no direct impact on the mulch being produced. The lowboy is equipment used by the purchaser but not directly used in the direct production of the mulch as required in 45 IAC 2.2-5-8(b). Although the lowboy may be essential, the lowboy does not have an immediate effect on the mulch and is not an integral part of an integrated process which produces tangible personal property.

The Department concluded that Taxpayer did not meet its burden.

Revenue Ruling Number: 2020-13ST (Jan. 8, 2021) (Sales and Use Tax; Adjusted Gross Income Tax) - Sourcing of Transactions to Out-of-State Purchasers

Company is an Indiana manufacturer that fabricates and sells fiberglass pools, which are ultimately installed for in-ground use. The pools are sold by Company to dealers, both in Indiana and in other states. These



dealers subsequently sell the pools to their customers, after which the dealers install the pools. A dealer will either pick up the pool at the Company's Indiana location, or Company will deliver the pool to the dealer by a private carrier (which is owned by the owners of the Company) or by common carrier. When the pools are delivered, it is often to the dealer's business location, but in some cases it could be sent to another location, such as to the dealer's customer. By contract, title passes where the dealer takes possession (upon delivery when delivered by truck; e.g., freight on board (or f.o.b.) destination).

In light of *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018) and Indiana's legislative and regulatory response to that decision, Company requested a determination as to which of these sales would be considered Indiana transactions and which would not, for purposes of both Indiana gross retail tax (sales tax) and the Indiana adjusted gross income tax.

The Department ruled that a sale by Company at Company's Indiana location (e.g., the customer picks up the pool in Indiana) is considered the sale of tangible personal property sourced to Indiana as an Indiana sale for Indiana sales tax purposes. IC 6-2.5-13-l(d)(1). For these sales, any delivery charges (e.g., trucking transportation charges) on an invoice, bill of sale, or similar document issued by Company to its customer, whether those charges are separately stated or not, are subject to Indiana sales tax. These sales will also be sourced to Indiana as an Indiana sale for purposes of the Indiana adjusted gross income tax.

Those sales where the pools are delivered outside Indiana will not be considered Indiana sales. IC 6-2.5-13-1(d)(2). Specifically, sales by Company in which Company delivers the pool (whether they use their own vehicles or they hire a related company or third party to transport the pool using the other company's vehicles) to the dealer by truck will be sourced to the state in which the pool is delivered (whether to the dealer's location or the dealer's customer's location), for both Indiana sales tax and Indiana adjusted gross income tax purposes.

Further, sales where a customer hires or arranges for a delivery company to pick up the pool in Indiana to be delivered outside Indiana will be sourced to the state of delivery, as IC 6-2.5-13-1(a) makes clear that "receipt" does not mean "possession by a shipping company on behalf of the purchaser," meaning the purchaser receives the pool at the delivery location pursuant to IC 6-2.5-13-1(d)(2). This is true regardless of whether the f.o.b. designations state that title transfers in Indiana when the shipping company picks up the pool. Any delivery charges invoiced directly to the customer by a transportation company (regardless of whether the transportation company has common ownership with Company as described above) are not subject to Indiana sales tax. See IC 6-2.5-1-5(a). These sales will also be sourced to the state of delivery for purposes of the Indiana adjusted gross income tax.

For any of the sales to out-of-state dealers, if a dealer provides Company with a fully completed Indiana General Sales Tax Exemption Certificate (Form ST-105), a fully completed Streamlined Sales and Use Tax Agreement Certificate of Exemption (SSTGB Form F0003), or an Indiana direct pay permit, Company may rely on that certificate or permit and not collect or remit Indiana sales tax for that transaction.

This Revenue Ruling supersedes repealed Revenue Ruling #2020-01ST.

C. Property Tax Cases

Southlake Indiana, LLC v. Lake County Assessor, 21S-TA-239 (Ind. Sept. 22, 2021) – Remedy for Assessor's Failure to Meet Burden of Proof

In 2014, the Assessor more than doubled the assessment of the Taxpayer's mall property. At the same time, the Assessor retroactively increased the subject property's assessments for the prior 3 years (also more than doubling those assessments). The Taxpayer appealed all four assessments to the Indiana Board of Tax Review. Because the assessments had increased by more than 5% over the prior year's assessment, the Assessor bore the burden of proving that the assessment was correct. IC § 6-1.1-15-17.2. The Indiana Board's final determination did not adopt the values presented by either party. The Indiana Tax Court affirmed on these points, and the Taxpayer sought review by the Indiana Supreme Court. The issue on review concerned the application of IC § 6-1.1-15-17.2(b), which provides that "if neither the assessing official nor the taxpayer meets the burden of proof . . . the assessment reverts to the assessment for the prior tax year . . . ." The Supreme Court found that the Tax Court erred as a matter of law by failing to apply the reversionary clause. The Court also rejected the Tax Court's conclusion that Section 17.2 requires only that the parties submit probative evidence to avoid such a reversion. The Supreme Court found that this would make the statutory "burden of proof" only a "burden of production." The Supreme Court concluded that the Tax Court had ignored the unambiguous, plain terms of the reversionary clause in Section 17.2. The Supreme Court reversed and remanded the case to the Indiana Board with instructions to enter assessments for tax years 2011 to 2014 in the amount of Southlake Mall's 2010 assessment.

Piotrowski BK #5643, LLC v. Shelby County Assessor, 21T-TA-00004 (Ind. Tax Ct. Sept. 16, 2021) – Application of Assessment Guidelines

The Taxpayer challenged the assessment of its restaurant building, arguing that it was over-assessed because the Assessor had not properly applied the depreciation tables in Indiana's Assessment Guidelines ("Guidelines"). In response, the Assessor argued that application of the Guidelines would not have accurately reflected the property's market value-in-use, because the Taxpayer had extensively renovated the building, effectively making it a new building. The Indiana Board of Tax Review upheld the assessment, noting that the Taxpayer bore the burden of proof and was required to do more than attack the methodology used by the Assessor; the Taxpayer also was required to present market-based evidence to demonstrate that the assessment did not reflect the property's market value-in-use. On appeal, the Tax Court noted that the Guidelines are afforded a presumption of correctness, but that presumption can be rebutted. Thus, the Court disagreed with the Taxpayer's argument that the Assessor's failure to follow the Guidelines rendered the assessment invalid. As such, the Guidelines serve as merely the starting point of the assessment process. The Taxpayer also argued that the assessment violated the requirement for "uniform and equal" assessments under the Property Taxation Clause of the Indiana Constitution. The Court disagreed, finding that the Property Taxation Clause does not require a uniform method of valuation, and adding that it was insufficient for the Taxpayer to allege a constitutional infirmity with no evidence to support it. The Indiana Board's final determination was affirmed.

Three Fountains West, Inc. v. Marion County Assessor, Pet. Nos. 49-600-10-2-8-03179 (Ind. Bd. Tax Rev. Aug. 25, 2021) – Authority of County Board to Review Exemption Sua Sponte

The subject property of this exemption appeal was a cooperatively-owned 300-unit apartment complex that sought a charitable purposes exemption. The Taxpayer's Articles of Incorporation contemplate operations and activities that further "nonprofit, benevolent, fraternal, and social purposes."

Typically, an exemption application must be filed annually, although there are limited exceptions to the annual filing requirement for non-profit entities and for entities who have previously obtained an exemption. The Taxpayer filed its only exemption application in 2008 and presumably relied on IC § 6-1.1-11-3.5 for its decision not to file another application in 2009. The Marion County Property Tax Assessment Board of Appeals ("PTABOA") granted a 100% charitable exemption for 2008. However, at a meeting in 2010, the PTABOA voted to deny the exemption for 2009.

The Taxpayer did not file an exemption application in 2010, presumably based on the newly amended IC § 6-1.1-11-4 in effect in 2010. Later, in 2011, a notice was sent to the Taxpayer requesting further information and indicating that the property's eligibility for an exemption in 2010 would be heard at the PTABOA meeting on February 25, 2011. The PTABOA found the property taxable for the 2010 tax year, and issued a notice to that effect. After the PTABOA disapproved the exemption for 2010, the Taxpayer chose not to file exemption applications for the years 2011-2016, again relying on IC § 6-1.1-11-4 to claim the exemption.

Although the issue was not addressed by either party, the Board observed that once the PTABOA revoked the Taxpayer's exemption for 2009, the Taxpayer was required to file a timely new application for 2010 and any year thereafter. Having failed to do so, this should have foreclosed any relief for the Taxpayer. However, because neither party directly addressed this issue, the Board declined to dispose of the matter on this ground.

The Taxpayer argued for a statutory interpretation whereby a property that has been granted an exemption remains exempt without any further action by the Taxpayer, and the exemption can be revisited only when property ownership changes or when the Taxpayer self-reports a change in circumstances.

The statutory authority of the PTABOA to grant or deny an exemption is found in IC § 6-1.1-11-7(a). The PTABOA is statutorily obligated to investigate, through "careful examination," the eligibility of an exemption. The ongoing authority of the PTABOA to consider whether a property "is no longer eligible for the exemption" in a year in which no application is required is expressly referenced in IC § 6-1.1-11-3.5(d).

Eligibility for an exemption in a particular year is always determined by the use of the property during the prior calendar year. Accordingly, if a property ceases to be owned, occupied or predominantly used for a charitable purpose, it loses its eligibility in the following year. All of the application procedures expressly require continued eligibility. The right of non-profits to file biannually hinges on whether the property remains "eligible for the exemption." IC § 6-1.1-11-3.5(b); (d). The right to avoid filing subsequent applications is based on the condition precedent that the "property continues to meet the requirements for an exemption." IC § 6-1.1-11-4(d)(3).

The Board concluded that the Legislature granted the PTABOA the statutory authority to review the eligibility of property tax exemptions during the years at issue, even after granting the exemption for 2008.

The Board further concluded that the PTABOA was substantively correct in denying the exemption because the Taxpayer owns the property for the purpose of providing cooperative housing, not low-income housing. The Taxpayer's provision of housing at below-market rents is not a function of charitable purposes but rather a function of mutual benefit housing: housing without a profit margin going to a landlord. The exemption denials were affirmed.

Convention Headquarters Hotels, LLC v. Marion County Assessor, 19T-TA-00021, (Ind. Tax Ct. Aug. 5, 2021) – Equal Protection and Due Process; Cross-Motions for Summary Judgment

The subject property is a hotel in Indianapolis. In 2010, it was under construction, and the Assessor used a "percentage complete" factor to assess the property. The Taxpayer appealed the assessment and after a substantial delay, the Taxpayer attempted twice to appeal the assessment directly to the Indiana Tax Court pursuant to IC 6-1.1-15-5(g), though on both occasions the Tax Court determined that such appeals were prematurely filed. However, on its third, and finally timely, attempt at such an appeal, the Taxpayer alleged that the partially complete assessment violated its Constitutional rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution, 42 U.S.C. § 1983, and the Property Taxation and Equal Privileges and Immunities Clauses of the Indiana Constitution. The Taxpayer further contended that its land assessment violated Indiana's market value-in-use standard. The Court stayed all proceedings on valuation issues until the constitutional claims were fully resolved. The Taxpayer moved for partial summary judgment on its constitutional claims, alleging that the Assessor had pursued a practice, custom or policy of selectively assessing certain partially-complete properties while not assessing other such properties until they were fully constructed. With respect to each such claim, the Tax Court found that the record contained designated evidence which raised genuine issues of material fact, which were matters to be decided at trial, not at summary judgment. The Assessor also moved for Partial Summary Judgment, contending that he was entitled to summary judgment on the Taxpayer's constitutional claims, arguing that they were essentially valuation issues in disguise. The Court was not persuaded by the Assessor's argument. Additionally, the Assessor claimed absolute immunity against the Taxpayer's Section 1983 claim, arguing that it had acted in a "quasi-judicial" capacity. Again, the Court was not persuaded. Accordingly, the Court denied both parties' motions for partial summary judgment.

Crossing at Hobart, LLC v. Lake County Assessor, Pet. Nos. 45-046-12-1-4-02009-16, et al. (Ind. Bd. Tax Rev. July 28, 2021) – Appraisal Methodology; Retail Power Center

The subject property of this assessment appeal was an open air shopping center with mostly large tenant spaces, multi-tenant strip centers, a mix of single-tenant and multi-tenant retail buildings, and six free-standing restaurant buildings, having over 600,000 sq. ft. of net leasable area, also including approximately 60 acres of land, assessed at approximately $61,000,000 to $64,000,000 during the years at issue.

The Taxpayer appealed 5 parcel identification numbers. As maintained by the Assessor's office, one of those parcels contained an 84,800-square-foot addition to a national discount retailer's store. The total store size was 206,408 sq. ft., but the majority of the square footage was assessed to a parcel identification number which was not appealed by the Taxpayer. The Taxpayer asserted that it was not challenging the assessment of any part of the national discount retailer's store, and the Taxpayer's appraiser did not consider those 84,800 sq. ft. of improvements, nor the associated land footprint, as part of his assignment.

The Board favored the opinion of the Assessor's appraiser for several reasons. For comparable properties, the Assessor's appraiser considered similarly sized retail power centers located in suburban communities, examining key location-related factors that drive markets for power centers, such as traffic counts, demographics, and supporting and complimentary uses.

In contrast, the Taxpayer's appraiser artificially chose to limit his comparable search to Indiana. In support of this decision, he pointed to conversations with investors who, for example, would be happy to invest in Indiana but not in Cook County, Illinois and collar counties because of their tax systems. This rationale was unpersuasive because it presumed the universe of competing properties was limited to Indiana and Illinois. The Taxpayer's appraiser's decision to limit his search to sales from Indiana led him to choose properties that were unlike the subject property in almost all relevant respects. They were a fraction of the subject property's size and none were retail power centers. One comparable was merely a single-tenant department store.

The Board found the methodology of the Assessor's appraiser more reliable in determining market rent. He stratified the space at the subject property into market-driven categories, such as anchor, junior anchor, and big box, as well as into other size-based categories.

In contrast, the Taxpayer's appraiser divided all the space into three size-based categories. For instance, he lumped all space of more than 25,000 square feet into a single category for which he used only three comparable leases, even though that space composed most of the subject property's leasable area.

The Assessor's appraiser was able to confirm most of his comparable sale and lease data with parties to the transactions or other appraisers, and he largely relied on market data when considering whether to adjust the sale prices and rents for his comparable properties and leasable spaces. Conversely, the Taxpayer's appraiser was unable to confirm most of his comparable sale and lease data, and he lacked any traffic counts or other demographic information for any of his comparable sales. Similarly, when asked at hearing what he based many of his adjustments on, the Taxpayer's appraiser responded only that they were based on his opinion

The Board expressed a preference for valuing the subject property as a single economic unit, and the Assessor's appraiser came closer to doing so by valuing the 84,800-square-foot addition to the national discount retailer's store, and associated land. The national discount retailer's store was part of the retail power center, and the Taxpayer's rent rolls include rent for the entire store. The Taxpayer's assertion that it was not disputing that store's assessment was not helpful in formulating a value for the entire economic unit that was under appeal.

Based on the opinions of the Assessor's appraiser, the Board valued the subject property at approximately $66,000,000 to $70,000,000 for the years at issue.

Merrillville Apartments, LLC v. Lake County Assessor, Pet. Nos. 45-030-16-1-4-01238-18, et al. (Ind. Bd. Tax Rev. July 16, 2021) – Appraisal Methodology; Analyzing Cost, Comparable Sales and Income Approaches

The subject property of this assessment appeal was a 356-unit, age-restricted (55+) multifamily apartment complex on 20.08 acres, assessed at $40,000,000.

The Taxpayer argued that because the Assessor's appraiser made numerous corrections and amendments to his income approach, this demonstrates a lack of knowledge and experience sufficient to undermine his credibility. Although the Assessor's appraiser initially erred in loading the base capitalization rate and also erred in calculating an effective tax rate, those mistakes ultimately had little to no effect on his value conclusions for the years at issue. The Board found that the willingness of the Assessor's appraiser to try and correct his mistakes did more to bolster his credibility than to undermine it.

The Taxpayer asserted that CoStar's square footage measurements were not accurate and took issue with the Assessor's appraiser's reliance on CoStar as the source for the subject's square footage, as the appraiser was unaware how CoStar derived that measurement. However, the Board was not concerned by this criticism and found the appraiser's reliance on CoStar to be reasonable.

The Board rejected the comparable sales approach by the Assessor's appraiser due to his failure to meaningfully address differences in the demographic attributes between the comparables—from distant geographic locations—and the subject.

The Taxpayer's appraiser relied exclusively on the subject's actual costs of construction as reported to him by the developer. The Board found this cost approach valuation to be unreliable, noting the lack of market cost data, a lack of congruence with the original construction loan agreement, and resulting valuations that were substantially lower than the other approaches developed by the Taxpayer's appraiser.

The Board rejected the comparable sales approach of the Taxpayer's appraiser, whose net adjustments to the comparables ranged from 25% to 55%, and whose comparables were much different in age than the subject.

The Taxpayer's appraiser elected to use the subject's actual income and expenses to develop his income approach. The Board explained that this methodology simply does not yield a probative value: "[a]lthough examining a property's actual rent is an important step, relying on it exclusively is inappropriate when appraising a property's market value-in-use." (citing *Indiana MHC, LLC v. Scott Cty. Ass 'r*, 987 N.E.2d 1182, 1185-86 (Ind. Tax Ct. 2013)).

After weighing the evidence, the Board determined that the Assessor's appraiser's income approach was well-supported and relevant to an income-producing property. Further, the income approach was the lowest valuation produced by his three approaches to value, and the lowest valuation is required under Indiana Code § 6-1.1-4-39(a) for apartment buildings such as the subject. Thus, the Board changed the value of the subject property to approximately $39,000,000.

Wheels, LT v. Lake County Assessor, Pet. Nos. 45-002-16-1-7-01218-19, et al. (Ind. Bd. Tax Rev. Jun. 18, 2021) – Business Personal Property; Timeliness of Appeal

This assessment appeal stemmed from a business personal property audit conducted by the Assessor that increased the Taxpayer's assessment. The subject property consisted of vehicles the Taxpayer leased to a large industrial concern in Lake County.

The Taxpayer received unsigned notices of assessment changes ("Form 113 notices") via email on November 7, 2018 and filed its appeal several months later, arguing that the Form 113 notices were "issued improperly, fails to apply applicable exemptions, constitutes an error, fails to properly describe the property at issue and is illegal and unconstitutional. The assessment was not properly signed, authorized or approved." The Assessor argued that the Taxpayer's appeal was untimely because the auditor had previously mailed signed Form 113 notices to the Taxpayer on September 6, 2018.

Although the Taxpayer claimed not to have received executed Form 113 notices in the mail, the auditor testified that she sent the forms to the Assessor for signature and mailed the signed forms on the same day she received them back; that she recalled details of surrounding circumstances that jogged her memory; that she contemporaneously noted mailing the documents in a spreadsheet she kept; and that about two weeks later she spoke to an employee of the Taxpayer who acknowledged receipt of the Form 113s. This employee did not testify at the hearing. The Board credited the auditor's testimony and found that valid Form 113 notices were mailed to the Taxpayer on September 6, 2018.

The Taxpayer characterized its appeal as challenging the legality or constitutionality of the assessment. This and certain other challenges are permitted within three years after the resulting taxes were due. IC § 6-1.1-15-1.1(a)(2)-(6), (b) (2018). In contrast, a taxpayer challenging the assessed value of its tangible property had to file notice of its appeal by the earlier of (a) 45 days after the date notice of the assessment was mailed, or (b) 45 days after the date the tax statement was mailed. IC § 6-1.1-15-1.1(a)(1), (b)(1) (2018).

The Board concluded that to the extent the Taxpayer was challenging the assessed value of its property, the Taxpayer failed to timely appeal within the 45-day deadline. As for the Taxpayer's argument that the assessments were illegal, this argument was based on the arbitrariness of the audit. However, the 3-year limitation period does not allow for challenges to the methodology used to determine an assessment. The Board concluded that even though the audit "may well have been founded on improper methodology," the Taxpayer failed to timely appeal the Form 113 notices. Thus, the assessment was sustained.

Mac's Convenience Stores, LLC v. Jefferson County Assessor, Pet. No. 39-007-18-1-4-01056-19. (Ind. Bd. Tax Rev. Jun. 7, 2021) – Appraisal Methodology; Generally Accepted Appraisal Principles

The subject property in this assessment appeal was a 1.68-acre commercial vacant lot. The assessment increased from $47,300 to $118,400 the following year, prompting the Taxpayer's appeal. Because the assessment had increased by more than 5% over the prior year's assessment, the Assessor bore the burden of proving that the assessment was correct. IC § 6-1.1-15-17.2. If the Assessor does not meet the burden of proof, then the assessment would revert to the amount of the prior year's assessment.

The Assessor argued that she followed the Real Property Assessment Guidelines in establishing the land base rate and standard lot frontage for properties in the neighborhood, and that the subject was treated similarly to many other commercial properties in the neighborhood. However, strictly applying assessment regulations does not necessarily make a prima facie case. The Assessor's burden was not merely to explain why the assessment was increased but to offer probative evidence based on information compiled in accordance with generally accepted appraisal principles to prove the subject property's market value-in-use. Because the Assessor failed to do so, the subject property's assessment was reduced from $118,400 back to $47,300.

Lowe's Home Centers, Inc. v. Vanderburgh County Assessor, Pet. Nos. 82-027-14-1-4-10177-15, et al. (Ind. Bd. Tax Rev. Jan. 22, 2021) – Appraisal Methodology; Definition of Fee Simple; Income Approach

The subject property of this assessment appeal was a 135,197 square foot Lowe's retail store located on 19.26 acres, built in 1999, assessed at approximately $8,000,000 for the years at issue. The Assessor argued that Taxpayer's appraiser incorrectly interpreted the definition of fee simple to mean that the subject property should be valued as though it is vacant and available for lease. The Board noted that Indiana Tax Court precedent neither compels nor forbids the consideration of vacant property comparables in the sales comparison approach.

The Board rejected the cost approaches of the Taxpayer's and the Assessor's appraisers, noting deficiencies such as failure to support obsolescence adjustments, using deductions for leasing costs and lost rent, failure to adequately account for the HVAC system, and the use of base cost data derived from time periods and geographic locations that did not match the subject property. The Board rejected the sales comparison approach of the Taxpayer's appraiser due to the failure to support adjustments for items such as deed restrictions, traffic count, and post-purchase expenditures. The Board rejected the sales comparison approach of the Assessor's appraiser because he relied on sales to existing tenants and leased fee sales that required significant adjustments that he either failed to make or for which he offered insufficient support.

The Board noted significant agreement on portions of the income approaches used by both appraisers, including the estimation of market rent and vacancy/collection loss. This level of agreement between the appraisers led the Board to conclude that these elements of the income approach were reasonable and helped both appraisers produce reliable net operating income estimates. The different opinions of value essentially boiled down to the selection of a capitalization rate.

The rate used by the Assessor's appraiser was primarily based on rates he extracted from the leases for the two Ohio Lowe's properties he included as comparable sales. However, the leases involved in those two sales were non-arm's length negotiations between the current tenants and the owners that were not properly exposed to and negotiated on the open market. Further, the Taxpayer persuasively demonstrated that those two properties had far superior demographics, with nearly double the population, households, and median household income in a 5-mile radius around each property than the subject. The Board found in favor of the income approach valuation of the Taxpayer's appraiser, with a resulting value of approximately $4,800,000.

Mac's Convenience Stores, LLC v. Hendricks County Assessor, Pet. Nos. 32-003-18-1-4-00609-19, et al. (Ind. Bd. Tax Rev. Jan. 11, 2021) – Appraisal Methodology; Separating Real and Personal Property

The subject property in this assessment appeal was a 4,476-square-foot convenience store built in 2014 with fuel pumps, canopies, and a freestanding carwash on 3.2 acres, assessed at $1,913,400 for the years at issue. Because the assessment had increased by more than 5% over the prior year's assessment, the Assessor bore the burden of proving that the assessment was correct. IC § 6-1.1-15-17.2. If the Assessor does not meet the burden of proof, then the assessment would revert to the amount of the prior year's assessment. The Assessor offered an appraisal report from a licensed appraiser prepared in compliance with USPAP, estimating the property's market value-in-use at $2.1 million using only the comparable sales approach. However, the Assessor's appraiser was not present at the hearing and did not testify. The Taxpayer did not offer an appraisal report or any other probative evidence of value.

The Taxpayer argued that the appraisal report erroneously included substantial personal property, including fuel pumps, underground storage tanks, prefabricated walk-in cold storage units, and racks and shelving. The Board surmised that underground tanks, fuel pumps, and similar property transferred at the same time as real estate in each of the comparable sales used by the Assessor's appraiser. The Board determined it was likely that the real estate and personal property transferred as part of a single transaction with a single sale price: the same price the Assessor's appraiser used in his analysis. Thus, the Board had "concerns about whether [the Assessor's appraiser] took enough care to exclude personal property from his valuation opinion."

Even though the appraiser's estimate of value may have included some personal property, the Board noted his value conclusion of $2,100,000 was almost $200,000 above the contested assessment. Thus, the Board found that the Assessor's appraisal tended to show that the subject property was worth at least the amount for which it was assessed. The Assessor met the burden of proof, and no change was ordered to the assessment.

Meijer Stores Limited Partnership v. Boone County Assessor, 19T-TA-00030 (Ind. Tax Ct. Dec. 31, 2020) - Comparison of Appraisals

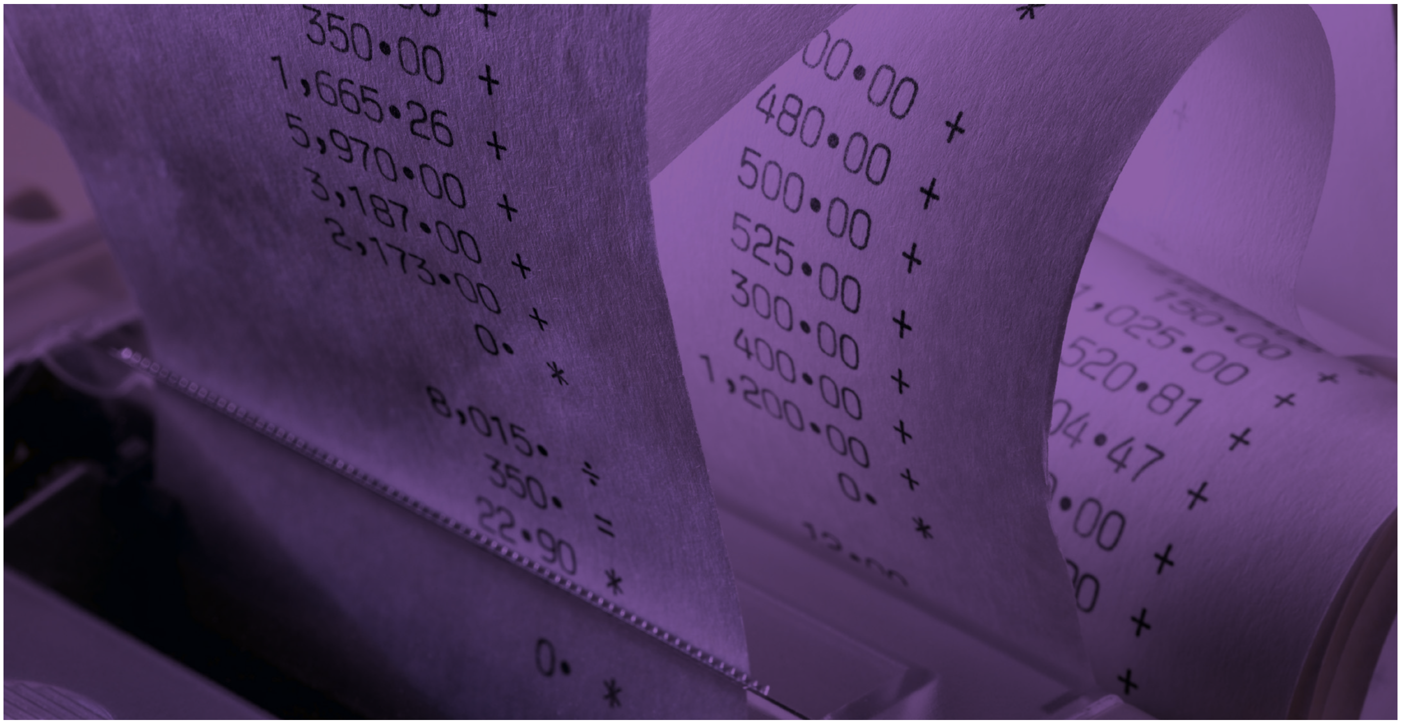
Taxpayer appealed the increase of assessed value on its "big box" store covering assessment years 2014-2017. By prior agreement, the parties provided evidence concerning one year, 2016, and agreed to assess the other years by use of trending applied to the final determination for 2016. Both parties presented appraisals using all 3 approaches to value, namely sales comparison, income approach and cost approach. Among the differences between the appraisers was that the cost approach analysis of the Taxpayer's appraiser included adjustments for external and functional obsolescence, while the cost approach analysis by the Assessor's appraiser found no such obsolescence. Additionally, the Assessor's appraiser presented two appraisals, one with the cost approach using Marshall Valuation Service data, and the other with the cost approach using the property's actual construction cost data. In its final determination, the Indiana Board noted the Taxpayer's appraiser's belief that a fee simple valuation requires that all comparable properties must be unencumbered by a lease, while the Assessor's appraiser believed that the use of vacant "dark stores" as comparable properties was improper because it would not reflect a property's highest and best use. The Indiana Board found that neither side presented reliable sales comparison analyses, and the Board determined that the cost approach was the most reliable methodology for valuing the Meijer store because it "avoids the controversies over the definition of fee simple ownership" and is useful for valuing new or nearly new improvements and properties not frequently exchanged on the market. The Indiana Board found that the Taxpayer's obsolescence calculation was unreliable because it did not identify specific inadequacy, and was derived from his income approach which the Board had determined to be unreliable. The Board further determined the Assessor's cost approach using Marshall Valuation Service was more reliable because the other cost approach had utilized actual cost data which did not incorporate market data. The Indiana Board excluded an adjustment for entrepreneurial profit but otherwise accepted the Assessor's appraiser's cost approach.

On appeal, the Tax Court affirmed the Indiana Board, finding its reliance upon the cost approach to be reasonable and supported by substantial evidence. The Court further found that it was reasonable for the Indiana Board to conclude that obsolescence was inherently accounted for in the Assessor's cost approach analysis. Regarding comparable properties, the Court referred the parties back to prior decisions: "The Court has put to rest any purported [dark store] controversy about fee simple valuation by holding that because property taxes apply exclusively to real property (i.e., the land and improvements to the land) and not to intangible business value, investment value, or the value of contractual rights, the use of vacant property comparables can be appropriate."

D. Administrative/Procedural

Muir Woods Section One Association, Inc., et al. v. Marion County Assessor, Joseph P. O'Connor, 21S-TA-158 (Ind. Aug. 26, 2021) – Correction of Illegal Taxes; Form of Appeal Petition

The Taxpayers were homeowners' associations (HOAs) which had used "Form 133 Petitions" to challenge the property tax assessments on their common area parcels as "illegal as a matter of law" because (among other reasons) they were so encumbered by restrictions that the land had zero value. The Assessor moved to dismiss, arguing that resolution of these issues was an inherently subjective issue, and thus a Form 133 was an inappropriate vehicle for such an appeal. The Indiana Board of Tax Review granted the motion to dismiss. On appeal, the Tax Court affirmed in part and reversed in part, remanding the matter for further proceedings on the issue of whether property taxes had been imposed more than once for the same year. The Indiana Supreme Court granted review, focusing on whether the Assessor's land value determinations were objectively erroneous in violation of the 1995 Marion County Land Order and the Residential Neighborhood Valuation Forms used by the Assessor. The HOAs contended that the Assessor's failure to apply these provisions was an inherently objective error, such that it could be challenged using a Form 133 Petition. The Supreme Court agreed. The Court noted that while determination of an initial assessment base rate may



have been inherently subjective in nature, subsequent application of that codified base rate (or failure to apply it) was inherently objective in nature. Accordingly, the Court found that dismissal of the HOA's petitions on this basis was improper, and thus partially reversed the Tax Court, summarily affirmed it with respect to the remainder of its opinion, and remanded the matter to the Indiana Board of Tax Review for further proceedings consistent with the Supreme Court's and the Tax Court's opinions.

Express Scripts Inc. vs. Indiana Dep't. of State Revenue, 19T-TA-00018 (Ind. Tax Ct. May 14, 2021) - Summary Judgment

Taxpayer managed prescription drug benefits for its health insurer clients. It filed Indiana adjusted gross income tax returns for 2011 through 2013, apportioning its income using provisions applicable to service providers and concluding that none of its revenue should be sourced to the state. The Indiana Department of Revenue concluded that rather than providing a service, the company's income should have been sourced using provisions applicable to sales of tangible personal property - buying, selling and delivering prescription drugs. On appeal, the Department moved for summary judgment, and the Tax Court found that the designated evidence did not show that Taxpayer's revenue was from the "sale" of prescription drugs. Though the Court acknowledged that Taxpayer had not moved for summary judgment, the Court noted that the Indiana Trial Rules allowed it nevertheless to grant summary judgment in Taxpayer's favor on issues raised in the Department's motion. The Court held that there was no genuine issue of material fact that the Taxpayer's income was derived from the provision of services, and not from the sale of prescription drugs. Thus, the Court found that Taxpayer was entitled to judgment as a matter of law.

Memorandum of Decision: 03-20200385 (Mar. 30, 2021) (Withholding Tax) – Collection Fees

Taxpayer is an out-of-state S-corporation with no Indiana employees during the tax periods at issue. Previously, Taxpayer had Indiana employees and correctly remitted withholding tax, but it had failed to properly close the withholding tax account. The Department issued proposed assessments for tax, penalties, and interest after it received no withholding tax returns or remittance from Taxpayer during the taxable periods. Taxpayer did not respond to these assessments and the Department issued Demand Notices for payment. Again, Taxpayer did not respond. The tax liabilities eventually advanced to the warrant stage and the Department contacted a third-party collection agency to levy Taxpayer's accounts.

On December 30, 2019, Taxpayer contacted the collection agency and the Department. It was informed that it had not correctly closed its withholding account and that it needed to file a backdated BC-100 form indicating when it stopped collecting withholding tax. That same day, Taxpayer filed a BC-100 form with the Department. The Department acknowledged receipt of the BC-100 in a letter dated January 31, 2020, informing the Taxpayer that its registration for withholding tax was closed on December 31, 2019. However, the collection agency proceeded to levy Taxpayer's accounts to satisfy the liability.

Taxpayer filed a Claim for Refund (Form GA-110L) requesting refund of the entire amount (which consisted of tax, penalty, interest, and collection fees) that was levied. The Department granted refund of the base tax, penalty, and interest but denied refund of the collection fees. Taxpayer filed a timely protest requesting refund of the collection fees. Taxpayer asserted that it is entitled to a full refund because the Department, not the Taxpayer, should bear the costs of a levy occurring after the withholding tax account was properly closed.

Because Taxpayer contacted the Department prior to the levying of its bank account and because the withholding account was closed and its liabilities were cancelled prior to the levy by the collection agency, the Department determined that Taxpayer should not be held liable for the collection fees, and that the outstanding collection fees should be refunded.

B.L. Reever Transport, Inc., et al. v. Indiana Dept. of State Revenue, 20T-TA-00009 (Ind. Tax Ct. Jan. 27, 2021) - Motion to Dismiss; Subject Matter Jurisdiction

Taxpayers were trucking companies which had claimed a refund of motor carrier fuel tax (MCFT), arguing that the Indiana Toll Road was not a "highway" for purposes of the MCFT. The Department moved to dismiss the appeals for two reasons: (1) lack of subject matter jurisdiction by the Tax Court, and (2) failure to state a claim upon which relief could be granted. On the first issue, the Court noted that it has exclusive jurisdiction over cases arising under the tax laws of Indiana and which are initial appeals of final determinations made by the Department. In this case, the Department argued that there had been no final determination because the Taxpayers had done a "bait and switch" by raising different issues on appeal. Noting that it hears such matters de novo, and as such is not bound by the record below, the Court found no defect in its subject matter jurisdiction. As to the alleged failure to state a claim, the Department's argument hinged upon purported similarity with issues in a prior case. However, the Tax Court found that the Taxpayer's case had different issues than the prior case, and its claim presented a matter of first impression in Indiana. The Department also made a legislative acquiescence argument since its administrative interpretations were long-standing and had not been corrected by the legislature. But the Court found that silence by the legislature could just as easily be seen as a failure to express any opinion at all. The Court thus denied the Department's motion to dismiss.

Letter of Findings Number: 03-20200283 (Dec. 8, 2020) (Withholding Tax) – Abatement of Penalty

Taxpayer is a company operating in Indiana. Taxpayer was late in remitting its withholding for certain tax periods. The Department assessed Taxpayer a ten percent penalty for late filing. Taxpayer protested the imposition of penalty.

Taxpayer claimed that its previous payroll provider filed for bankruptcy and so Taxpayer had to move its payroll to a different company. Taxpayer subsequently remitted its withholding ten days late. It was not until Taxpayer received the notices from the Department that it was notified of the late remittance. Taxpayer provided sufficient evidence and reasoning to show reasonable cause for the late filing, as required under IC § 6-8.1-10-2.1 and guided by 45 IAC 15-11-2(c). Thus, Taxpayer's protest was sustained and the penalty was abated.

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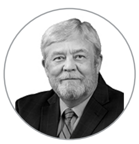

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