Indiana Tax Developments: Spring 2022

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I. SELECTED NEW LEGISLATION

STEEL MANUFACTURING: P.L. 138 (MARCH 15, 2022)

Expands applicability of "Pool 5" depreciation to include certain "mini-mill" steel production facilities which use electric arc furnaces to produce steel.

PROPERTY TAX: P.L. 174 (MARCH 21, 2022)

Amends the "burden shift rule" in property tax appeals where assessments have increased by more than 5% (See discussion of Supreme Court decision in Southlake, infra.) with the addition of new IC 6-1.1-15-20, which provides that if an increase of more than 5% has occurred, that assessment is no longer presumed to be equal to true tax value, and the Board can decide the appeal based upon the totality of the evidence. If the totality of the evidence is insufficient for such a determination, the assessment reverts to the prior assessed value. These amendments apply to assessment appeals filed after the effective date of this public law, which was March 21, 2022.

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.

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: 18-20210085 (Nov. 18, 2021) (Income Tax) – Financial Institutions Tax; Combined Reporting - Nexus

Taxpayer filed combined Indiana Financial Institution Tax returns which included Taxpayer along with a number of Taxpayers subsidiaries performing banking services, including an Indiana single member LLC treated as a disregarded entity for tax purposes. Taxpayer's position is that Taxpayer should be included in the combined return because Taxpayer has Indiana nexus by virtue of the disregarded Indiana LLC's employee in Indiana conducting the business of a financial institution in Indiana.

The Department disagreed with the Taxpayer's position in audit, on the basis that the disregarded Indiana LLC was not registered with the Indiana Secretary of State, did not maintain an office in Indiana, Indiana activities were *de minimis*; and, including Taxpayer in the Indiana returns has the result of distorting Indiana adjusted gross income. The Department concluded that Taxpayer is a holding company and is not conducting the business of a financial institution, as required by statute.

The Department upheld its own position, finding that Taxpayer "bootstraps" its way into the combined returns based on a single employee. The Department determined that the facts showed a lack of registration of the disregarded Indiana LLC subsidiary, and receipts of only $20,000, with Taxpayer reporting over $850 million in combined losses, which the Department determined did not fairly represent the combined group's income attributable to Indiana.

Taxpayer also protested the Department's adding back of $800 million of income from the sale of stock of a credit card company by an out of state subsidiary. Taxpayer reported the proceeds as non-business income since neither Taxpayer nor its subsidiary were involved in the operation of the credit card company and the proceeds from the stock sale were not related to the subsidiary's regular trade or business. The Department, however, found that the business/nonbusiness provisions cannot be transplanted into the provisions to determine income subject to Indiana's FIT and stated that FIT statutes have no provision allowing the business/nonbusiness distinction.

B. SALES AND USE

Revenue Ruling #2022-01ST (Feb. 25, 2022) (Sales and Use Tax) – Applicability of Medical Exemptions to Certain Devices

Taxpayer, a national pharmacy with locations in Indiana, sought a determination regarding the application of sales tax to sales of certain medical devices including: glucose test strips and lancets, at-home COVID test kits, and other at-home test kits (e.g., pregnancy test kits, cholesterol kits, etc.). As a general matter, all purchases of tangible personal property are subject to sales and/or use tax unless specifically excepted. Indiana provides exemptions both for "blood glucose monitoring supplies" and certain medical devices and equipment.

Here, the Department determined that while glucose test strips would fall within the definition of exempt "blood glucose monitoring supplies", the exemption statute specifically states that such supplies must be furnished without charge. Thus, if the supplies are sold, either with or without a prescription, they would not meet the requirements of the statute and would thus not be exempt. The glucose test strips and lancing devices would also not be exempt as medical devices and equipment since the statute requires that the items be "used exclusively for medical treatment" and the subject items are diagnostic devices. Accordingly, the sale of glucose test strips and assorted paraphernalia was determined to be subject to Indiana sales tax.

Similarly, at-home tests, whether COVID or otherwise, would not be exempt since the exemption statute does not include any items that are used for diagnostic purposes. Thus, the sale of at home tests are subject to Indiana sales tax, regardless of whether they are subject to a prescription.

Revenue Ruling #2022-01ST (Feb. 18, 2022) (Sales and Use Tax) – Nonprofit Status

Taxpayer, a voluntary employees' benefit association organized as a trust under Section 501(c)(9) of the Internal Revenue Code, sought a determination regarding its status as a nonprofit for Indiana sales tax purposes. Taxpayers members are several private universities in Indiana, each with a non-profit status.

Indiana provides for an exemption of sales tax for certain organizations. Absent from this list is voluntary employees' benefit association. Thus, since Taxpayer's organization is not listed, Taxpayer does not qualify as an entity exempt from sales tax for purchases, even though its member universities are exempt.

Letter of Findings: 04-20210060 (Dec. 20, 2021) (Sales and Use Tax) – Consumer Use Tax – Manufacturing Exemption

The taxpayer is an out of state company with a location in Indiana, manufacturing pavement preservation products for asphalt and concrete. Taxpayer protests the imposition of use tax on materials used around a walkway/catwalk structure and structural supports, believing that the structure is exempt since it is used to access an item used for routine maintenance and is a requirement for worker safety by OSHA. Thus, the structural supports are integral parts of the system.

Indiana requires items meet a "double direct" test to qualify for the manufacturing exemption, which focuses on the manufacturing process itself and encompasses all the production steps involved in transforming a work in progress into a finished marketable product. In reviewing Taxpayer's process, it was determined that the structure was used for maintenance, and was not part of the direct manufacturing process since no one is required to be on the structure to participate in the manufacturing process. Thus, the structure does not have an "immediate link" in the manufacture of Taxpayer's products.

Taxpayer also suggests that the structure is exempt as worker safety equipment since the structure is mandated by OSHA and required under federal safety guidelines. However, since Taxpayer cannot establish that anyone is required to be present on the structure while the product is manufactured, it does not come within the definition of exempt "safety equipment" which "allow[s] a worker to participate in the production process without injury" under 45 IAC 2.2-5-8.

Thus, neither the structure nor the structural supports are exempt from Indiana sales tax; "that a particular property may be considered essential to the conduct of the business of manufacturing because its use is required…by practical necessity does not itself mean that the property 'has an immediate effect upon the article being produced.'" 45 IAC 2.2-5-8(g).

Memorandum of Decision: 04-20200386 (Dec. 16, 2021) (Sales and Use Tax) – Sales-Tax Refund – Utility Used in Manufacturing Process; Documentation

The Taxpayer is an Indiana corporation which offers electronic assembly, engineering, and design services. Taxpayer appealed a denial for a request for refund for sales tax paid on water used in Taxpayer's manufacture of circuit boards and other electronic components.

Although, in general, the furnishing of water to consumers is subject to sales tax, Indiana provides an exemption from such sales tax if the water is used predominately (i.e., more than 50%) for excepted uses. Taxpayer argued that it was entitled to a refund since the purchased water is used to chill a piece of equipment during the production process and to clean items produced prior to final inspection and packaging. Taxpayer explained that in order for the manufactured items to properly cure, the temperature in various zones is lower through the circulation of water. Taxpayer also provided a utility study showing that 74% of the water is used in the manufacturing process.

In considering the documentation provided, Taxpayer's water purchase was found to be wholly exempt under the statutory requirements. Though, it was noted that such documentation should have been included with the Sales Tax Exemption Form in order to avoid the need for a protest.

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.

C. PROPERTY TAX CASES

Hall of Heroes Super Hero Museum, Inc. v. Elkhart County Assessor (Ind. Bd. of Tax Rev. January 7, 2022) – Property Tax Exemptions

In a recent decision, Hall of Heroes Super Hero Museum, Inc. v. Elkhart County Assessor (Ind. Bd. of Tax Rev. January 7, 2022), the Indiana Board of Tax Review ("Indiana Board") denied a museum's 2020 claim for property tax exemption for education and/

or charitable purposes. The Hall of Heroes Super Hero Museum, Inc. (the "Museum") is dedicated to preserving the 80-year history of superheroes in comics, toys, art, film and animation. The Museum is a not-for-profit corporation, and although it did charge admission fees, it also provided free passes to libraries, schools and local charities. It also conducted educational programs and promoted literacy by supporting a summer reading program, and many of such programs were either free or offered at reduced fees.

The evidence indicated that the Museum did not provide classes on a weekly basis, and it was estimated that classes were only taught during approximately 25% of the time that the museum was open during 2019 and 2020.

All or part of a building is exempt if it is owned, and exclusively or predominantly used or occupied for educational, literacy, scientific, religious or charitable purposes. IC 6-1.1-10-16(a) and IC 6-1.1-10-36.3(c). Property is predominantly used for a stated purpose if it is used for such purpose more than 50% of the time that it is used in the year that ends on the assessment date. IC 6-1.1-10-36.3. Where a property is not exclusively used for an exempt purpose, the taxpayer must offer evidence comparing the relative distribution of time between the exempt and non-exempt purposes. (Citation omitted).

The evidence showed that the Museum did not hold any classes during 2019, and held classes only approximately 25% of the time through 2020. The Indiana Board therefore concluded that the Museum did not predominantly use the museum for educational purposes during the time in question. Thus, it did not qualify for the educational exemption.

The Museum also claimed an exemption for charitable purposes, which requires evidence of relief of human want, manifested by obvious charitable acts, as well as an expectation that sufficient benefit will inure to the public from such use as to justify the loss of tax revenue. (Citation omitted). In support of its claim, the Museum pointed to *McClain Museum, Inc., vs. Madison County Ass'r.*, 134 N.E.3rd 1096 (Ind. Tax Ct. 2019) in which a museum devoted to honoring America's military history was found to justify such an exemption.

However, the Indiana Board found that the Museum's case was more akin to recreational and hobby activities, and as such was not shown to qualify for a charitable use exemption.

The Indiana Board thus found the Museum's property to be 100% taxable for property tax purposes.

This case shows that nonprofit status alone may not be enough to qualify for a property tax exemption; in many states, including Indiana, not-for-profit organizations are not guaranteed an exemption from property tax. Consider getting assistance in analyzing the relevant facts and circumstances that may be necessary to secure an exemption in Indiana.

GIV Green Tree Mall Investors, LLC v. Clark County Assessor, Pet. Nos. 10-011-17-1-4-02089-17, et al. (Ind. Bd. Tax Rev. Oct. 15, 2021) – Appraisal Methodology; Regional Shopping Mall

The subject property of this assessment appeal is an enclosed regional shopping mall with three large department store anchors. The portion of the mall on appeal consisted of roughly 290,000 leasable sq. ft. located on 18 acres, assessed at approximately $35,000,000 during the years at issue.

The Taxpayer's appraiser relied on an occupancy cost ratio (OCR) in estimating market rent. An OCR is derived by the total rent (including rent, percentage rent, and expense reimbursements) paid to the landlord divided by the tenant's gross sales, on a square footage basis. Out of the four expert witnesses who testified, the Taxpayer's appraiser was the only one who maintained that the use of OCR in estimating market rent is a generally accepted appraisal practice. The Board was persuaded that the use of OCR to estimate market rent was not a generally accepted appraisal practice. The Board thus rejected the income approach valuation of the Taxpayer's appraiser based on a failure to credibly estimate market rents. Because the sales comparison approach by the

Taxpayer's appraiser was offered only as a "measure of the reasonableness" of his income approach, the Board also rejected the sales comparison approach as not probative.

The Board criticized the Assessor's appraiser for using only one year of data to support his rating of the mall as Class B+. Because the choices of the Assessor's appraiser in regard to market rents and capitalization rates were influenced by his Class B+ rating, which was not supported by the evidence, the Board found that the appraiser's most important conclusions were unfounded. In addition, the Board determined that the Assessor's appraiser failed to explain how he arrived at the market rent establishing potential gross income for the vacant space, and also failed to explain how he accounted for tenant improvements, if at all. As a result, the Board ruled that the opinion of the Assessor's appraiser was incomplete and therefore conclusory.

As neither party presented a probative case for increasing or decreasing the assessment in any year on appeal, the Board affirmed the original assessments.

Target Corporation v. Lake County Assessor, Pet. Nos. 45-035-07-1-4-00836-19, et al. (Ind. Bd. Tax Rev. Nov. 8, 2021) – Appraisal Methodology; Big Box Store

The subject property of this assessment appeal is a 124,474-square-foot big-box discount store on approximately 13 acres, built in 2006 and assessed between $9,500,000 and $10,500,000 during the 11 years at issue, dating back to 2007. The subject property is connected to a grocery store and surrounded by other commercial properties as part of a larger shopping center.

The parties presented valuations for the 2007 and 2018 assessment dates. The parties agreed to a formula for valuing the intervening assessment dates, based on the Board's ruling on the 2007 and 2018 assessment dates.

The Board determined that the Assessor's appraiser relied on incomparable or faulty data in some instances, and he made key judgments that were largely unsupported. The Board noted that many of his land sales could not support a big-box store like the subject property and would not compete for the same types of buyers. The Assessor's appraiser also ignored the recent sale of the subject site. In determining an overall capitalization rate, the Assessor's appraiser considered the interest rate on 10-year treasury notes, even while acknowledging that such data does not relate to property investment. Although his sales and rental data required substantial adjustment, the Assessor's appraiser repeatedly acknowledged that he did not have any market support for many of his judgments. For his rent comparables, he did not attempt to determine whether the leases were financing transactions or instead reflected market rent. On the whole, the Board found the valuation opinions of the Assessor's appraiser too unreliable to carry probative weight.

The Board found fault with the Taxpayer's appraiser for using comparison data in his 2007 valuation from properties that were much older, even though the subject property was essentially new in 2007. Although the Board was convinced that the subject property suffered from obsolescence, the Board determined that the Assessor's appraiser did not reliably support his quantification of obsolescence, which was the most significant feature of his analysis under the cost approach. These shortcomings made the opinions of the Assessor's appraiser too unreliable to be probative for the 2007 valuation.

For 2018, the subject property was no longer new, and the comparison data used by the Taxpayer's appraiser was more appropriate. The Board found the value conclusions of the Taxpayer's appraiser under the sales-comparison approach sufficiently reliable to establish the property's market value-in-use for 2018, and because the Taxpayer's appraiser placed lesser weight on his income and cost approaches, any shortcomings in those approaches did not undermine his sales-comparison valuation.

The Board changed the assessment in 2018 to approximately $5 million, leaving the 2007 assessment unchanged at approximately $10 million. The intervening years were assigned a range of values using a formula agreed by the parties prior to the presentation of evidence.

The Board decided a companion case the same day involving another big-box store in the same county, involving the same appraiser witnesses and the same 11 assessment years under appeal, with assessments ranging from approximately $7 million to $7.5 million: *Dayton Hudson Corp. d/b/a Target Corp. v. Lake County Assessor, Pet. Nos. 45-046-07-1-4-00831-19, et al. (Ind. Bd. Tax Rev. Nov. 8, 2021*). The subject property in Dayton Hudson Corp. was built in 1993, and the Taxpayer's appraiser did not suffer the same criticism in the Target Corporation decision concerning a failure to use data reflecting the newness of the property in 2007. As a result, the Taxpayer's appraiser stated a prima facie case to change both the 2007 and 2018 assessments for the subject property. The Assessor's appraiser failed to present a credible opinion of value for either assessment year, due to largely similar criticisms found in the Target Corporation decision. The Board in Dayton Hudson Corp. changed the 2007 assessment to approximately $5.2 million and the 2018 assessment to approximately $3.7 million.

Marion County Assessor v. Kohl's Indiana LP, 179 N.E. 3d 1, (Ind. Tax Ct. Oct. 26, 2021) – Standing to Appeal Assessments; Reweighing of Evidence

The taxpayer had appealed the assessment of a department store leased by it with respect to assessment years 2011 through 2014. The Board had reduced the assessment and in this decision the Indiana Tax Court affirmed the Board. The assessor had claimed that Kohls lacked standing to appeal the assessment because it was not the owner of the property. The Court found that this was not a standing issue, but rather was controlled by IC 6-1.1-15-1 and-3, which provide that a "taxpayer" may seek review of an assessment, and the Court found that the ordinary meaning of "taxpayer" would include Kohls, as it is "subject to, or liable to pay, the real property tax under IC 6-1.1-2-4."

This case also involved certain discovery disputes, which, inter alia, generally involved "the Assessor's lack of diligence in conducting discovery" as he had issued subpoenas so late as to make it practically impossible to comply with them prior to the scheduled hearing, effectively negating portions of the agreed appeal management plan. The Court saw no reason to overturn the Board's determinations on these issues. Finally, there were several instances in which the Board had ruled against motions made by the assessor, and the assessor simply restated the same motions to the Court without dealing with the Board's reasoning for its decisions. The Court found these to be tantamount to inviting the court to improperly reweigh the evidence, which the Court did not do. The Court affirmed the Board decision below.

Southlake Indiana, LLC v. Lake County Assessor, 181 N.E.3d 484 (Ind. Tax Ct. Dec. 13, 2021) - Assessor Burden of Proof

This case involved the same parties and property as the Indiana Supreme Court decision below. However, while that case concerned Assessment Years 2011 through 2014, this case involved Assessment Years 2015 and 2016. As with the prior Southlake decision, the Tax Court found that neither part had met its requisite burden of proof under IC 6-1.1-15-17.2, and the Court followed the earlier Supreme Court decision in finding that the 2015 and 2016 assessments must revert to the assessed value that was in place as of assessment year 2010.

In reaching its decision, the Tax Court found that in order to meet its burden under the statute, the assessor must present as evidence "an appraised value that is exactly the same as the original assessment". While the Court acknowledged that this might seem infeasible, it is possible (e.g. preparing appraisals before increasing assessments). The Court held that this was based on the legislature's wording of the statute. The Court also found that the taxpayer also had failed to meet its burden due primarily to flaws in its appraiser's capitalization rate under the income approach. Accordingly, the Court found that the reversionary clause applied, and ordered that the assessments for 2015 and 2016 be set at the 2010 assessed value under the statute.

Mathew A. Schiffler v. Marion County Assessor, Cause No. 21T-TA-00014 (Ind. Tax Ct. Feb. 23, 2022) - Property Tax Caps; Classification of Property

Taxpayer owns a residential property consisting of a house with an attached garage, a detached carriage house, a detached 2-car garage, and 2.56 acres of land. As of assessment year 2019, Indiana's 1% property tax cap had been applied to the assessed value of the house; the 2% cap (generally applicable to multifamily and agricultural properties) had been applied to the assessed value of the detached carriage house, and the 3% cap (applicable to other classifications such as commercial property) had been applied to the taxpayer's detached garage. The taxpayer appealed, arguing that the carriage house and detached garage should also have received the benefit of the 1% cap because they constituted "curtilage" and were part of the taxpayer's homestead. The Tax Court agreed, finding that the word "dwelling" under the statute was not defined as "just one house and garage as had been determined by the Board. The Court based its ruling in part upon the fact that the Board had made the factual finding that the taxpayer used the carriage house and garage as extensions of his home. The Court reversed and remanded the case for further proceedings consistent with its opinion.

Ingredion, Incorporated v. Marion County Assessor, Cause No. 20T-TA-00006 (Ind. Tax Ct., Feb. 25, 2022) - Business Personal Property Substantial Compliance; Limitations on Assessment Changes

The taxpayer's 2012 and 2013 business personal property tax assessments were audited by the assessor, who increased the assessments as a result, finding significant inaccuracy in calculating the values on the returns. Under IC 6-1.1-16-1, a county assessor has 5 months in which to review and change a business personal property tax assessment if the taxpayer has "substantially complied" with applicable reporting requirements. If the returns do not substantially comply, such changes in assessment must be made within 3 years after the date the return is filed. Thus, whether the assessor's changes of assessed value in this case were timely depended upon whether the taxpayer had substantially complied. The Court noted that the Indiana Legislature had prescribed that a taxpayer "make a complete disclosure of all information required by the [Department of Local Government Finance] that is related to the value, nature or location of [their] personal property (emphasis original to the Court's opinion). As the word "or" was used, a taxpayer only need to satisfy one of these requirements, not all three of them, in order for substantial compliance to occur. Because Ingredion disclosed the location of its personal property, the Court found its returns to be substantially compliant. Accordingly, the 5 month statute of limitation applied, and the Court reversed the Board and ordered the taxpayer's original values reported on its 2012 and 2013 returns to be reinstated.

Ingredion, Incorporated v. Marion County Assessor, Cause No. 20T-TA-00007 (Ind. Tax Ct., Feb. 25, 2022) – Business Personal property Refund Claim Procedure and Limitation

This was a companion case to the previous case discussed above, which involved the taxpayer's 2012 and 2013 business personal property tax assessments. As part of the audit discussed above, the taxpayer discovered that it had overpaid its taxes for the 2011 tax year. In 2015, during the course of the audit, the taxpayer filed a refund claim accordingly, which was ultimately denied. The taxpayer appealed the denial to the Board and filed for summary judgment, claiming that the assessor was obligated under IC 6-1.1-9-10 to correct the overpayment of tax. The assessor argued that any such refund for business personal property tax must occur as a result of the filing of an amended return, which had to happen within one year of the date the return in question was filed, which the taxpayer had failed to do. The Court noted that there was one other avenue for such a refund, which only exists if the assessor has initiated a review of the assessment in question. However, the Court found that the 2011 assessment could only have been changed within 5 months of the filing of that return, because it was substantially compliant (see analysis in the preceding case summary). Accordingly, the Court found that the value reported by the taxpayer on its 2011 return was final, and Ingredion was not entitled to a refund, having failed to amend that return.

Riley-Roberts Park, LP v. Joseph O'Connor in His Official Capacity as Marion County Assessor, Cause No. 21T-TA-00024 (Ind. Tax Ct., Mar. 18, 2022) – Real Property Tax Exemption for Charitable Purposes

The IBTR found that the taxpayer's property was not owned, occupied and predominantly used for charitable purposes during the 2010 through 2016 tax years, and revoked the exemption therefor. The dispositive issue before the Court was whether the Marion County Property Tax Assessment Board of Appeals (PTABOA) had the statutory authority to reach the same decision below. The Court found that it did not. One statute on which the PTABOA had relied, IC 6-1.1-11-3.5, applied solely to not-for-profit corporations, and the taxpayer in this case is a for-profit limited partnership. IC 6-1.1-11-3(a), a counterpart to Section 3.5, contains procedures for for-profit entities, but does not convey any authority upon a PTABOA to review or revoke exemption applications. Finally, while IC 6-1.1-11-7 does give a PTABOA the power to approve or disapprove an exemption application, the taxpayer had not filed any application upon which to act for the 2010 assessment year, nor was it required to do so since its use of the property had not changed since it received the exemption. Finally, the court examined the PTABOA's powers to change "assessments" under IC 6-1.1-13-1 et seq., but found that an exemption is not the same as an assessment. The Court reversed the Board's decision below and remanded for further proceedings consistent with its opinion.

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.

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.

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