

***The Art of the (Tax) Matter:
The 2011 IndyBar State & Local Tax Update***

July 27, 2011

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INDIANA COURT DECISIONS RELATING TO TAXES

Adjusted Gross Income Tax

1. *Lyle Lacey v. Indiana Department of State Revenue*, 948 N.E.2d 878 (Ind. Tax Ct., May 16, 2011). Lacey appealed the Department of Revenue's final determination in which it determined Lacey owed Indiana adjusted gross income tax for the 2007 tax year. Lacey, an Indiana resident, was employed as an engineer. He received a 2007 W-2 form from his employer that showed a substantial amount in wages. When Lacey filed his 2007 federal and state income tax returns, he did not attach his W-2 form. Instead, he attached a federal form which indicated his W-2 was incorrect and which indicated his wages were zero. He argued that under sections 3121 and 3401 of the Internal Revenue Code, "wages" could only be earned by workers who received a "privilege" and, thus, his employer mischaracterized what it paid him. As a result of his "correction," Lacey's federal return reported his adjusted gross income as zero, and because taxable income in Indiana piggybacks on federal adjusted gross income, his Indiana return showed zero income. His state return also claimed a refund for state and county income taxes withheld by his employer.

The Department determined that Lacey was not entitled to a refund and that he owed additional state income tax. The Internal Revenue Service also rejected Lacey's federal return and charged him a penalty for filing a frivolous tax return. Lacey protested the Department's assessment, and, after an administrative hearing, the Department denied Lacey's protest.

¹ I extend special thanks to my colleagues and co-authors Benjamin Blair, Andrea Kochert, and Christopher W. Kimbrough for their contributions to this update. I would also like to thank my talented wife Natalie Auberry and Indy Reads Executive Director Travis DiNicola for their contributions to this program.

On appeal to the Tax Court, Lacey argued that the compensation he received in 2007 was not income within the meaning of the Sixteenth Amendment to the United States Constitution or the Internal Revenue Code. In support of this claim, Lacey cited the U.S. Supreme Court decision in *Eisner v. Macomber*, 252 U.S. 189 (1919), which stated that only gain or profit can be income. Because the compensation he received from his employer was in equal exchange for the services he rendered, he argued that there was no gain or profit, and thus no income.

The Tax Court affirmed the Department's final determination. 948 N.E.2d at 882. In a previous ruling, the Tax Court had explained that *Eisner* merely concluded that stock dividends were not income, but that the Court did not discuss what constituted gain derived from labor. *Id.* at 880 (citing *Snyder v. Indiana Dept. of Revenue*, 723 N.E.2d 487, 489-90 (Ind. Tax Ct. 2000)). Further, the U.S. Supreme Court had, since its decision in *Eisner*, "repeatedly rejected the argument that income is limited to gain or profit." *Id.* at 881. Therefore, the Court held, whether Lacey's compensation was gain or profit was irrelevant. *Id.*

Lacey also argued that the federal income tax was an "un-apportioned direct tax," and that it therefore runs counter to another Supreme Court decision that held that the Sixteenth Amendment's provision exempting a tax from apportionment is in irreconcilable conflict with the general constitutional requirement that all direct taxes be apportioned. *Id.* (citing *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1 (1916)). The Tax Court rejected this claim, stating that Congressional power to tax "embraces every conceivable power of taxation." *Id.* Thus, Lacey had federal taxable income and, consequently, had Indiana taxable income. *Id.* at 882.

The Tax Court also offered a warning to future litigants. Because the Court had ruled three times that wages were income, in the future, when a taxpayer advances the same or substantially similar argument, the Court "will not hesitate to consider whether an award of attorney fees is appropriate." *Id.* This argument "has been identified as frivolous and deemed sanctionable by both the Internal Revenue Service and the federal courts." *Id.* at n. 9.

2. *Rent-A-Center East, Inc. v. Indiana Department of State Revenue*, Cause No. 49T10-0612-TA-106 (Ind. Tax Ct., May 27, 2011). Rent-A-Center East (RAC East) appealed the Department's final determination in which it determined that RAC East owed additional adjusted gross income tax for the 2003 tax year following a forced combination with two of RAC East's affiliates. Slip. op. at 1. In 1998, RAC East acquired its largest rent-to-own competitor and transferred various trademarks to a new affiliate, Advantage Companies, Inc. Slip. op. at 2. The corporate structure changed again in 2003, when Advantage became Rent-A-Center West, and two new entities were formed, Rent-A-Center Holdings and Rent-A-Center Texas. As part of the reorganization, RAC East engaged an independent accounting firm to determine arm's-length pricing for royalties it would pay RAC West and management fees it would pay RAC Texas.

Each affiliate operated stores in different areas of the country, and RAC Texas employed the executive management for the group. Slip. op. at 2-3. On its 2003 Indiana corporate tax return, RAC East filed on a separate company basis and reported that it owed no tax. Slip. op. at 3. A Department audit, however, proposed an additional tax liability and determined that RAC East should have filed a combined return with RAC West and RAC Texas. After a hearing, the Department issued a final determination upholding the audit results, and RAC East appealed to the Tax Court. *Id.*

When the Department moved for summary judgment, the Tax Court denied the Department's motion and reversed the assessment. Slip op. at 9-10. First the Court discussed the burden of proof. Slip. op. at 5. In Indiana, each corporation with Indiana income must report on a separate company basis according to the generally applicable allocation and apportionment rules on sourcing. Slip op. at 3 (citing *Kohl's Dept. Stores, Inc. v. Indiana Dept. of State Revenue*, 822 N.E.2d 297, 301 (Ind. Tax Ct. 2005)). However, if the sourcing rules "do not fairly represent the taxpayer's income derived from sources within the state of Indiana," the Department may require, if reasonable, another equitable method. Slip op. at 4 (citing Ind. Code § 6-3-2-2(1)). Further, the Department cannot require a combined return unless it cannot fairly reflect the taxpayer's income through another method. Slip op. at 5 (citing Ind. Code § 6-3-2-2(p)). Thus, the party seeking to depart from the standard sourcing rules must first show that the return filed using the sourcing rules does not fairly represent the taxpayer's income and next show that its alternative method is reasonable. Slip op. at 4-5. Here, that burden was on the Department. Slip. op. at 6.

The Court found that the Department did assert that it complied with the requirements of Ind. Code § 6-3-2-2(1), and designated facts to show that compliance. Slip op. at 7. However, the Department did not designate any facts to show that it complied with the requirements of Ind. Code § 6-3-2-2(p). *Id.* The Department merely argued that it considered, but rejected, alternatives to requiring a combined return. *Id.* The Court does not accept arguments or allegations as evidentiary materials for summary judgment; accordingly, the information provided to the Court was insufficient to establish that the Department considered alternatives to assessing tax based on a combined return. Slip op. at 8. "The Department has failed to designate any facts to show it complied with Ind. Code § 6-3-2-2(p); therefore, it has not made a prima facie case that it is entitled to judgment as a matter of law." Slip op. at 9. Thus, the Court denied the Department's motion for summary judgment and reversed the assessment. Slip. op. at 9-10.

Inheritance Tax

1. *Indiana Department of State Revenue, Inheritance Tax Division v. In re: Estate of Deloras J. Biddle*, 943 N.E.2d 932 (Ind. Tax Ct., February 8, 2011). The Indiana Department of State Revenue appealed the Knox Circuit Court's order determining that Biddle's estate did not owe Indiana inheritance tax and was therefore not required to file an Indiana inheritance tax return. Biddle died intestate, and the probate court appointed her son as the personal representative of her estate. In an unsupervised administration, her son filed an inventory, final accounting, and a verified closing statement, which the court approved on April 24, 2006. Biddle's son was her sole heir, and received a

distribution that was less than the exemption to which he was entitled, so no inheritance tax return was filed.

In 2008, the Department learned that MetLife Insurance Company issued two checks to Biddle's brother, Richard Fine, in May of 2005. The checks indicated that they "represented the amount of death claim proceeds from an annuity contract" held by Biddle. 943 N.E.2d at 933. Explaining that the annuity proceeds were subject to inheritance tax, the Department asked the probate court to order the estate to file an inheritance tax return and remit the appropriate amount of tax due on the transfers to Fine. The court ruled that Fine was the transferee of proceeds under a contract of life insurance that did not pass through the decedent's estate, and that, therefore, no party was required to file an inheritance tax return. The Department appealed to the Tax Court, arguing that the checks issued by MetLife to Fine were annuity payments, not life insurance proceeds.

In Indiana, certain property interest transfers are exempt from inheritance tax. Unless the proceeds become subject to distribution as part of the decedent's estate and subject to claims against the estate, the proceeds from life insurance on the life of a decedent are exempt from the inheritance tax. *Id.* at 934 (citing Ind. Code § 6-4.1-3-6). Annuity payments are also exempt, but only to the same extent that the annuity is excluded from the decedent's federal gross estate under the Internal Revenue Code. *Id.* (citing Ind. Code § 6-4.1-3-6.5). Consequently, an annuity payment received by a beneficiary is subject to Indiana's inheritance tax if the annuity "was payable to the decedent, or the decedent possessed the right to receive the payment either for his life, for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death." *Id.* (citing I.R.C. § 2039).

Here, the evidence showed that the payments received by Fine from MetLife were not life insurance proceeds. *Id.* The checks clearly stated that they were proceeds from an annuity contract. *Id.* Therefore, the Tax Court reversed the judgment of the probate court, and remanded with instructions to the probate court to order the estate to provide a copy of the subject MetLife contract so that the court could determine whether the estate was required to file an inheritance tax return and remit inheritance tax on the transfers to fine. *Id.* at 934-35.

Municipal Financing of Public Improvements

1. *City of Indianapolis, et al. v. Christine Armour, et al.*, 946 N.E.2d 553 (Ind., May 10, 2011). Indiana's Barrett Law authorizes municipalities to provide or require public improvements and fund those improvements by levying special assessments against the benefitted properties. Prior to 2006, Indianapolis used Barrett Law to fund sewer projects. In 2001, the city sent a letter to property owners in the Northern Estates neighborhood notifying them that their properties were to be part of a Barrett Law sewers project. The city levied a special assessment against each parcel subject to the project, and gave the owners the option to pay in monthly installments over a 10-, 20-, or 30-year period. Of the 180 parcels covered by the project, 142 elected to pay in installments, while the remainder paid in a single lump-sum payment.

In 2005, the city, responding to concerns about out-of-date septic tanks and a heavy financial burden on homeowners, discontinued use of the Barrett Law method of financing sewer projects in favor of the STEP method. As a result, the 142 parcels who had elected to pay in installments were discharged from their debts, along with taxpayers in 40 other projects around the city. The owners of 31 parcels that paid the entire assessment up front complained to the Board of Public Works for a refund of the amounts they had paid. The Board reasoned that issuing a refund to every person who had paid any amount in any of the 40 Barrett Law projects would be impractical, and that issuing a refund to just these owners would establish a precedent of unfair and inequitable treatment to all other property owners who had also paid Barrett Law assessments.

The property owners brought suit, alleging that the city had violated their rights to due process and equal protection. The trial court and the Court of Appeals found that the city did not have a rational basis for granting relief to those who were paying their Barrett Law assessments in installments and denying relief to those who had paid up front. Thus, the city was ordered to issue refund to the plaintiffs.

The issue on appeal to the Supreme Court was whether the city's forgiveness of all outstanding Barrett Law assessments as part of its transition to STEP violated the plaintiffs' rights under the Equal Protection Clause. 946 N.E.2d at 559. A law attacked on equal protection grounds will be upheld if it survives rational basis review, unless the classification infringes the exercise of fundamental constitutional rights. *Id.* (citing *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). Here, rational basis review applies. Courts are especially deferential to legislators in the context of classifications made by complex tax laws. *Id.* at 559-60 (citing *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)). Under rational basis review, it does not matter what the actual policy reason was, so long as a legitimate reason can be conceived. *Id.* at 561 (citing *Beach Communications*, 508 U.S. at 315).

Governments have a legitimate interest in preserving their limited resources when granting benefits, as well as minimizing administrative costs. *Id.* at 560. The ordinance moving the city from Barrett Law to STEP was enacted because Barrett Law imposed financial hardship on homeowners who were in need of sewers. It was reasonable for the city to believe that property owners who had already paid their assessments were in better financial positions than those who chose installment plans. *Id.* at 562. The decision not to issue refunds to those who had already paid implicates another legitimate interest: preservation of limited resources. *Id.* at 563. The plaintiffs each paid for a sewer and received a sewer, so they cannot argue they did not receive a benefit. *Id.* at 564. Lastly, because no taxpayers in any of the 40 Barrett Law projects received any refunds of the amounts they had paid, this was not a "class-of-one case" that would support a claim of unequal treatment. *Id.* at 565-66. The Court held, therefore, that the ordinance did not violate the Equal Protection Clause because it was rationally related to legitimate government interests. *Id.* at 570. No refund was due, and the trial court's decision was reversed. *Id.*

Tax Court Jurisdiction

1. *State ex rel. Gregory F. Zoeller, Attorney General of Indiana v. Aisin USA Manufacturing, Inc.*, 946 N.E.2d 1148 (Ind., May 12, 2011). When Aisin filed its 2000 tax return, it underpaid its taxes, and thus remitted a payment plus interest. On its 2001 tax return, Aisin overpaid and was entitled to a refund, which it requested to be applied towards its 2002 taxes. Even though Aisin was neither entitled to nor expecting a refund check for its 2001 taxes, it received a check for \$1.1 million in September 2003, which it negotiated. The Department issued the check because of several accounting and clerical errors.

In October 2005, Aisin filed an amended return for the 2001 tax year, which resulted in an additional refund. While processing the amended return, the Department discovered its earlier mistakes and issued a proposed assessment to Aisin stating that Aisin owed \$616,062 for 2001. Aisin filed timely protests, claiming the statute of limitations had expired and requesting a hearing. Before a hearing was held, the Department cancelled the proposed assessment and agreed that Aisin had paid the correct amount of taxes, but subsequent efforts by the Department to recover the erroneously issued funds were unsuccessful. The state filed a complaint against Aisin in Jackson Superior Court, claiming unjust enrichment, theft, treble damages, and constructive trust. Aisin moved for, and the Court granted, a dismissal for lack of jurisdiction, concluding that the matter fell within the exclusive jurisdiction of the Tax Court. The Court of Appeals affirmed, and the state appealed to the Supreme Court.

The Tax Court has exclusive subject matter jurisdiction over original tax appeals, so if the Tax Court has jurisdiction over a case, then the Jackson Superior Court does not. 946 N.E.2d at 1152 (citing Ind. Code § 33-26-3-1). For the Tax Court to have jurisdiction, a case must arise under the tax laws of Indiana and must be an appeal of a final determination made by the Department. *Id.* (citing Ind. Code § 33-26-3-1).

For a case to "arise under" the tax laws, the tax statute must create the right of action or the case must principally involve collection of a tax. *Id.* The lower courts here held that "whether and to what extent mistakes were made [were] quintessentially tax matters." *Id.* at 1153. The Supreme Court disagreed with this view, however, saying that "the trial court's approach would find that a case arises under the tax laws anytime it involved the Department or another tax agency." *Id.* The statute does not grant such broad jurisdiction to the Tax Court. *Id.* at 1154.

The Court also considered whether the case principally involved the collection of a tax. Here, Aisin paid its tax liability in full. Further, the Department's errors were not due to a misunderstanding of the tax laws. Aisin argued that the State's issuance of an erroneous refund resulted in a net underpayment of taxes, and that the current case of action attempted to remedy that underpayment, but the Court disagreed. *Id.* "Aisin's argument overlooks the fundamental difference between what the State seeks to recover (a mistaken payment caused solely by accounting and clerical errors) and what Aisin originally owed and paid to the Department (its tax liability). *Id.* at 1155. This case was an accounting case, not a tax case. *Id.* Thus, the case was a common-law claim for

restitution, and not one that arose under Indiana tax law. *Id.* at 1159. Consequently, the Jackson Superior Court had subject matter jurisdiction. *Id.*

Justice Rucker dissented (and was joined by Justice Dickson), reasoning: "Given the lengths to which the majority was required to analyze Aisin's various tax filings and the resultant repercussions, I agree this is a tax case and would affirm the judgment of the trial court." *Id.* at 1159.

2. *Virginia Garwood and Kristin Garwood v. Indiana Department of State Revenue*, 939 N.E.2d 1150 (Ind. Tax Ct., December 21, 2010). In February 2009, the Indiana Attorney General and Department of Revenue began investigating the Garwoods' business activities to determine if they were selling puppies and not remitting tax. On May 29, 2009, the Department obtained a warrant from Marion Superior Court to search the Garwoods' properties in Harrison County. The Department also generated four jeopardy tax assessments for income tax liabilities and twelve jeopardy assessments for sales tax liabilities. The Department served the Garwoods with all sixteen jeopardy tax assessments and demanded immediate payment. When neither Garwood paid, the Department seized 240 dogs, which the Department sold to the Humane Society for \$300 total. The Department applied the monies to the Garwoods' outstanding tax liabilities.

The Department filed the jeopardy tax warrants in Harrison Circuit Court, and that court entered an order allowing the Department to proceed. The Garwoods timely protested their jeopardy assessments to the Department, which declined to conduct a hearing, and which concluded that "the relief requested by the Garwoods is best available in Harrison Circuit Court." 939 N.E.2d at 1153. The Garwoods appealed to the Tax Court, and the Department moved to dismiss for lack of jurisdiction. The Department argued that its jeopardy tax warrants were the final judgments of the Harrison Circuit Court, and that "the day for disputing the tax is over" and that the matter had progressed to the "collection stage." *Id.* at 1154. In the alternative, the Department argued that the Garwoods did not exhaust their administrative remedies, which they could do by paying the taxes and then filing a claim for refund.

The Tax Court rejected the Department's reasoning. As to the first argument, the Court found that the Garwoods attempted to contest the validity of the jeopardy tax assessments with both the Department and the Tax Court. *Id.* Therefore, the jeopardy tax warrants at issue in this case had not yet attained the status of judgments. *Id.*

For the Tax Court to have jurisdiction, a case must arise under the tax laws of Indiana and must be an appeal of a final determination made by the Department. *Id.* (citing Ind. Code § 33-26-3-1). The first requirement was easily met, as the Garwoods' claims "indisputably arise under the tax laws of this state." *Id.* As to the second requirement, the Department claimed that because the Garwoods did not file a claim for refund with the Department, there is no final determination. *Id.* at 1155. The Department claimed that the jeopardy tax assessment remedy is a pure "pay to play" system, but the Court disagreed. *Id.* The Department's regulation provides that taxpayers "may protest a jeopardy assessment within twenty days after the assessment is made." *Id.* (citing 45 Ind.

Admin. Code 15-5-8(c)). Therefore, for purposes of this case, the Department's letter to the Garwoods rejecting their request for a hearing constituted a final judgment. *Id.* at 1156. Accordingly, the Court denied the Department's motion to dismiss. *Id.*

3. *Brenda Truedell-Bell v. Marion County Treasurer and Auditor*, 938 N.E.2d 291 (Ind. Ct. App., December 9, 2010). Truedell-Bell appealed the trial court's denial of her petition for a preliminary injunction to remove her property from the property tax sale pending the outcome of her appeal for property tax assessment. In July 2008, Truedell-Bell challenged the reassessment of her property taxes on land she owned in Marion County by filing a tax appeal with the local official. The Marion County PTABOA did not hold a hearing on the matter, and Truedell-Bell did not pay the placeholder tax liability that is required by statute to keep the property out of a tax sale pending a tax appeal. The Treasurer and Auditor therefore included Truedell-Bell's property in the tax sale, which was scheduled to occur on March 18, 2010.

On February 23, 2010, Truedell-Bell filed a petition pro se in Marion Circuit Court requesting the removal of her property from the tax sale, and after retaining counsel, filed a petition for preliminary injunction on March 8 to remove her property from the tax sale pending the outcome of her appeal for property reassessment. Truedell-Bell contended that injunctive relief by the Circuit Court to remove her property from the tax sale was necessary because the remedies available at law were inadequate, but the court denied her petition.

On appeal to the Court of Appeals, Truedell-Bell argued that the trial court should have granted her petition, and that the Circuit Court had subject matter jurisdiction over her petition because she was seeking injunctive relief and not a property tax appeal or a reassessment of taxes. 938 N.E.2d at 293. Though sympathetic, the Court of Appeals disagreed.

The General Assembly created the Tax Court for the purpose of consolidating tax-related litigation in one court of expertise. *Id.* (citing *Marion County Auditor v. Revival Temple Apostolic Church*, 898 N.E.2d 437, 445 (Ind. Ct. App. 2008)). The legislature intended that all taxpayer challenges to property tax assessments, regardless of the reason for the challenge, be decided by the Tax Court after the taxpayer has exhausted her administrative remedies. *Id.* (citing *Common Council of City of Hammond v. Matonovich*, 691 N.E.2d 1326, 1330 (Ind. Ct. App. 1998)). Under the Indiana Code, the Tax Court has exclusive jurisdiction over any case that arises under the tax laws of the state. *Id.* (citing Ind. Code § 33-26-3-1 and -2). An appeal of the assessment of property taxes is a matter which arises under the tax laws of Indiana. *Id.* Thus, the Circuit Court did not have jurisdiction to hear challenges to assessments. *Id.*

An appeal of a tax assessment must first be taken to the County PTABOA, and if the taxpayer is unsuccessful there, or if the PTABOA does not hold a hearing, the taxpayer may appeal that decision to the State Board. *Id.* (citing Ind. Code §§ 6-1.1-15-1(a), (k), (o); 6-1.1-15-12(e)). A negative decision under the administrative process results in a final determination that vests exclusive jurisdiction in the Tax Court. *Id.* (citing *Revival*

Temple, 898 N.E.2d at 445). "By not following the statutory procedure that exists for disputes under the tax law, Truedell-Bell failed to exhaust her administrative remedies, and the Circuit Court did not have jurisdiction." *Id.* at 294.

Property Tax – Valuation

1. *Rostamkolai v. Hendricks County Assessor*, Pet. No. 32-022-07-1-5-00053 (January 5, 2011). [Small Claims Docket Case]. Rostamkolai challenged the March 1, 2007 assessment of his single-family residence in Avon, Indiana. Page 2, at ¶ 7. For 2007, the Hendricks County PTABOA determined the property's total assessed value to be \$410,000. *Id.*, at ¶ 9. However, Rostamkolai contended his property was over-assessed by 15 percent in 2007 and the total assessed value should be \$353,430. *Id.*, at ¶ 10.

The Indiana Board determined Rostamkolai had failed to provide sufficient evidence to support a change in the assessment. To develop his 15 percent estimate, Rostamkolai averaged figures from two website articles. One, an *Indiana Business Review* article dated December 22, 2006, reported "the median price of *new* homes sold in September was . . . down almost 10 percent from a year earlier." *Id.*, at ¶ 11(a) (emphasis added). The other, a "City-Data.com" article, reported a 20 percent drop for homes in the Avon area in 2006. *Id.* The Indiana Board found both web articles "to be insufficient evidence." Page 8, at ¶ 15(d). Rostamkolai had written neither article. Nor were the authors present. Finally, Rostamkolai had submitted no evidence regarding the credibility of the data relied upon by the articles' authors or the accuracy of the conclusions drawn therein. *Id.*

Furthermore, Rostamkolai had improperly sought an equalization adjustment claim. The Indiana Board explained "[a] taxpayer has the right to show that other properties are assessed below their market values and thus the taxpayer's "property taxes were higher than they would have been had other properties been properly assessed." Page 9, ¶ 15(f) (citing *Indiana Department of Local Government Finance v. Commonwealth Edison Co.*, 820 N.E.2d 1222, 1227 (Ind. 2005)). However, Rostamkolai contended the sale prices of nine properties sold in his neighborhood were, on average, 9.24 percent *below* their assessed values. *Id.* Thus, Rostamkolai made the opposite claim – that properties were assessed for *more* than their market value. *Id.* The Indiana Board added that, even if Rostamkolai had properly sought an equalization adjustment, his evidence would not have been sufficient because Rostamkolai failed to establish the assessed-value to market value-in-use ratio for his own property. *Id.*, ¶ 15(g). The only evidence of the property's market value in the record, its purchase price in 2002, was too far removed from the January 1, 2006 valuation date to be probative of the property's market value-in-use for the March 1, 2007 assessment. *Id.*

The Board also addressed Rostamkolai's analysis regarding the uniformity and equality of assessments. Rostamkolai derived his assessment/sale ratio of 9.24 percent based on a simple average of nine properties sold between December of 2007 and November of 2009 in his neighborhood. The Board responded that such evidence, in addition to being outside the proper timeframe for the determination of 2007 assessment values, was "not sufficient to make any legitimate conclusion." Page 10, ¶ 15(h). Rostamkolai "failed to

establish that his data constituted a statistically reliable sample or that his assessment/sale ratio analysis was prepared according to professionally acceptable standards." *Id.*

Procedural Note: Rostamkolai also contended he was dissatisfied with the County Assessment's handling of his appeal and PTABOA proceeding. However, the Board noted its proceedings are *de novo*. Page 3, n.4. *See* Ind. Code § 6-1.1-15-4(k). Thus, neither the County Assessor's handling nor the PTABOA proceeding would hinder Rostamkolai's ability to present his case to the Board. *Id.*

Procedural Note: The Indiana Board overruled Rostamkolai's objection to the Respondent's exhibits, specifically that the Respondent failed to provide a copy of its documentary evidence to him five days prior to the Indiana Board of Tax Review hearing. Page 3, n.6. The Board responded that the duty to provide such copies, as well as the names and addresses of witnesses, only arise *upon request* in small claims hearings. *See* 52 IAC 3-1-5. And Rostamkolai testified he had never made such a request.

2. *Wyland Drive Associates LTD v. Elkhart County Assessor*, Pet. No. 20-011-07-1-3-00095 (January 6, 2011). In its appeal for a March 1, 2007 assessment, Wyland Drive Associates ("Wyland") objected to all of the Assessor's exhibits because the Assessor did not provide those exhibits to Wyland before the hearing in accordance with 52 IAC 2-7-1(b)(1) and (2). Page 4, ¶ 14. The Indiana Board noted an exception: that the failure "to exchange exhibits offered solely for the purposes of impeachment may not necessarily require exclusion of those exhibits." *Id.* However, the Board added that exhibits must be identified for the purpose of impeachment. "The Board will not undertake that analysis." *Id.*
3. *Albion Limited d/b/a Brandonwood Apartments v. Noble County Assessor*, Pet. Nos. 57-002-07-1-4-00005 and 57-002-08-1-4-00005 (January 19, 2011). Albion Limited d/b/a Brandonwood Apartments ("Albion Limited") successfully argued the assessed value for its Section 515, 17 unit apartment complex was overstated for the 2007 and 2008 tax years based on the property's appraised values. Page 2, ¶ 1. While the PTABOA determined the total assessed value to be \$663,500 for 2007 and 2008, Albion Limited request a total assessed value of \$267,500 for 2007 and \$274,100 for 2008. Page 4, ¶ 10. The Indiana Board found Albion Limited's appraised values to be more persuasive than the Noble County Assessor's income analysis or sales comparison approach. Page 14, ¶ 39.

Before beginning its analysis, the Board noted the appraisal profession traditionally has used three methods to determine a property's market value: (1) the cost approach, (2) the sales comparison approach, and (3) the income approach to value. Page 10, ¶ 30. For assessment dates after February 2005, a rental property with more than 4 units is to be assessed according to the lowest valuation determined from the three generally accepted approaches to value. *Id.*, ¶ 31. *See* Ind. Code § 6-1.1-4-39(a).

The Board held Albion Limited raised a prima facie case by using a licensed appraiser (an Indiana Certified General Real Property Assessor) who prepared his reports in conformance with the Uniform Standards of Professional Appraisal Practice ("USPAP") and Standards of Professional Appraisal Practice of the Appraisal Institute. Page 11, ¶ 34. "Appraisals performed in accordance with generally recognized appraisal principles are often sufficient to establish a prima facie case." *Id.* However, the Board did note "a troubling issue" with Albion Limited's appraisal in that its appraiser "chose to value the detriment of owning and operating a Section 515 housing project – namely the restricted rents – but [] failed to consider the benefit of owning subsidized property – the [1 percent] mortgage subsidy on the property's value. . . . The better evidence in this case would have been to value the property as a whole." Page 13, ¶ 37. The Board noted it had cautioned against such "parsing of interests" in a previous order. *Id.* See *Schooler v. Boone County Assessor*, Petition No. 06-003-071-5-00044 (May 7, 2010).

Yet, the Board gave greater criticism for the Assessor's appraisal. First, the Assessor's witness was not an appraiser; nor did he prepare his estimates in compliance with USPAP. Page 10, ¶ 29. Second, in contrast to Albion Limited's appraiser, the Assessor's witness failed to explain how he determined the "market" capitalization rate, merely claiming that the "overall cap rate for conventional apartments was 10.81%." Page 12, ¶ 36. The Board explained, "Statements that are unsupported by probative evidence are conclusory and of no value to the Board in making its determination. *Id.* Finally, for his sales comparison analysis, the Assessor's witness "[fell] far short" of establishing the comparability of the properties, merely concluding that the properties were Section 515 properties similar in age and style. Pages 13-14, ¶ 38. The Board stressed that such "conclusory statements [did] not constitute probative evidence;" rather, the proponent must identify, compare, and contrast property characteristics. *Id.*

Procedural Note: Albion Limited's counsel objected to Assessor's witness also serving as her counsel because the witness was not an attorney, tax representative, or county employee. Page 3, n.2. The Indiana Board overruled Albion Limited's objection, holding there was no evidence Albion Limited was prejudiced by the witness' actions in testifying at the hearing. *Id.* The assessor's witness was clearly identified by the Assessor in her witness and exhibit list and further would have to comply with the Board's representation rules. Also, the Assessor was properly represented by a Deputy Assessor. *Id.* See 52 IAC 2-2-4. To the extent that the witness would represent the Assessor, he would have to submit written verification that he was a "professional appraiser" approved by the Department of Local Government as required by 52 IAC 1-1-3.5 and file a power of attorney with the Board as required by 52 IAC 2-3-2. *Id.* See 52 IAC 1-1-3.5.

Procedural Note: The Board also admitted the entirety of Assessor's Exhibit 1 over objection because any objection to the failure to present any testimony regarding certain pages of the exhibit went to the weight of the evidence rather than its admissibility. Page 3, n.3.

Procedural Note: The Board sustained Albion Limited's objection to Assessor's Exhibit 2 because the Assessor had failed to provide a copy of the exhibit before the

hearing. Under 52 IAC 2-7-1(b), a party to an appeal must provide (1) copies of documentary evidence and summaries of statements of testimonial evidence at least five business days before the hearing and (2) a list of witnesses and exhibits to be introduced at the hearing at least fifteen business days before the hearing. *Id.* The Board explained, "[t]he purpose of this requirement is to allow both parties to be informed, to avoid surprises, and to ensure a more organized, efficient and fair consideration of the issues." *Id.*

4. *Kendallville Associates, LP d/b/a Drake Terrace II Senior v. Noble County Assessor*, Pet. No. 57-004-08-1-4-00003 (January 24, 2011). The Indiana Board discussed the application of Rule 408 of the Indiana Rules of Evidence to settlement negotiations in prior appeals. In this case, the objected-to exhibit was the county's 2001 through 2005 income analysis reconstructed from Kendallville Associate's operating statements. As there was no evidence of a settlement offer being made to Kendallville Associates ("Kendallville") or negotiation occurring between Kendallville and the Noble County Assessor for the assessment year of 2008, the Board overruled Kendallville's objection.
5. *Durcholz v. Dubois County Assessor*, Pet. No. 19-002-08-1-5-00097, et al. (February 7, 2011). [Small Claims Docket Case]. This case dealt with the pre-2006 and amended versions of Indiana's "developer's discount" law under Indiana Code § 6-1.1-4-12. For 2008, the Durcholzcs contended their properties should be assessed at a value similar to the assessed value of the surrounding agricultural land because, although the properties had been subdivided into parcels, none of the parcels had been improved or sold. Page 4, ¶ 11(c). In turn, the Assessor argued nine of the Durcholzcs' properties did not qualify for the developer's discount. *Id.*, ¶ 12(a).

The Board held the Durcholzcs failed to raise a prima facie case for a reduction in the assessed values of their properties. Page 8, ¶ 25. First, the developer's discount applied only to subdivided lots under the pre-2006 version of Indiana Code § 6-1.1-4-12 – if the land was rezoned or put to a different use, it would be reassessed on the basis of its new classification. Pages 8-9, ¶ 15(b). The amended statute, under which the developer's discount applied regardless of whether the land was rezoned, applied to assessment dates after December 31, 2005. Page 9, ¶ 15(c). Thus, the Durcholzcs' parcels which had been rezoned (all before 2002) had already lost the developer's discount. *Id.*, ¶ 15(d). Second, the Board reminded the Durcholzcs that the amended version of Indiana Code § 6-1.1-4-12, like its predecessor, "[did] not provide for any certain value to be assessed to a class of property held in inventory. *Id.*, ¶ 15(g). The statute merely [held] that a property retain[ed] its classification – not its numerical value – until it is sold." *Id.* Thus, Indiana Code § 6-1.1-4-12 did not preclude an annual adjustment pursuant to Indiana Code § 6-1.1-4-4.5. *Id.*

Although the Durcholzcs failed to raise the Assessor's duty to support the assessment with substantial evidence, the Assessor also failed to prove her case – that nine of the Durcholzcs' parcels were given a 60 percent developer's discount when such parcels were ineligible under the pre-2006 version of the law. *Id.*, ¶ 15(h). The Board responded that, although the Board had the power to weigh the evidence presented and "correct any

errors that may have been made and adjust the assessment or exemption " pursuant to Indiana Code § 6-1.1-15-4(a), it no longer "assessed" properties. *Id.*, ¶ 15(i). As the Assessor merely contended that she assessed the property in error by applying a 60 percent discount, the Board would not make that change absent a showing that the value sought by the Assessor better represented the properties' market values-in-use. *Id.*, ¶ 15(j). Furthermore, the Assessor had another option to assess omitted or undervalued property – she could remove the influence factor following the procedures of Indiana Code § 6-1.1-9-1. *Id.*, ¶ 15(k).

The Board also cautioned taxpayers who may challenge a property assessment. "[W]hen a taxpayer elects to challenge its assessment, it assumes a certain degree of risk, as resolution of a property tax appeal may lead to an increase in assessment." *Id.*, ¶ 15(i) (quoting *Hubler Realty Co. v. Hendricks County Ass'r.*, 938 N.E.2d 311, 315 (Ind. Tax Ct. 2010)).

With regard to property assessments, the Board noted that an assessment under the Guidelines (Real Property Assessment Manual) was presumed to accurately reflect its true tax value, a market-in-value appraisal prepared according to the Uniform Standards of Professional Appraisal often would suffice, and a taxpayer may also offer sales information for the subject property or comparable properties and other information compiled according to generally accepted appraisal principles. Page 10, n.5.

6. *Indiana Business Bank v. Morgan County Assessor*, Pet. No. 55-021-08-1-4-00052 (February 9, 2011). [Small Claims Docket Case]. Indiana Business Bank (the "Bank") appealed the 2008 assessed value of its convenience store/gas station, purchased at a foreclosure/sheriff's sale for \$600,000. Page 3, ¶ 14(b). The Bank contended the 2008 assessment should be \$600,000 instead of \$727,400. Page 1, ¶¶ 8-9. To support its case, the Bank presented a March 31, 2009 appraisal for \$542,000 prepared under the sales comparison approach by an Indiana licensed appraiser and in accordance with USPAP standards. Page 3, ¶ 14(a).

However, the Indiana Board noted the valuation date for a 2008 assessment was January 1, 2007 and the Bank had failed to offer any substantial explanation as to how the appraisal as of March 31, 2009 might demonstrate or be relevant to value as of January 1, 2007. Page 4, ¶ 19(c). *See* 50 IAC 21-3-3 (2009). The Board found the actual purchase price of the subject property on January 6, 2007 for \$855,000 – which was not included in the Bank's appraisal – to be "more persuasive evidence" than the appraisal in part because the actual purchase price was not an estimate but rather "direct evidence of how a buyer and seller valued the utility of the property." Pages 5-6, ¶ 19(g)-(i). Thus, the timely price of \$855,000 was a "strong indication" that the [Bank's] requested assessment of \$600,000 would be much too low. *Id.*

The Board noted the Bank made no attempt to use the facts that it had bought the subject property at a foreclosure sale for \$600,000 in 2008 or that it leased the property with an option to purchase for \$542,000 in 2010 to support its argument. Page 5, n.2.

Procedural Note: The Board sustained the Bank's objection to the introduction of any testimony or exhibits by the Assessor because the Assessor had failed to provide copies of documentary evidence or a witness list prior to the hearing. Page 2, ¶ 11. The Board explained the rules in small claims court. *Id.*, ¶ 12. "If requested by any party, the parties shall provide to all other parties copies of any documentary evidence and the names and addresses of all witnesses intended to be presented at the hearing at least five (5) business days before the small claims hearing." *Id.* See 52 IAC 3-1-5(d). The Assessor acknowledged she did not provide the requested documents and agreed to offer no testimony or exhibits at the hearing. *Id.*, ¶ 13.

Procedural Note: Although there was a potential claim that the current assessment was too low, the Assessor presented no such argument and the Board would not make a case for her. Page 6, ¶ 19(j).

7. *Krichbaum v. Kosciusko County Assessor*, Pet. No. 43-014-08-1-5-00001 (February 10, 2011). [Small Claims Docket Case]. The Indiana Board held Mrs. Krichbaum failed to make a prima facie case for reducing the 2008 assessment of her residential property. Page 7, ¶ 15(g). The subject property had been acquired by U.S. Bank at a foreclosure/sheriff's auction and subsequently sold to Mrs. Krichbaum for \$69,900 on May 21, 2008. Page 2, ¶ 9(a). Krichbaums requested the assessment be reduced from \$95,400 to \$69,900 to reflect this sale price. *Id.*, ¶ 8.

The Indiana Board responded that the valuation date for March 1, 2008 assessments was January 1, 2007. Page 6, ¶ 15(c). See 50 IAC 21-3-3(2006). As the Krichbaums' purchase took place nearly 18 months after the relevant valuation date, the property's sale prices lacked probative value. *Id.*, ¶ 15(d). Given Mrs. Krichbaum's failure to relate the property's sale price to the relevant valuation date, the Board did not consider the extent, if any, to which a foreclosure purchase affected the sale price's probative weight. *Id.*

Procedural Note: The Indiana Board overruled Mrs. Krichbaum's objection to the admission of one of the Assessor's exhibits, contending that the exhibit dealt with a property incomparable to the subject property. The objection went to the exhibit's weight rather than to its admissibility. Page 5, n.3.

Procedural Note: The Board also described Mrs. Krichbaum's claims that PTABOA members were inattentive and arrogant and rushed through the hearing as "largely irrelevant." Page 7, ¶ 15(g). The "Board's proceedings are *de novo*; the Board therefore does not review the PTABOA's reasoning or lack thereof in deciding a taxpayer's appeal." *Id.*

8. *Meadow Lake of Mooresville, LLC v. Morgan County Assessor*, Pet. No. 55-005-08-1-4-00021 (February 11, 2011). [Small Claims Docket Case]. The Indiana Board found in favor of Meadow Lake, reducing the 2008 assessed value of its nursing home from \$9,810,400 to \$6,041,800. Page 5, ¶ 17(g). "The use of actual construction costs as a method of determining value complies with generally accepted appraisal principles." *Id.*, ¶ 17(b) (citing 2002 REAL PROPERTY ASSESSMENT MANUAL at 5 (incorporated

by reference at 50 IAC 2.3-1-2)). Meadow Lake's evidence consisted of a 31-page itemized list of site development and construction costs. *Id.* Meadow Lake then trended the actual cost data to the relevant valuation date of January 1, 2007. *Id.*, ¶ 17(e). Furthermore, the Assessor presented no substantial evidence that Meadow Lake's "detail[ed]" and "credible" cost approach evidence was "unreliable, inaccurate, or incomplete." *Id.*, ¶ 17(b)-(c).

The Board also noted the Assessor failed to present market data in support of its current assessment and offered "only minimal explanation" about how the current assessment was determined. *Id.*, ¶ 17(f). The Assessor's method, namely the elimination of land classifications and uniform application of its claimed value-per-acre, was "not relevant or probative" and did "nothing to effectively counteract" Meadow Lake's method. *Id.*

9. *Labeco Properties LLC v. Morgan County Assessor*, Pet. No. 55-005-07-1-4-00016, et al. (March 3, 2011). [Small Claims Docket Case]. Labeco Properties, LLC ("Labeco") failed to make a prima facie case for any change in the 2008 assessment of the subject properties: a manufacturing facility, an adjacent vacant lot, and a nearby parking area. Page 6, ¶ 17(f). Labeco contended environmental contamination warranted a reduction in total assessed value from \$371,400 to \$140,135. Page 2, ¶¶ 9-10.

Although the Indiana Board agreed that environmental contamination reduced the value of property, it criticized Labeco's lack of probative evidence on *the amount* of negative impact on true tax value. "Merely establishing the existence of environmental contamination . . . is not enough to support changing the assessment. And there is no basis for concluding that the reduction in value would be equivalent to the costs of remediation." Page 4, ¶ 16(a). In order to make a prima facie case, a petitioner *must "quantify the effect* of the environmental contamination and present probative evidence about what a more accurate valuation would be." *Id.* (emphasis added).

Labeco acknowledged the contamination's "impact on the market [was] unknown." Pages 4-5, ¶ 16(a). The Board also noted Labeco's "appraisals" were the opinion of a real estate broker – not an appraiser – with unknown qualifications. Page 5, ¶ 16(d). The "appraisal" letters lacked Uniform Standards of Professional Appraisal Practice ("USPAP") certification or even an explanation as to what generally recognized valuation approach was followed. *Id.* Thus, the Board found in favor of the Assessor. Page 6, ¶ 18.

10. *Azar, Inc. v. Allen County Assessor*, Pet. No. 02-073-07-1-4-03011 (March 4, 2011). Azar Incorporated ("Azar") failed to make a prima facie case in its appeal of a 2007 property assessment. Page 16, ¶ 45. In its appeal, Azar requested an assessed value of \$425,300 rather than \$522,900 because the subject property must have been worth less in 2007 when it suffered from significant deferred maintenance than it was worth in 2009 after Azar addressed that problem through repairs and remodeling. Page 15, ¶ 44.

The Board began by rejecting the subject property's sales price. Azar acquired the subject property for \$405,000 in September 2004, *more than 15 months* before the January 1,

2006 valuation date, through a quitclaim deed. Page 12, ¶ 34. The low sale price gave Azar room to make needed repairs and improvements. Page 5, ¶ 13. In addition to the length of time since Azar's purchase, the Board noted that the quitclaim deed "raise[d] significant questions about whether the sale price [was] a reliable indicator of the subject property's value." Page 12, ¶ 34.

Moving on to Azar's analysis of four purportedly comparable properties, the Board found that, although Azar's analysis tracked the sales-comparison in form, it lacked substance. *Id.*, ¶ 36. Azar did little to explain how the properties actually compared to the subject property or their relative condition. *Id.* Furthermore, although Azar made adjustments to account for differences in terms of building age and land-to-building ratio, it did not explain *how* these differences were quantified. Page 13, ¶ 37. And Azar did not even use the average sale price from this analysis – \$130 per square foot, simply asserting that a price of \$115 per square foot would be more appropriate give the subject property's condition. *Id.*

The Board also criticized Azar's income approach. Azar used the rent listed in an unsigned 2008 lease involving the subject property without explaining how that rent related to the market rent (e.g. for comparable properties) for the subject property as of either the March 1, 2007 assessment date or the earlier January 1, 2006 valuation date. Page 13, ¶ 38. Azar also erred in deducting a fifth of the \$60,000 spent to repair and remodel the subject property as an annual operating expense *on top of* the amount deducted for replacement reserves as a capital improvement. *Id.*, ¶ 39. The Board stressed any error of the Assessor during settlement negotiations, since recognized and corrected, did not make expensing capital improvements more complaint with generally accepted appraisal principles. Page 14, ¶ 40. The Board added, "Statements [including calculations] made in settlement negotiations should not even be in evidence" or treated "as some type of admission or concession." *Id.*, ¶ 41. *See* Ind. Evidence Rule 408.

Overall, the Board held Azar failed to make a *prima facie* case because Azar's evidence was largely unrelated to the relevant valuation date and Azar failed to show how its analyses complied with generally accepted appraisal principles. Page 11, ¶ 33. The Board also noted the lack of probative evidence to account for intervening factors such as how much, if any, the market changed from 2007 to 2009 and the dollar impact of repair and remodeling upon a property's market value-in-use. Page 15, ¶ 44. Buyers and sellers did not necessarily "value those repairs and improvements on a dollar-for-dollar basis." *Id.*

11. *Walters v. White County Assessor*, Pet. No. 91-021-06-1-5-00070 (March 11, 2011). Ms. Walters appealed the 2006 assessment of the subject property, contending that the two-family residence constructed in 1900 and with an assessed value less than \$49,920 met the criteria to receive a rehabilitation deduction. Pages 5-6, ¶ 18. According to Ms. Walters, rehabilitation began in 2002 and continued through 2005. *Id.* On April 20, 2005, Ms. Walters' filed Form 322, Application for a Deduction on Assessment of Rehabilitated Property – the first filing under Indiana Code § 6-1.1-12-18 or Indiana Code § 6-1.1-12-22 ever received by the White County Auditor's office. Page 6, ¶ 20.

The Board agreed with the Assessor that the assessed value increased between March 1, 2005 and March 1, 2006 only because of a statewide mandated general reassessment of properties. Pages 9-10, ¶¶ 29-30. Under Indiana Code § 6-1.1-4-4.5, beginning in 2006 and each year thereafter, assessors are required to adjust or “trend” property values every year to account for changes in property values. Page 10, ¶ 30. In fact, instead of improving after renovation, the grade and condition of the house was actually *lowered* from "fair" to "poor" in 2002 – a rating that remained unchanged. Page 7, ¶¶ 24, 29. The Board added that "[n]either Indiana Code § 6-1.1-12-18, nor Indiana Code § 6-1.1-12-22, state that the assessed value of rehabilitated property can never be changed. The statutes merely state that the rehabilitation deduction applies *if* the assessed value of a property is increased due to the property being rehabilitated." Page 10, ¶ 31.

Overall, the Board rejected Ms. Walters' appeal for a rehabilitation deduction because there was no evidence that the Assessor changed the property's grade or condition to reflect its rehabilitated state. *Id.*, ¶¶ 31-32.

Procedural Note: Although Ms. Walters purported to appeal both the property's 2005 and 2006 assessments, the Form 322 only showed a request for deduction effective for March 1, 2006 and the Form 115, Notification of Final Assessment Determination, showed that the PTABOA acted upon the Form 322 for the March 1, 2006 assessment date. Page 1, n.1.

Pet. No. 91-021-06-1-5-00071. Ms. Walters filed another petition in 2005 for the March 1, 2006 assessment year. However, in this case, the condition rating for the rehabilitated property was raised from fair to good although its grade was lowered from a B+1 to a B grade in 2002. Page 9, ¶ 28. However, the Board held that, because Ms. Walters had notice yet did not timely file for a rehabilitation deduction as a result on the increase in assessed value in 2002, her property lost any entitlement to receive such deduction. *See* Indiana Code § 6-1.1-12-24(d). Pages 10-11, ¶ 30-32.

12. *Kopetsky v. Johnson County Assessor*, Pet. No. 41-015-07-1-5-00153 (March 14, 2011). For a 1.53 acre unimproved parcel, the PTABOA determined the assessed value to be \$97,900 while Ms. Kopetsky contended the assessed value should be \$19,900. Page 3, ¶¶ 11-12. The Board found Ms. Kopetsky made a prima facie case for an assessment change because of a "troubling" error by the Assessor. Page 5, ¶ 21. To start, the Board noted "an assessor's misapplication of the guidelines will not necessarily invalidate an assessment; rather, the pivotal question is . . . [whether] the assessment accurately reflects the property's market value-in-use. Pages 5-6, ¶ 21(b). However, the Board added Ms. Kopetsky "did more than just challenge the methodology of the assessment and prove that it was misapplied" – she "proved the Respondent assessed something [a homesite] that did not exist." Page 6, ¶ 21(c).

According to the 2002 Assessment Guidelines, "[t]here is no homesite if the parcel lacks a dwelling." *Id.* Ms. Kopetsky's parcel lacked a dwelling, sewers, or "any of that" – it was just a wood property with a ravine. Page 4, ¶ 17. As the base rate for a homesite is

10 times more than the base rate for residential land without a homesite, the Board found the Assessor's "apparently cavalier disregard of the subject property's lack of a homesite . . . extremely troubling." Page 6, n.2.

Procedural Note: Ms. Kopetsky objected to any testimony or exhibits from the Assessor because the Assessor failed to provide copies of documentary evidence or a witness list before the hearing. Page 3, ¶ 14. For plenary hearings, the Board's procedural rules require that parties exchange copies of documentary evidence and summary statements of anticipated testimony at least 5 business days prior to the hearing and a list of witnesses and exhibits to be introduced at the hearing at least 15 business days before the hearing. *Id.* See 52 IAC 2-7-1(b)(1)-(2). Failure to comply may result in the exclusion of evidence. *Id.* See 52 IAC 2-7-1(f). The Board described the reasoning behind this rule. "The purpose of this requirement is allowing parties to be informed, avoiding surprises, and promoting an organized, efficient, fair consideration of cases." *Id.* As the Assessor did not offer any testimony or exhibits, the Board dismissed Ms. Kopetsky's objection as "a moot point." Page 4, ¶ 15.

13. *McCartin v. Clark County Assessor*, Pet. No. 10-010-08-1-5-00005 (March 16, 2011). [Small Claims Docket Case].

Procedural Note: The Indiana Board overruled McCartin's objection to one of the Assessor's exhibits (an appraisal), namely that the Assessor should not be allowed to present another appraisal because the PTABOA did not request the Assessor to obtain an appraisal – it purportedly requested only that the Assessor review another appraisal. Page 2, n.11. The Board responded that what the PTABOA requested was "irrelevant." *Id.*, n.12. In appeals of assessments, either party may offer evidence that is relevant to the market value-in-use of the subject property. *Id.* "Such evidence may include actual construction costs, sales information regarding the subject or comparable properties, *appraisals*, and any other information compiled in accordance with generally accepted appraisal principles." *Id.* (emphasis added). See MANUAL at 5. As McCartin failed to present a legitimate reason for excluding this evidence, the Board overruled his objection. *Id.*

14. *Skidmore v. Kosciusko County Assessor*, Pet. No. 43-034-08-1-5-00004 (March 17, 2011).

Procedural Note: The Indiana Board sustained the Assessor's objection to one of Mr. Skidmore's exhibits: a sales disclosure form. Page 4, ¶ 13. The Assessor objected on grounds that her counsel had not received a copy of the exhibit before the hearing. Page 3, ¶ 11. Mr. Skidmore offered a copy of a letter he claimed to have faxed to both the Assessor and her counsel – a letter which gave notice of the exhibit and offered to provide a copy. *Id.*, ¶ 12. The Assessor's counsel denied having received the letter. Page 4, ¶ 12. The Board responded its procedural rules required "each party to provide all other parties with (1) copies of documentary evidence and summaries of statements of testimonial evidence at least five days business days before the Board's hearing, and (2) a

list of witnesses and exhibits at least 15 business days before the hearing." *Id.*, ¶ 13. *See* 52 IAC 2-7-1(b).

The Board first found Mr. Skidmore failed to provide timely notice. *Id.* As Mr. Skidmore's letter was the first notice to the Assessor – and that was less than 15 business days before the hearing – even if the Assessor's counsel had received a copy of the letter, such notice would have been too late. *Id.*

Next, the Board held Mr. Skidmore failed to meet his obligation to provide copies of his documentary evidence at least 5 days before the Board's hearing. *Id.* The Board explained, "Mr. Skidmore did not say what date the sales disclosure form had been filed or otherwise identify the sale to which it applied. Under those circumstances, simply telling the Assessor that she had the data instead of providing a copy of the [sic] what he intended to offer at the hearing" did not satisfy the Board's procedural rules. *Id.*

15. *International Constructors Company IV v. St. Joseph County Assessor*, Pet. No. 71-026-06-1-4-60001 (April 4, 2011). In its appeal of a 2006 property assessment, International Constructors Company ("International") failed to make a prima facie case by relying solely on irrelevant evidence that dealt with the settlement of a later appeal and failing to offer any probative non-hearsay evidence (or hearsay to which the Assessor did not object) to support its claims. Page 14, ¶ 41.

To prove the subject property's market value-in-use, International relied upon a 2009 appraisal report and a settlement agreement for the subject property's 2007 assessment. International also relied upon its counsel's testimony to explain why it filed written notice contesting the 2006 assessment past the "cutoff" date. Page 12, ¶ 35. With the plethora of issues in this case, the Board first addressed the Assessor's objections to International's evidence before turning to the merits of the case. Page 10, ¶ 30.

The Board overruled the Assessor's relevancy objections, except with regard to the evidence concerning a proposed settlement of a later assessment. Page 7, ¶ 22. With respect to the 2009 appraisal report, the Board found objections regarding its relevance to the January 1, 2005 valuation date at issue and the Ohio-licensed appraiser's subsequent lack of a temporary Indiana permit, went to the weight, rather than the admissibility, of the appraisal report. Page 8, ¶¶ 22-23. However, the Board found the Assessor's relevancy objection to a letter regarding a proposed settlement of International's 2007 assessment to be "well grounded." *Id.*, ¶ 24. The Board stressed "Each tax year and each assessment year stands alone. Thus, evidence of a property's assessment for one year does not necessarily show its true tax value for a different assessment year." *Id.* Further, there were strong policy reasons for excluding evidence of settlement negotiations. *Id.*

The Board overruled the Assessor's hearsay objections. Page 9, ¶ 25. Although the challenged evidence did not necessarily fall within a recognized exception to the hearsay rule, it bore "at least some indicia of reliability." *Id.*, ¶ 29. The Ohio-licensed appraiser certified he complied with the Uniform Standards of Professional Appraisal Practice, and his follow-up letters related to his appraisal report. Page 10, ¶ 29. Other evidence had

been affirmed in an affidavit under penalty for perjury. *Id.* As for the letters and testimony of International's counsel ("Counsel"), the Board cited Counsel's availability to be cross-examined as an indicator of reliability. *Id.*, ¶ 30.

Yet, the Board noted a "troubling aspect" to Counsel's testimony – in that he chose to act as both an advocate and witness in this appeal. *Id.*, ¶ 31. It added that Rule 3.7 of the Indiana Rules of Professional Conduct, which "appear[ed] to include the Board and its administrative law judges," prohibited lawyers from acting as advocates at trials in which they are likely to be necessary witnesses – with limited exceptions. Page 11, ¶ 32. However, as the Assessor had neither urged Rule 3.7 as a ground for objection nor moved to disqualify Counsel, the Board did not address the issue. *Id.*, ¶ 33. Nonetheless, the Board cautioned Counsel and other attorneys against acting as both a witness and advocate in hearings before the Board unless an exception to Rule 3.7 applied. *Id.*

Finished with its response to the Assessor's objections, the Board turned to the merits of the case. First echoing its earlier comments, the Board rejected any reliance upon evidence of a settlement from a different tax year's assessment. Page 12, ¶ 36. The Board reiterated, "[E]ach assessment year stands alone and evidence of a property's assessment for one year does not necessarily show its true tax value for a different assessment year." *Id.* Further, to encourage settlement agreements, the Tax Court "refused to afford consummated settlement agreements *any precedential effect* in property tax appeals" to avoid "a chilling effect on the incentive of all assessing officials to resolve cases outside the courtroom." Page 13, ¶ 37.

With regard to the appraisal report and related letters, the Board stressed that, under its procedural rules, it could not rely solely upon International's hearsay evidence. *Id.*, ¶ 38. "Hearsay evidence *may be admitted* However, if the evidence is *properly objected to* and *does not fall within a recognized exception* to the hearsay rule, the resulting determination may not be based solely upon the hearsay evidence." Page 9, ¶ 27 (second and third emphasis added). As International failed to offer non-hearsay evidence, did not claim its hearsay evidence fell within a recognized exception, and offered no other probative evidence, the Board found International failed to make a prima facie case. Page 14, ¶ 39.

Procedural Note: At the Board's hearing, International offered a document titled "Amended Petition" as an exhibit. Page 10, n.2. The Assessor initially objected to the Amended Petition as hearsay; the Board agreed with International that it was a procedural document and thus non-hearsay. *Id.* However, the Board remarked International should have filed the Amended Petition with the Board in the first place. *Id.*

The Board's rules permit amendments to appeal petitions so long as the petitions are filed at the Board's central office and served on all parties. Page 3, n.1. *See* 52 IAC 2-5-2(e). However, an amended petition must be filed at least 15 business days before a hearing; otherwise, the consent of the other parties is required. *Id.* *See* 52 IAC 2-5-2(d). The Board noted that, even had International properly filed the Amended Petition with the Board, International did not serve the Assessor with a copy within 15 business days of the

hearing. *Id.* Nor did International obtain the Assessor's consent to amend its original petition. *Id.* Thus, the Amended Petition did not operate to amend International's original Form 131 petition. *Id.*

Procedural Note: The Board noted that "[u]nlike the Indiana Rules of Trial Procedure, which allow an attorney to issue and sign subpoenas for an action pending in a court where the attorney has appeared for the party, the Board's procedural rules require parties and their representatives to request the Board to issue subpoenas. *Compare* Ind. Trial Rule 45(A) with 52 IAC 2-8-4." Page 11, n.3. The Board cautioned International's counsel, who had signed a subpoena duces tecum, to follow its procedural rules in future appeals. *Id.*

16. *Chapello v. LaPorte County Assessor*, Pet. No. 3 46-022-06-1-5-00316 (April 5, 2011). [Small Claims Docket Case]. The Indiana Board found that the Chapellos established a prima facie case and that the Assessor rebutted the Chapellos' evidence. However, the weight of the evidence supported the taxpayers' appraisal of \$521,500.

Both the Chapellos and the Assessor provided sufficient evidence of the subject property's market values-in-use. In fact, both parties submitted appraisals by the same appraiser, estimating the value of the property as of December 31, 2005. Page 10, ¶ 15(h). The Indiana certified appraiser attested that the Chapellos' appraisal was in accordance with USPAP. Page 9, ¶ 15(d). The Board noted that "[a]n appraisal performed in conformance with generally recognized appraisal principles is often enough to establish a prima facie case that a property's assessment is over-valued." *Id.* Furthermore, the Board found an appraisal valuing property as of December 31, 2005 must "have some probative value" for a 2006 assessment although the date generally is January 1, 2005. *Id.* The Board based its reasoning on the guide for sales ratio analyses, which allows a window between January 1, 2004, and December 31, 2005 for the March 1, 2006 assessment date. *See* 50 IAC 21-3-3(a). *Id.*

Although the appraisals had been prepared by the same appraiser on September 11, 2007 (Assessor's preference) and February 29, 2008 (Chapellos' preference), the Board found the weight of the evidence supported the Chapellos' appraised value because of a "clear error on the face of the appraisal presented by [the Assessor]." Page 10, ¶ 15(h). The 2007 appraisal made a positive adjustment to the sale price of the first comparable sale although that comparable property's lot size was almost twice the size of the Chapellos' property. *Id.* In contrast, the "corrected", 2008 version made a negative adjustment to account for the subject property's smaller lot size. *Id.*

The Board also rejected the Assessor's arguments against the selection of properties in the 2008 appraisal. Pages 10-11, ¶ 15(i). It explained, "Absent evidence to the contrary, the comparable properties chosen by the appraiser or the adjustments made by the appraiser in a USPAP-compliant appraisal will be deemed reasonable." *Id.*

Finally, the Board questioned the Assessor's sales comparison analysis offered in support of the 2007 appraisal. Page 11, ¶ 15(j). Here, the Assessor failed to show how the

properties were comparable and to value the differences between them. *Id.* The Board explained, "Conclusory statements that a property is 'similar' or 'comparable' to another property do not constitute probative evidence of the comparability of the properties. *Id.* (citing *Long v. Wayne Township Assessor*, 821 N.E.2d 466, 470 (Ind. Tax Ct. 2005)). Thus, the Board found the Chapellos' appraisal to be a more credible estimate of the property's value. *Id.*

17. *Tippecanoe Lake Country Club v. Kosciusko County Assessor*, Pet. No. 43-023-08-1-4-00023 (April 6, 2011). [Small Claims Docket Case]. The Tippecanoe Lake Country Club ("Country Club") failed to raise a prima facie case that its property was over-valued for the March 1, 2008 assessment. Page 10, ¶ 16. In its decision, the Indiana Board addressed arguments that the subject property – lakefront lots on which the majority of the country club's three tennis courts were located – was misclassified in a residential (versus commercial) neighborhood and assessed much higher than comparable properties.

The Board first held the Assessor's classification of the property as lakefront property in a residential neighborhood was a reasonable classification of the property. Page 8, ¶ 15(e). Under the Guidelines, the Department of Local Government Finance defines neighborhoods and establishes their land base rates. *Id.* In its analysis, the Board quickly emphasized that such classifications were merely a starting point, that "the pricing *method* for valuing the neighborhood [was] of less importance than arriving at the correct *value* of the land as of the valuation date." *Id.* (emphasis added) (citing GUIDELINES, ch. 2 at 13, 16). *Id.* Even if the Assessor had erred in her method, the County Club failed to show that applying a commercial neighborhood classification would result in the correct market value-in-use. *Id.*, ¶ 15(f).

The Country Club also erred in comparing the assessed values of other properties. The Board cited *Westfield Golf Practice Center, LLC v. Washington Township Assessor* in its explanation that "it is not enough for a taxpayer to show that its property is *assessed higher* than other comparable properties. Page 9, ¶ 15(g). Instead, the taxpayer must present probative evidence to show that its assessed value *does not accurately reflect* the property's *market value-in-use*." *Id.* (emphasis added) (citations omitted). See *Westfield Golf*, 859 N.E.2d 396 (Ind. Tax Ct. 2007). *Id.* Here, the Country Club did not show the market value-in-use of any property. *Id.* Even worse, the Country Club failed to explain the characteristics of the subject property and how these characteristics compared to and differed from the "comparable" properties – merely highlighting differences in front foot base rates and testifying that all the properties were located on some lake in the area. *Id.*, ¶ 15(h).

To conclude its opinion, the Board addressed the Country Club's comparison of assessed values with an adjacent parcel. Page 10, ¶ 15(i). Again, the Country Club failed to present evidence of either property's market value-in-use. *Id.* As the evidence suggested that the adjacent property was more likely to have been assessed incorrectly than the subject property, the Board was reluctant to make a change. *Id.* The Board explained, "A taxpayer should not be allowed to take advantage of a mistake in the assessment of another property." *Id.*

18. *Swift Transportation Company, Inc. v. Martin County Assessor*, Pet. Nos. 51-003-08-1-4-00004 and 51-003-08-1-4-00005 (April 7, 2011). In this case, although the PTABOA determined a total 2008 assessed value of \$1,088,500, Swift Transportation Company ("Swift") argued the assessed value should be \$200,000. Page 4, ¶¶ 10-11. Swift based its estimation on the properties' July 2, 2009 sale price of \$200,000. Page 11, ¶ 32.

Although the sale of a subject property is often the best evidence of its value, the Indiana Board found two problems with Swift's use of the 2009 sale price. *Id.* First, the sale was more than two years after the January 1, 2007 valuation date for the March 1, 2008 assessment. *Id.* And Swift had failed to explain how a 2009 purchase price related to 2007 values. *Id.* Second, Swift also failed to show that the properties' \$200,000 sale price reflected the properties' market value-in-use. Page 12, ¶ 33. The Board noted the sale of a property in a competitive and open market often is a good indicator of its actual market value; however, as shown by the purchase agreement, this sale was a combined cash contribution and charitable contribution. *Id.* Swift clearly believed the properties were worth more than \$200,000 as it intended to claim that additional value as a charitable contribution. *Id.*

The Board also lowered the weight given to Swift's estimate of value because Swift's witness was being paid on a contingency basis. Pages 13-14, ¶ 36. The Board explained, "[W]hile contingently paid expert witnesses are not absolutely prohibited from testifying in Indiana, [such a witness'] estimate of value is not as persuasive as a similar analysis made by a non-contingently paid licensed appraiser

19. *Strange v. Vermillion County Assessor*, Pet. No. 83-001-09-1-5-00106 (April 7, 2011). [Small Claims Docket Case]. The Stranges appealed the 2009 assessment of a .137 acre vacant lot. The couple admitted they bought the subject property because it was contiguous with four other lots that they owned.

Procedural Note: The Board noted it could not focus on the value of the subject property as a single, isolated parcel. Page 5, ¶ 15(e). It added, "The definition of true tax value looks to the utility that an owner, or similar user, receives from [sic] a property. Sometimes (as here) the value of an individual parcel cannot realistically be separated from a greater whole." *Id.*, n.2. Here, arguments devaluing the parcel because of the inability to build any structure on such a small parcel were not accurate given the Stranges owned four contiguous lots. *Id.*, ¶ 15(e).

20. *Baker v. County Assessor*, Pet. Nos. 18-012-06-1-5-00022 and 18-012-06-1-5-00023 (April 21, 2011). [Small Claims Docket Case]. This case revolved around the 2006 assessment of contaminated property. Page 2, ¶ 9(a). Despite an assessed value of \$54,300, the Bakers asked for an assessment of \$0 because they were unable to sell their property. *Id.*, ¶ 8. Even after an EPA cleanup, the property was uninsurable and thus prospective buyers were unable to obtain mortgage loans. *Id.*, ¶ 9(c)-(d).

The Board first responded that it was not impossible to sell the property. Page 6, ¶ 15(d). The inability to obtain liability insurance for a mortgage loan did not exclude cash buyers as prospective purchasers. *Id.*

Next, the Board added that a property's true tax value is measured by its market value-in-use, not simply by its market value. *Id.*, ¶ 15(e). And the property had some use value – Ms. Baker lived there and had sought a mortgage loan to improve the property. *Id.* Thus, the subject property's market value-in-use was something more than zero. *Id.*

The Board also noted that, although the property's market value-in-use may have been less than \$54,300, the Bakers did not offer any evidence from which the Board could determine how much less. *Id.*, ¶ 15(f). Sympathizing with the Bakers' plight, the Board suggested ways the Bakers could have shown the property's market value-in-use. *Id.*, ¶ 15(g). For example, the Bakers could have tried to sell the property in a reasonable manner – any inability might suggest the upper limit of the property's market value-in-use. *Id.* However, the Board emphasized it did not issue advisory opinions and would only analyze such evidence in the context of a case in which such evidence was presented. Page 7, ¶ 15(g).

21. *Best v. Harrison County Assessor*, Pet. No. 31-015-08-1-5-00001 (April 25, 2011). [Small Claims Docket Case]. Best, the owner of an Indiana winery, appealed the 2008 assessment of the subject property – land and a building with grape-processing and wine-tasting facilities. Page 2, ¶ 9. Best argued the building and the land underneath it were improperly classified as commercial rather than agricultural. *Id.* The Board first noted Best was mistaken regarding the classification of the entire 33-acre parcel – only the one-acre homesite was not classified as agricultural. Page 5, ¶ 13(e).

Second, Best mistakenly focused on the assessor's methodology rather than offering market value-in-use evidence. *Id.*, ¶ 13(f). The Board admitted that Indiana allowed the application of a unique methodology to assess agricultural *land* – under which a taxpayer could rebut a property's assessment by showing that his agricultural land was misclassified and what the land's assessment would have been had the rules for assessing agricultural land been properly applied. *Id.* Compare Ind. Code § 6-1.1-4-13 (setting out requirements for assessing agricultural land) with Ind. Code § 6-1.1-4-13.7 (setting out requirements for valuing residential, commercial, and industrial land). However, such statutes did not refer to agricultural *buildings* or other improvements. *Id.*

22. *HDS, LLC v. Marshall County Assessor*, Pet. Nos. 50-014-09-1-5-00031 and 50-014-09-1-5-00032 (April 25, 2011). On April 7, 2011, the Indiana Board issued its Final Determination against HDS, LLC. Page 2, ¶ 3. However, a week later, the Board granted a rehearing because of its error in determining that the property had been on the market for only a few weeks, rather than over a year, before purchase. *Id.* The Board determined HDS raised a prima facie case that its property was over-valued for the March 1, 2009 assessment year. Page 15, ¶ 38. However, the Marshall County Assessor ("Assessor") presented sufficient evidence to rebut and impeach HDS' case. *Id.* And the weight of the evidence supported the current assessed values. *Id.*

HDS established its prima facie case by using the change in the consumer price index ("CPI") in the Midwest area between January 2008 and November 2009 to relate its 2009 purchase price to the January 1, 2008 valuation date. Page 12, ¶ 31. Yet, the Board agreed with the Assessor's criticism of HDS' method – that the sale was not a good indicator of actual, open-market value because the seller had been compelled to sell due to financial difficulties and property tax delinquency. Page 14, ¶ 36. In fact, the seller had lowered the price 20 percent in the two weeks prior to HDS' purchase. *Id.* Furthermore, HDS' attempt to sell the whole property (the two parcels under appeal and a third parcel) for \$1,600,000 – less than a month after purchasing the lots for \$700,000 – suggested it recognized that the purchase price did not reflect the property's market value. *Id.*

The Board found the Assessor's use of five comparable lakefront sales in the neighborhood to be sufficient, in fact, more credible evidence of the subject properties' market value-in-use. Pages 14-15, ¶ 37. It explained, "Land within a neighborhood is presumed to be comparable, both in distinguishing characteristics and market value." Page 13, ¶ 34. Also, the November 2009 purchase price of \$700,000 was less than half of the lowest front foot sale price of the comparable properties. Page 14, ¶ 36. And HDS itself asked for \$1,600,000 for the whole property in December 2009 – a price consistent with the \$1,591,000 total assessment. *Id.* Page 4, ¶ 11.

Procedural Note: The Indiana Board noted HDS had attached additional evidence in his Request for Rehearing. Page 15, ¶ 38. Although the Board found such evidence would have clarified inconsistent testimony regarding HDS' purchase, it did not consider the new evidence and declined to reweigh the evidence presented at hearing. *Id.* Posthearing evidence will be accepted only if requested by the administrative law judge ("ALJ") or the Board. *Id.* The Board stressed, "Ultimately . . . it is the Petitioner's burden to present his case." *Id.*

23. *Evansville Chrysler, Kia, Mazda, Volvo v. Vanderburgh County Assessor*, Pet. No. 82-027-05-1-7-14967 (May 4, 2011). For 2005, the PTABOA determined the assessed value of Evansville Chrysler's personal property (car inventory) to be \$3,129,780 while the dealership requested an assessed value of \$2,331,860. Page 4, ¶¶ 12-13. To achieve this lower value, the dealership adjusted its 2005 personal property tax return to remove the value of "intangibles," such as warranties and brand value, from new cars in inventory. The Indiana Board found such adjustments failed to "substantially comply" with Indiana law and therefore the Assessor's changes to the tax returns were timely under Indiana Code § 6-1.1-16-1. Page 13, ¶ 35. The Board also addressed the issue whether the intangible aspects of personal property were meant to be treated differently for the purpose of assessment under 50 IAC 4.2-1-1(h).

Indiana Code § 6-1.1-16-1 provides deadlines by which a township or county assessing official or county assessor or PTABOA may make a change in a property's assessed value. Pages 9-10, ¶ 29. Because the Knight Township Assessor missed this statutory deadline, the dealership argued that its self-assessed values should stand as reported.

Page 6, ¶ 19. However, the Board noted two exceptions to Indiana Code § 6-1.1-16-1. *Id.* That section does not apply "if the taxpayer: (1) fails to file a personal property return which substantially complies with this article and the regulations of the department of local government finance; or (2) files a fraudulent personal property return with the intent to evade the payment of property taxes." *See* Ind. Code § 6-1.1-16-1(d). *Id.*

The Board held the dealership tripped the first exception by reporting reduced values for personal property on its inventory schedule as if the reported values were the actual book values of its vehicles. Pages 12-13, ¶ 34. There was nothing on the face of the dealership's tax return to notify the assessor of "this novel claim" – that adjustments had been made to remove the value or intangible property or for how much. Pages 12-13, ¶¶ 33, 35. The only notice the dealership provided was a single line on a Form 106 that stated, "Per 50 IAC 4.2 and other relevant statutes and regulations, inventory values (Line 4 – Stock in trade) have been adjusted to reflect tangible values as required." Page 11, ¶ 32. Furthermore, the dealership had failed to fill in a box on Form 106 with the "total adjustment claimed by taxpayer." *Id.*

After finding the Assessor's changes to the tax returns were timely, the Board addressed whether the intangible aspects of personal property were meant to be treated differently for the purpose of assessment under 50 IAC 4.2-1-1(h). Pages 13-14, ¶ 37. This provision defines personal property to include billboards, motor vehicles, airplanes, and *all other tangible property* held for sale in the ordinary course of a trade or business, etc. The dealership interpreted this language to mean the "intangible parts" of a motor vehicle – namely, the value of the brand and warranty – were non-assessable and thus non-taxable. *Id.*

The Board held to the extent brand value and warranty value of new car inventory may be intangible, "they [were] so intertwined with the product itself as to be assessable." Page 15, ¶ 41. The dealership pointed to no comparable Indiana law. Page 14, ¶ 37. Nor could the Board find one. *Id.* In fact, the Board agreed with the Assessor that "virtually all products that are sold by retailers include a brand name and some form of warranty." Page 16, ¶ 42. To assume that a motor vehicle could be broken into tangible and intangible parts was "too far of a reach for the Board to take absent clear legislative direction." *Id.*

The Board found in favor of the Assessor. Page 17, ¶ 44.

24. *Haynes International, Inc. v. Howard County Assessor*, Pet. No. 34-002-06-1-3-00500 (May 9, 2011). Haynes International failed to raise a prima facie case that the subject property was over-assessed for the March 1, 2006 assessment year. Page 13, ¶ 30. Haynes contended the Assessor failed to cure physical and functional depreciation or apply a factor for economic obsolescence (underutilization of facility) in her calculations and incorrectly trended the calculations from 1999 to 2006. Page 5, ¶ 17. In contrast, Haynes claimed to have calculated its assessment based on procedures outlined in the Guidelines. Page 6, ¶17(C).

To value property improvements, the Indiana Board found Haynes's witness merely recalculated the mass appraisal version of the cost approach set out in the Guidelines using an alternative trending method (based on Marshall & Swift Cost Index versus sales data) and applying additional obsolescence – rather than showing through the use of market-based evidence that the assessed value did not accurately reflect the property's market value-in-use. Page 10, ¶ 23. Simply disputing the trending method or presenting an alternative was insufficient – a petitioner *must show an error* in the Assessor's trending. Pages 10-11, ¶ 23-24. And Haynes did not. *Id.* The Board noted Haynes could have submitted evidence that the county calculated the trending factor incorrectly or relied on too few sales to make a valid trending conclusion. Page 11, ¶ 24. But Haynes did not. *Id.*

Because Haynes' calculation of depreciation was related to its alternative trending calculation, the Board similarly held the company failed to sufficiently show the Assessor's depreciation calculation was in error. *Id.*

The Board also criticized Haynes' calculation of obsolescence. Page 11, ¶ 25. According to the Guidelines, external obsolescence is calculated by dividing the 1998 utilization rate less the long-term utilization rate by the long term utilization rate. *Id.* However, Haynes' witness failed to use the most specific SIC code that could be determined and used 2004 data rather than the 1998 data specified in the Guidelines. *Id.* See GUIDELINES, App. F, p. 20. The Board stressed, "[I]t was the Petitioner's burden to show that the formula was applied properly." *Id.*

Finally, the Board criticized that Haynes alleged to follow the cost approach set out in the Guidelines – yet made no attempt to complete the final step: valuing the land upon which the improvements sit. Page 12, ¶ 27. Here, Haynes' witness merely added his revised improvement value to the assessed value of the land determined by the assessor. And he failed to show that this was a "generally accepted appraisal practice." *Id.*

The Board finished its opinion by noting Hayne's witness' analysis lost credibility because he was being compensated on a contingency basis. Pages 13-14, ¶ 28. Although it was generally inappropriate to pay an expert witness a contingency fee, the contingent nature went to the weight, not the admissibility, of the expert's testimony. *Id.*

Procedural Note: Under 52 IAC 2-7-1(b), a party to an appeal must provide (1) copies of documentary evidence and summaries of statements of testimonial evidence at least five business days before the hearing and (2) a list of witnesses and exhibits to be introduced at the hearing at least fifteen business days before the hearing. Page 3, n.2. The Board admitted into evidence, over Haynes' objection, exhibits which were assessment regulations subject to judicial notice and an exhibit from Haynes' own website. *Id.*

Procedural Note: Haynes also argued the Assessor improperly introduced evidence relating to the taxpayer's profitability at the PTABOA hearing. Page 7, n.7. However, the Assessor raised no such point at the hearing before the Board. As Board proceedings

are *de novo*, the Board described such evidence, presented at the PTABOA hearing but not to the Board, as "irrelevant." *Id.*

25. *Jacoby v. Allen County Assessor*, Pet. No. 02-072-08-1-5-01539 (May 17, 2011). [Small Claims Docket Case]. The Jacobys appealed the March 1, 2008 assessment of their home. The PTABOA determined a total assessed value of \$241,400 while the Jacobys requested a value of \$215,900.

The Indiana Board held the Jacobys failed to make a prima facie case for equalizing the subject property's assessment with the assessments of the Assessor's comparable properties. (Each comparable was assessed for less than its sales price.) Page 8, ¶ 16(f). The Board began by noting the Indiana Tax Court permitted the comparison of assessed values of properties within an assessing jurisdiction with objectively verifiable data, such as sales prices or market value-in-use appraisals, as "*one approach*" a taxpayer could adopt in attempting to prove an actionable lack of uniformity and equality. Pages 7-8, ¶ 16(e) (emphasis original). Such an analysis had to "conform to professionally acceptable standards and be based on statistically reliable samples." *Id.* Here, Mr. Jacoby only developed the sale-price-to-assessment ratios for three properties from St. Joseph Township – an insufficiently reliable sample "from which to infer anything about the common level of assessment in St. Joseph Township or any other area." *Id.*

However, the Board held the Jacobys made a prima facie case for reducing the subject property's assessment to \$232,000 – the price they paid for their home in August 2007, less than eight months after the January 1, 2007 valuation date that applied to 2008 assessments. Page 8, ¶ 16(h). In fact, August 2007 fell within the required two-year window for 2008 ratio studies. *Id.* See 50 IAC 21-3-3(a) (directing assessing officials to use sales from the two calendar years preceding the assessment date – in this case: March 1, 2006 through March 1, 2008). *Id.* The Jacobys' August 2007 purchase of the subject property therefore "bore at least some inherent relationship to the subject property's true tax value for the 2008 assessment." *Id.* Based on that purchase price, the Jacobys made a prima facie case for reducing the subject property's assessment to \$232,000. *Id.*

Next, the Board determined the Assessor failed to rebut the Jacobys' case. *Id.* Although the Assessor did list several relevant characteristics of the three sold properties and the subject property (location, number of bedrooms, number of bathrooms, amount of finished living area, and the presence of an attached garage), she failed to explain *how* any relevant differences affected the properties' relative market values-in-use, other than to account for size differences by using price-per-square-foot as her unit of comparison. *Id.*, ¶ 16(j).

Procedural Note: The Jacobys' motion for a directed finding – granting relief requested in their Form 131 petition because the PTABOA issued its determination past the statutory deadline – failed. Page 6, ¶ 15. The Board denied the Jacobys' request, finding that the Jacobys were mistaken about the appropriate remedy. *Id.* Although Indiana Code § 6-1.1-15-1(n) required a PTABOA to give written notice of its determination no later than 120 days after it held a hearing on a taxpayer's notice of review, the Board

noted the statute does not automatically entitle a taxpayer to have his assessment reduced. *Id.* Rather, the statute allows the taxpayer to either wait for the PTABOA to issue its determination or to bypass the PTABOA and file a petition for review with the Board. *Id.* See Ind. Code § 6-1.1-15-1(o). Here, the Jacobys chose to wait. *Id.*

26. *Brown v. Knox County Assessor*, Pet. No. 42-022-08-1-4-00001 (May 18, 2011). The Browns appealed the 2008 assessments of their older retail building.

Procedural Note: Because the Browns opted out of small claims procedures, copies of documentary evidence were required to be provided to the other parties at least five business days before the hearing. 52 IAC 2-7-1(b)(1). Page 3, ¶ 10. The Board noted failure to comply could serve as grounds to exclude evidence. 52 IAC 2-7-1(f). *Id.*

The Board overruled the Assessor's objection to Exhibit 2 – an e-mail summarizing the testimony of Mr. Palmer, a witness unable to attend the hearing. *Id.*, ¶ 11. Counsel for the Browns did not dispute the failure to provide a copy, the obvious hearsay nature of the e-mail, or the fact that the document indicated it was from Vickie Palmer. *Id.* However, the Board overruled the Assessor's objection because the Assessor had relied on Exhibit 2 to support part of her own case. *Id.*

In contrast, the Board sustained the Assessor's objection to Exhibit 3 – a Form 115 for 2005. Pages 3-4, ¶ 12. The Browns' Counsel simply responded that such evidence was a public record – he offered no substantial reason for allowing the document in spite of the applicable provisions in 52 IAC 2-7-1. *Id.* For example, Counsel did not offer to explain why such evidence might be relevant or probative with regard to the 2008 assessment. *Id.*

Finally, the Board sustained the Browns' objection to the Assessor's Exhibits 5, 6, and 7 – market data pages with MLS information. Page 4, ¶ 13. The Assessor argued the Browns must have had the information because an e-mail from their appraiser indicated he had the data for the Assessor's three comparables. *Id.* However, the Board agreed with the Browns that the e-mail only supported the conclusion that the appraiser had the property addresses for the Respondent's comparable properties. *Id.* As the Assessor offered no substantial reason for allowing the documents in spite of the applicable provisions in 52 IAC 2-7-1, the Board sustained the Browns' objection. *Id.*

27. *SBYC, Inc. v. Steuben County Assessor*, Pet. No. 76-011-07-1-5-00135, et al. (June 1, 2011). [Small Claims Docket]. SBYC owned two off-water parcels located near Lake James in Angola, Indiana. Page 1, ¶ 5. The parcels were roughly the same size, but their assessments differed significantly, and nearly doubled between 2006 and 2007. Page 2, ¶ 10(a). Two neighboring properties were valued at a much lower rate than the subject parcels. Page 2, ¶ 10(d). SBYC argued that these facts showed that the assessments were arbitrary and thus could not stand. Page 2, ¶ 10(b).

The Assessor argued that the neighboring parcels were not comparable, because they were assessed as excess acreage instead of platted lots, like the SBYC parcels. Page 3, ¶

11(b). The Assessor used actual sales data to perform a sales-ratio study in computing the assessments, and used actual comparable market sales, all of which exceeded the value used to assess the SBYC parcels. Page 3, ¶ 11(d), (e).

Although SBYC's arguments were not clearly explained to the Board, the Board believed that SBYC relied upon a recently-repealed statute that put the burden of proof on the assessor when the assessed value of a property increases by more than 5%. Page 5, ¶ 15 (citing Ind. Code § 6-1.1-15-2(p) (repealed, see P.L. 172-2011)). Because that statute applied only at the PTABOA level, the Board found that SBYC had the burden of proof. *Id.*

To rebut the presumption that an assessment is correct, a taxpayer must rely upon appraisals, construction costs, sales information, or other information consistent with the Real Property Assessment Manual's definition of true tax value. Page 7, ¶ 18(b). SBYC, however, offered no such evidence. Page 7, ¶ 18(c). SBYC first argued that the near-doubling of the assessments showed an arbitrary assessment, but the question "is not whether the subject parcels' assessments increased at a greater rate than the market, but instead whether those increased assessments reflected the parcels' true tax value." Page 7, ¶ 18(d).

SBYC's second argument pointed to the neighboring parcels to demonstrate a lack of uniformity or equality, but because SBYC failed to meaningfully compare the parcels, it did not make a prima facie case. Page 7, ¶ 18(e), (f). "Unfortunately, there is little guidance on how a taxpayer can make an actionable lack-of-uniformity-and-equality claim" in Indiana, other than a ratio study, which SBYC did not provide. Page 8, ¶ 18(h). The Assessor's justification for the disparity in assessments was "troubling" to the Board, which found it difficult to see how platting alone could make "two lots totaling approximately .64 acres worth almost \$120,000 more than an adjacent one-acre lot." Page 8, ¶ 18(i). However, because SBYC did not make a prima facie case, the Assessor had no duty to offer probative evidence explaining the disparity. *Id.* The Board therefore found for the Assessor. Page 9, ¶ 19.

Procedural Note: SBYC objected to the admission of several property record cards, arguing that they were not offered at the PTABOA hearing. "While the parties to a small claims action agree to limit their *appeals* to issues that are substantially the same as those below, they do not necessarily agree to limit their *evidence* to what was offered at the PTABOA hearing." Page 5, n. 2 (emphasis added). The Board overruled SBYC's objection.

28. *Delphi Industrial Park, LLC v. Carroll County Assessor*, Pet. No. 08-007-09-1-3-00001 et al. (June 13, 2011). [Small Claims Docket]. Delphi Industrial Park, LLC ("Delphi") agreed to purchase 53 parcels from Gerber Delphi, LLC ("Gerber"), which were subject to environmental contamination. Pages 5-6, ¶ 11(a), (c). Originally the parties agreed to a price of \$1 million less remediation costs, but later Gerber sold the property to Delphi for \$0, and paid Delphi \$400,000. Page 6, ¶ 11(d). The property was subject to deed restrictions based on the contamination, and much of the building leaked. Page 7, ¶ 11(f),

(g). Because of the environmental conditions on the property, the dilapidated condition of the buildings, and the deed restrictions, Delphi argued its property had no value at the time of the assessment. Page 7, ¶ 11(h). The PTABOA decreased the assessed value to \$606,400. Page 7, ¶ 12(a).

The Assessor argued that the PTABOA erred in applying an obsolescence adjustment; therefore the value of the property was \$1,139,400. Page 7, ¶ 12(a). To support this claim, the Assessor argued that the sales disclosure showed a sales price of \$1 million. Page 7, ¶ 12(b). Further, appraisal standards stated that when valuing contaminated property, remediation costs should not be subtracted on a dollar-to-dollar basis because it overstates the decline in a property's value. Page 8, ¶ 12(c).

The Board sustained the decision of the PTABOA. Delphi was in the business of cleaning up environmental contamination, and thus had knowledge about the cost of the remedial work and its impact on the value of the property. Page 12, ¶ 15(g). Testimony showed that Delphi predicted remedial costs of \$340,000, so it made a profit on the remediation payment alone; thus, the purchase agreement did not represent the property's market value-in-use. *Id.* Further, Delphi agreed to take responsibility for Gerber's contamination liabilities, a transaction with a great deal of value. Page 13, ¶ 15(i). Thus, the property's purchase price was not probative of the property's value because it included a transfer of liability as part of the consideration. *Id.*

However, the Assessor also failed to present evidence to support its valuation. Page 14, ¶ 15(l). While contending that the PTABOA reduced the assessment based on no ascertainable standards, the Assessor presented no evidence that the values determined by the PTABOA did not represent the parcels' market value-in-use. *Id.* Applying the same standard to the Assessor as it did the taxpayer, the Board refused to change the assessment absent a showing that the value sought by the Assessor represents the market value-in-use better than that determined by the PTABOA. *Id.*

Procedural Note: The evidence showed that as of the assessment date, the owner of the 53 properties was listed as Gerber Delphi, LLC, rather than Delphi Industrial Park, LLC. The Assessor did not contest Delphi's standing to appeal the assessments, so the Board addressed the claims on the merits.

Procedural Note: For 22 parcels, the PTABOA's Notifications of Final Assessment Determination were issued after Delphi Industrial had filed its Form 131 petitions to the Board. However, the PTABOA held a hearing on all 53 parcels on July 29, 2010, and the Assessor did not raise any objection. The Board, therefore, ruled on all 53 petitions.

29. *Vern R. Grabbe v. Carroll County Assessor*, Pet. No. 08-002-09-1-1-00004 (June 21, 2011). [Small Claims Docket]. After "spirited" bidding, Grabbe purchased the subject hog farm at an auction, at which he paid \$357,000 for the land, buildings, and personal property. Pages 2-3, ¶ 11(a). The auction was nationally advertised, with 71 registered bidders. *Id.* The Assessor assessed the property at \$588,500. Page 2, ¶ 9. Grabbe challenged the assessment, arguing that his purchase price, after removing the value of

the separately assessed personal property, was a fair indicator of the market value of the property. Page 3, ¶ 11(b). Grabbe also performed several other calculations to show that the auction price was a fair valuation based on the income, cost, and comparable sales approaches to valuation. Pages 3-5, ¶ 11(d)-(f). In response, the Assessor argued that Grabbe purchased a smaller and older neighboring property for only \$7,000 less than the price he paid at auction for the subject property. Page 6, ¶ 12(a). Thus, the auction sale price did not represent a "market value" sale. Page 6, ¶ 12(b).

The Board found that the auction was well-advertised and well-attended, and that where "the property was advertised to the public for a reasonable amount of time and where there was open, competitive bidding, an auction price has some probative weight." Page 10, ¶ 15(d). Thus, Grabbe's purchase of the property at auction had probative weight sufficient to raise a prima facie case that his property was over-valued. *Id.* Further, although the assessment determined the value of the property as of January 1, 2008, the purchase of the property that occurred on September 11, 2008, provided evidence of the value on the assessment date. *Id.* After rejecting Grabbe's other calculations for failing to conform to accepted appraisal standards, the Board found the Assessor's argument lacking. Pages 17-18, ¶ 15(t), (v). The Assessor failed to provide its own probative evidence of the property's market value-in-use, and thus it failed to meet its burden. Page 18, ¶ 15(v). The Board accordingly reduced the assessed value of the property to \$325,824, based on the auction sales price. Page 19, ¶ 16.

Property Tax – Exemptions

1. *Otis R. Bowen Center for Human Services, Inc. v. Elkhart County Assessor*, Pet. No. 20-011-08-2-8-00001 (January 11, 2011). The Otis R. Bowen Center for Human Services, Inc. ("Bowen Center") successfully argued its property, although not used for its purposes and at times vacant, still qualified for the charitable-use exemption under Ind. Code § 6-1.1-10-16. The subject property – originally purchased for use as a community mental health center – had been recognized as an exempt charitable use in 2005, 2006, and 2007. Page 5, ¶ 15. However, upon the loss of State funding, the Bowen Center closed its operations in Elkhart County in early 2007. Page 5, ¶ 16. A few case managers continued using the offices until late 2007 or early 2008; the property was subsequently used for storage. *Id.*, ¶ 17. In May 2008, the Bowen Center found a tenant, a church, to help cover the mortgage payments for two years. Page 6, ¶ 18. After that lease period, in late 2010, the Y.W.C.A. began leasing the property to use for domestic violence offices. *Id.*

On its Application for Property Tax Exemption (Form 136), filed on or about April 30, 2008, the Owen Center stated the subject property was "not currently being used" for its exempt purpose. Page 2, ¶ 1. Based on this assertion, the PTABOA denied the charitable purpose exemption for 2008. Page 6, ¶ 20.

The Board found in favor of Bowen Center, holding the subject property, both real and personal, was 100 percent exempt. Page 10, ¶ 35. Although there had been a temporary period of transition and the property subsequently was closed for a few months, the property had never been put to any kind of non-exempt use. Page 9, ¶ 34. And even

though the assessment date, March 1, 2008, fell in the middle of the transition period, the predominant use test under Ind. Code § 6-1.1-10-36.3(c) resulted in 100 percent exemption for the year leading up to March 1, 2008. *Id.* The Board explained, "The predominant use test . . . compares the time property is used for an exempt purpose with the total amount of time it is used during the year that ends on the assessment date. *It does not consider periods of non-use one way or the other.*" *Id.* (emphasis original).

2. *Shipshewana Air Associates, Inc. v. LaGrange County Assessor*, Pet. No. 44-014-09-2-8-00001 (January 13, 2011). Shipshewana Air Associates ("Air Associates"), a not-for-profit entity exempt from federal income taxation, claimed an exemption under Ind. Code § 6-1.1-10-16 for a tract of vacant land used as an airport. Page 2, ¶ 1. The Indiana Board determined Air Associates failed to meet its burden of proof and thus the subject property was 100 percent taxable for 2009. Page 6, ¶ 17.

The Board noted Indiana Code § 6-1.1-10-16 exempts *buildings* from taxation if those buildings are owned, occupied, and predominately used for educational, literary, scientific, religious, or charitable purposes. Page 4, ¶ 11. *See* Ind. Code § 6-1.1-10-16(a); Ind. Code § 6-1.1-10-36.3. However, *tracts of land* are exempt only if:

- An exempt building under Indiana Code § 6-1.1-10-1(a) or (b) is or will be situated on the land or a parking lot that serves such a building is situated on the land, or
- The land is owned by a nonprofit entity established for the purpose of retaining and preserving land and water for their natural characteristics, or
- The land is acquired to erect single-family residences that are to be given away or sold in a charitable manner to low-income individuals. *Id.* *See* I.C. § 6-1.1-10-16

The Board determined Air Associates failed to meet its burden of proof under Indiana Code § 6-1.1-10-16 because Air Associates failed to show the subject property was either associated with an exempt building or used for one of the limited purposes justifying an exemption for vacant land. Page 5, ¶ 14. Here, the undisputed evidence showed that the land was vacant. *Id.* at 13. On its exemption application, Air Associates described the subject property as unimproved. Although Air Associates offered copies of photographs that depict buildings close to the property, including one that appeared to house an airplane and bore the name "Wolfe Field," it offered no other evidence about who owned these buildings or what they were used for, much less that the buildings were exempt. *Id.*

Since Air Associates failed to meet the above minimum requirements, the Indiana Board did not reach the question of whether free public *use* of the vacant land as an airport constituted a charitable or scientific purpose. *Id.*

Although Air Associates' witness and counsel spoke about what they viewed as the public nature of the subject property's use, Air Associates did not claim the airport exemption under Indiana Code § 6-1.1-10-15 either on its original application or on the Form 131 petition that it filed with Board. The Board therefore did not address whether the subject property qualified for the exemption.

Procedural Note: The Indiana Board reminded the attorney for Air Associates, who did sign the Form 131 petition, to file a notice of appearance in future proceedings. *See* 52 IAC 2-3-2(c).

3. *GO, Inc. v. Spencer County Assessor*, Pet. No. 74-013-09-2-8-00001 (January 20, 2011). Go, Inc., a not-for-profit corporation organized to educate and research innovative activities for the benefit of rural and urban agriculture, economic development, and the environment, successfully appealed denial of the 2009 exemption for its property, which consisted of two buildings situated on 40 acres of land. Page 6, ¶ 18. The PTABOA had previously granted the property for exemption but based its denial on what it perceived as the more-recent lack of activity at the subject property. *Id.*, ¶ 16.

The Indiana Board first explained the application of Indiana Code § 6-1.1-10-16(a) to the subject property. This Section, when read together with Indiana Code §§ 6-1.1-10-36.3, exempts all or part of a building that is owned, occupied, and predominately used for educational, literary, scientific, religious, or charitable purposes. Pages 4-5, ¶ 13. *See* I.C. § 6-1.1-10-16(a); I.C. § 6-1.1-10-36.3(c). The Board stressed the provision of some public benefit as a condition precedent to an exempt status. Page 5, ¶ 14. For example, an entity that qualified for the educational-purposes exemption would provide education that was the "substantial equivalent" of instruction offered by Indiana's tax-supported institutions. *Id.*

After noting GO, Inc.'s bylaws stated it existed to provide a public benefit, the Board held the company exempt based on its educational, scientific, and charitable aims. Although the activities at the subject property may not have been the "substantial equivalent" of instruction provided in Indiana's public schools, many of those activities had an educational component. *Id.*, ¶ 15. Similarly, GO, Inc.'s field trials and experiments were scientific. *Id.* And all of GO, Inc.'s activities were charitable, i.e. designed to relieve human want and differed from the ordinary activities of man. *Id.*

The Board then addressed the lack of use of the subject property. The property allegedly looked abandoned with padlocked gates, an overgrown and weedy lawn, and deteriorated buildings. Page 4, ¶¶ 10-11. In response, the Board noted that the predominant-use test compared the time that a property was occupied or used for an exempt purpose to the total time that the property was occupied or used during the year leading up to the assessment date. Page 6, ¶ 18. *See* I.C. § 6-1.1-10-36.3(c). "Non-exempt uses matter; periods of disuse do not count either way." *Id.* (emphasis added). The Board also inferred that GO, Inc.'s various activities *throughout* 2009 were consistent with how it used the subject property during *the year leading up to* the March 1, 2009 assessment date. *Id.*

4. *SPD Realty, LLC v. Hamilton County Assessor*, Pet. No. 29-006-09-2-8-00002 (March 11, 2011). In this case, the Indiana Board considered whether, under Indiana Code § 6-1.1-10-16(a), a for-profit entity, SPD Realty, could claim a 2009 charitable exemption for property leased to a non-profit, New Life Generation, Inc. ("New Life")

and to Medigraft, LLC ("Medigraft"). Three members of New Life and Medigraft formed SPD Realty for the sole purpose of acquiring the subject property for use as a skin and tissue bank. Page 7, ¶ 22. New Life, an Indiana Non-Profit Corporation, operated the building as a tissue bank while Medigraft, LLC assisted New Life with its bone marrow recovery operations. Page 8, ¶ 23.

The Board held the weight of the evidence supported an exemption for SPD Realty's real estate and personal property. Page 17, ¶ 45. Although Indiana Code § 6-1.1-10-16(a) stated that "[a]ll or part of a building is exempt from property taxation if it is *owned, occupied, and used* by a person for educational, literary, scientific, religious, or charitable purposes," the statute did not require a single entity to achieve a unity of ownership, occupancy, and use. Pages 14-15, ¶ 37, 39. *See* Ind. Code § 6-1.1-10-16(a). Rather, the Board explained, "these words are used to ensure that the particular arrangement involved is not driven by a profit motive." Page 15, ¶ 39. As the parties did not dispute that New Life or Medigraft's use or operation was for an exempt purpose, the Board focused on the question whether SPD Realty's ownership was also for an exempt purpose. *Id.*, ¶ 40.

To decide this question, the Board discussed and distinguished the Indiana Supreme Court's recent decision in *Hamilton County Property Tax Assessment Board of Appeals v. Oaken Bucket Partners, LLC*, 938 N.E.2d 654 (Ind. 2010). *Id.*, ¶ 41. In *Oaken Bucket*, the Supreme Court determined that a for-profit leasing company renting space to a not-for-profit church did not own the property for an exempt purpose even if it leased the space for below-market rent. *Id.* However, the Board also noted the "owned, occupied, and predominately used for an exempt purpose" evaluation was a fact sensitive inquiry. Page 16, ¶ 42. The Board then distinguished *Oaken Bucket*. SPD Realty was formed by three members of the non-profit organizations for a sole exempt purpose while Oaken Bucket lacked a relationship with the lessee church. *Id.*, ¶ 43. Second, SPD Realty's only property was the property at issue while Oaken Bucket was a commercial leasing company. *Id.* Third, although SPD Realty charged New Life "above market" rent, the amount of the rent was comparable to SPD Realty's mortgage payments and carrying cost. *Id.* SPD Realty made no profit on the building; in fact, the owners of SPD Realty paid the real estate taxes contrary to the lease provisions when New Life did not have the funds to do so. *Id.* Finally, SPD Realty redeveloped the property specifically for use as a tissue bank, and the lease agreement limited the property's use to such purpose. Pages 16-17, ¶ 44.

In finding a 100 percent exempt status for SPD Realty, the Board noted "The language of Indiana Code § 6-1.1-10-16 does not differentiate between entities that are not-for-profit and those that are for-profit." Pages 17, ¶ 45 (citing *College Corner, L.P. v. Department of Local Government Finance*, 840 N.E.2d 905, 911 (Ind. Tax Ct. 2006)).

The Board added that this decision was consistent with its holding in *Avon Real Estate, LLC v. Hendricks County Property Tax Assessment Board of Appeals*, Indiana Board of Tax Review, Pet. No. 32-022-07-2-8-00001 (January 6, 2009). In that case, eight members of a congregation formed Avon Real Estate, LLC, specifically to purchase a property for their temple to hold religious services. The Petitioner did not own or lease

any other property. Thus, the Board found the property to be exempt despite the fact that the Petitioner was organized as a "for-profit" entity. Page 17, n.8.

5. *Imaging Center of North Central Indiana, Inc. v. Howard County Assessor*, Pet. No. 34-002-08-2-8-00002 (May 16, 2011). In this case, the Imaging Center argued its real and personal property were 100 percent exempt for the 2008 assessment year under Indiana Code § 6-1.1-10-4 because it was a wholly-owned subsidiary of the county hospital, which was a political subdivision of the State of Indiana. Page 6, ¶ 19. The Imaging Center raised a prima facie case that the subject property was owned, used, and occupied for an exempt purpose. Page 15, ¶ 42. Furthermore, the Assessor failed to provide a rebuttal. *Id.*

Under Indiana Code § 6-1.1-10-4, property owned by a political subdivision is exempt from taxation, except as otherwise provided by law. Page 11, ¶ 33. In its decision, the Board relied upon *Bonney v. Indiana Finance Authority*, a case in which the Indiana Supreme Court analyzed whether the private lessee of the Indiana Toll Road was entitled to a property tax exemption. Pages 12-13, ¶ 35 (citing 849 N.E.2d 473, 487 (Ind. 2006)). In *Bonney*, the Supreme Court acknowledged that public ownership was "ordinarily sufficient for exemption" but did not agree it was necessary. *Id.* (quoting *Bonney*, 849 N.E.2d at 488). The private lessee was entitled to the exemption because the toll road retained its municipal purpose. *Id.* (citing *Bonney*, 849 N.E.2d at 487). To find otherwise would subject the State to local property taxes – inconsistent with the object of Article X to protect and enhance public resources. *Id.*

The Board ruled in favor of the Imaging Center. Page 15, ¶ 42. The fact that the county hospital owned and funded the Imaging Center was undisputed. Pages 13-14, ¶ 38. Rather, the Assessor merely argued that the Imaging Center was a separate corporation from the hospital and thus not a municipal corporation. *Id.* The Board found, while the separate legal status of the Imaging Center was significant, the property must still be exempt because it was used for a "municipal purpose" and to hold otherwise would result in the situation of the county taxing the county. *Id.*

6. *National Federation of Music Clubs v. Johnson County Assessor*, Pet. No. 41-041-09-2-8-00008 (June 1, 2011). The National Federation of Music Clubs ("NFMC") was founded to enhance music education in the community. Page 7, ¶ 23. The NFMC conducts festivals, hosts competitions, and awards prizes and scholarships to young musicians. *Id.* From its property in Greenwood, the subject of the appeal, the NFMC maintained its website, stored its bylaws and regulations, and mailed brochures and membership information. Page 8, ¶ 27. The property also included a recital hall that is available for minimal charge to its members. Page 9, ¶ 28.

The Assessor argued that the NFMC had not shown that it engaged in charitable activities at the property. Page 10, ¶ 31. The property was used only for record keeping and administrative purposes. *Id.* Further, all of NFMC's charitable activities took place outside of Indiana. Page 14, ¶ 42. Thus, the Assessor argued the property was 100% taxable. Page 4, ¶ 11.

The Board disagreed with the Assessor. Because the NFMC was devoted to promoting the arts and it used its office to further that charitable purpose, the Board found that the property was owned and used for an exempt purpose. Pages 13-14, ¶ 41. The record keeping and information dissemination performed at the NFMC property were reasonably necessary to maintain the operation of the organization's charitable purpose. Page 15, ¶ 43. Further, the Board was "not aware of any requirement that an organization's 'charity' must be directed specifically to the residents of [Indiana]." Page 14, ¶ 42. Thus, the NFMC established a prima facie case that its property qualified for a charitable exemption, and the Assessor failed to rebut that evidence. Page 15, ¶ 44. Accordingly, the Board found the property 100% exempt. *Id.*

7. *Women of Color, Inc. v. Allen County Assessor*, Pet. No. 02-074-08-2-8-00002 et al. (June 29, 2011). Women of Color, an entity founded to help female veterans, owned 12 parcels, ten of which were vacant lots, one of which was a commercial building, and one of which was a residential building. Page 4, ¶ 7. Some of the parcels were deeded to the taxpayer by the city, and some of the parcels were purchased for \$100 each. Page 6, ¶ 19(B). All but one of the properties were acquired in 2006; the commercial building was acquired in 2003. *Id.* The taxpayer intended to build low-income housing on some of the vacant parcels, and intended to use the buildings as employment centers and a health food store. *Id.* The health food store had been under construction for five years, and the taxpayer had contracted to purchase several prebuilt homes for the vacant parcels. Pages 7-8, ¶ 19(E).

The Assessor argued that the properties were not owned, used, and occupied for charitable purposes, as required by statute. Page 9, ¶ 20. The Assessor argued that a tract of land may be exempt for charitable purposes only for four years, after which time the owner must demonstrate "substantial progress and active pursuit" towards the completion of the construction. Page 9, ¶ 21(A) (citing Ind. Code § 6-1.1-10-16(a)). Because Women of Color had made little to no progress toward using the properties for an exempt purpose, the exemption should not apply. Page 10, ¶ 21(B).

The Board agreed that the statute requires substantial progress within four years of the acquisition. Page 11, ¶ 22. The Board also agreed that there was little evidence that Women of Color had any ability to follow through with its ambitious plans. Page 13, ¶ 26. "Intent to use the property for an exempt purpose must be more than a mere dream." *Id.* (citing *Trinity Episcopal Church v. State Board of Tax Commissioners*, 694 N.E.2d 816, 819 (Ind. Tax Ct. 1998)). However, the taxpayer had owned the properties for fewer than four years as of the 2008 assessment date. Page 14, ¶ 27. The sole property acquired more than four years before the assessment date was under construction, and while there was no evidence as to how much of the work had been completed as of the assessment date, the Board was "reluctant to frustrate [Women of Color's] charitable purpose" by declaring that its work had not been performed in a timely manner. Page 16, ¶ 31. "When viewed as of the date of the hearing, the [Assessor's] arguments are well-founded – at least for several of the Petitioner's parcels." Page 16, ¶ 33. However, "the evidence must be viewed as of the assessment date at issue and, as of that date, the

Petitioner's time for showing substantial progress had not yet run." *Id.* The properties were thus 100% exempt for 2008. Page 17, ¶ 35.

Property Tax – Jurisdiction

1. *Summers v. Porter County Assessor*, Pet. No. 64-003-07-1-5-00005 (March 11, 2011). [Small Claims Docket Case]. On December 6, 2010, the Board upheld an agreement on the subject property's March 1, 2007 assessed value reached at a preliminary informal meeting. Page 1. In this amended determination, the Board resolved a mathematical error in the parties' agreement by ordering a total assessed value of \$344,900 (sum of \$55,500 for the land plus \$289,400 for the improvements) rather than the \$346,900 reported by the Assessor. Page 9, ¶ 16.

The Board first explained why the assessment appeal was resolved at the local level via Form 134, Joint Report on Preliminary Informal Meeting. The Summers contended both parties agreed to an assessed value at the preliminary meeting, and thus the PTABOA's subsequent change was in error. Page 6, ¶ 15(a). The Assessor responded that the amount on the Form 134 was merely the hearing officer's "recommendation." *Id.* Although the Board noted the hearing officer had written "*This [the changed amount] is my Recommendation,*" it stressed the officer had also indicated the parties' agreement on the resolution of all issues, explained the changes, and signed the form. *Id.*, 15(b).

The real issue consisted of the retroactive application of Indiana Code § 6-1.1-15-1 (2009), the statute governing procedures for the review of property assessments by the PTABOA. Page 7, ¶ 15(c). Prior to July 1, 2008, agreements formed at preliminary informal meetings were merely joint recommendations which the PTABOA could adopt or reject in whole or in part. *Id.*, ¶ 15(d). However, effective July 1, 2008, the statute required the PTABOA to cancel hearings on the matter upon receipt of Form 134. *Id.*, ¶ 15(c). The Board noted the PTABOA may reserve the right to change the assessment under Indiana Code § 6-1.1-13-3; however, there was no evidence in this case that the PTABOA acted in its capacity as an "assessor" under Indiana Code §6-1.1-13-3 rather than as a review board under Indiana Code §6-1.1-15. *Id.*, n.5. *See* Ind. Code § 6-1.1-15-1(j)(3).

Noting the presumption that legislation applies prospectively, the Indiana Board added "applying newly enacted procedure to a case awaiting trial ... is not, strictly speaking, a retroactive application of the law" because the court has not yet "*done the affected thing*" when the new law is applied. Page 8, ¶ 15(f) (emphasis added) (quoting *Brown v. Amoco Oil Co.*, 793 F. Supp. 846, 851 (N.D. Ind. 1992)). In this case, Board concluded that the filing of the appeal in March of 2009 was "the affected thing" rather than the original assessment determination in March of 2007. *Id.* Therefore, the Board found that the existing statute, effective July 1, 2008, governed this appeal and held that the agreement reached at the informal hearing was binding on the parties and the PTABOA. *Id.*

Procedural Note: Mr. Summers raised a blanket objection to any document that was available at the time he requested information under the Access to Public Records Act. Page 4, n.2. The Board overruled Mr. Summers' objection, reminding him that a request

for information under the Act was neither part of an appeal proceeding nor governed by the Board's rules. *Id.* Furthermore, Mr. Summers had not taken advantage of other discovery options under the Board's procedural rules. *Id.* See 52 IAC 2-8-3. As the Summers had received copies of *requested* documents prior to their hearing as required by 52 IAC 2-7-1, the Board overruled their objection. *Id.*

2. *Cupples v. LaPorte County Assessor*, Pet. Nos. 46-022-04-1-5-00127 and 46-022-06-1-5-00368 (March 17, 2011). [Small Claims Docket Case]. For one of his arguments, Mr. Cupples contended it was unfair to double the property taxes (from 2004 to 2006) on a house that was not livable. Pages 7-8, ¶ 15(g). The Board responded that it lacked jurisdiction to address tax rates or tax bills. Rather, the Board only possessed the powers conferred by statute – such as addressing property assessments. *Id.* Mr. Cupples' argument regarding the subject property's taxes did nothing to show that the property's assessment was incorrect. *Id.*
3. *Kimmons v. Knox County Assessor*, Pet. No. 42-022-08-1-5-10001 (May 27, 2011). On November 17, 2009, Mr. Kimmons filed a Form 130 petition for the 2008 assessment year and attempted to file Form 133 petitions for 2006 and 2007 at the local level. Page 6, ¶ 20. The Form 133 petitions were not accepted because they were allegedly not timely filed. *Id.* The Form 130 was processed because it was allegedly timely. *Id.* After local officials failed to act on these petitions, Mr. Kimmons filed the Form 133 petitions along with the Form 131 petition to the Board. *Id.*

The Indiana Board held it had no authority to make any determination about the merits of the assessment or change anything for 2006 or 2007 without a county PTABOA determination. Page 11, ¶ 33. The Board emphasized, "Even if it [were] true that county officials should have acted on his Form 133 petitions, there is no authority for bypassing the county board." *Id.*

Procedural Note: The Indiana Board added that Mr. Kimmons' choice of a Form 133 petition was "a more fatal problem" with his claim. Page 12, ¶ 34. The Board explained, "The issues that can be addressed by a Form 133 are much more limited than those that can be addressed by a Form 131. Form 133 petitions are only for objective errors that can be corrected with exactness and precision. They are not for corrections that require subjective judgment." *Id.* See Ind. Code § 6-1.1-15-12. As Kimmons' evidence and arguments "relate[d] entirely to subjective determinations about the actual market value-in-use of the subject property," his choice of a Form 133 petition "could not possibly lead to legitimate corrections." *Id.*, ¶ 35.

4. *Morgan v. Vermillion County Assessor*, Pet. No. 83-003-08-1-5-00039 (April 7, 2011). Morgan claimed her property taxes increased "too much." Page 1. The Board responded it had statutory authority to determine (1) the assessed valuation of tangible property, (2) property tax deductions, and (3) property tax exemptions *but not* tax rates or tax bills. Page 4, ¶ 16. See Ind. Code § 6-1.5-4-1(a). Accordingly, the Morgan's claim about any increase or the amount of her tax bill was outside of the Board's jurisdiction. *Id.*

5. *Latta v. Lake County Assessor*, Pet. No. 45-026-06-1-5-00018 (April 15, 2011). [Small Claims Docket Case]. Latta complained he was not receiving the full homestead credit for his residential property. Page 3, ¶ 11(g). The Indiana Board emphasized again that, under Indiana Code § 6-1.5-4-1(a), it had statutory authority to determine (1) the assessed valuation of tangible property, (2) property tax deductions, and (3) property tax exemptions. Page 9, ¶ 15(1). Although this statute previously contained a fourth subdivision which included credits, it was amended in 2003 to omit the reference. *Id.* See Ind. Code § 6-1.5-4-1(a)(2002); P.L. 256-2003 § 31. Thus, the Board lacked jurisdiction over appeals – such as Latta's – claiming the right to a credit under Indiana law. *Id.*

Income Tax

1. Letter of Findings No. 02-20090673, Income Tax for the Years 2003 - 2005 (May, 2011).

Taxpayer was an out-of-state corporation doing business in Indiana. After an audit, the Department found the Taxpayer had not properly reported the receipts in its sales factor for the tax years in question. Taxpayer then requested its apportionment factors be calculated differently. Under this different apportionment, adjustments to the Taxpayer's original returns would allow Taxpayer to receive a refund of adjusted gross income tax without having filed amended returns/refund requests.

Taxpayer argued the Department incorrectly added sales to the numerator of its Indiana sales factor formula by including "retail sales" receipts. These adjustments were incorrect, because Taxpayer's involvement in the "retail sales" consisted of the provision of a service in which it had no interest in the products provided to insurance company customers. Additionally, Taxpayer argued the "retail sales" should only be included in the sales factor denominator since the services were performed outside of Indiana. Finally, Taxpayer argued these proposed adjustments were warranted based on language taken from two advisory letters that were written by a Department employee for a tax professional that is neither the Taxpayer's current representative nor an employee of the Taxpayer's representative's employer.

The Department found the advisory letters were not binding on it, because they did not disclose a specific taxpayer and were not published in the Indiana Register. As for the service provider contention, Taxpayer would need to be a mere conduit receiving reimbursements from the insurance company in the same amount that it pays to the retail stores for the goods provided to the insurance company customers. These receipts would not be included in the numerator or the denominator of the adjustments. Conversely, Taxpayer's arrangement with the insurance companies and retail stores resulted in a profit instead of a mere reimbursement. Since these transactions are an "income-producing factor" in Taxpayer's business, the IRS requires the Taxpayer to report these purchases as goods recorded as inventory of a taxpayer. *See* Treas. Reg. § 1.471-1. Since the receipts occurred from transfers of property in Indiana, these transactions are included in the sales factor numerator adjustment calculations as provided in 45 IAC 3.1-1-50.

2. Letter of Findings No. 02-20100620, Corporate Income Tax for the Years 2004, 2005, 2006, and 2007 (May, 2011).

Taxpayer's parent company (Parent) was in the business of designing and marketing clothing and clothing accessories. The Parent company filed taxes in Indiana until 2003. In 2004 and beyond, Taxpayer filed Indiana taxes instead of the Parent. Parent resells all of the clothing and accessories it acquires to Taxpayer. Taxpayer ships the clothing and accessories to distribution centers located in Kentucky and Oregon. Taxpayer then markets and resells the clothing and accessories to third-party retailers, including retailers in Indiana. Taxpayer filed amended Indiana income tax returns seeking a refund of income tax. In response, the Department performed an audit review. The Department denied the requested refund and assessed additional Indiana

income tax for the years in question. It also found there to be a sufficient nexus between the Taxpayer and Indiana.

Taxpayer argued the sales of its clothing and accessories to third-party retail customers should not have been included in the numerator of the sales factor when the third-party customers made arrangements to deliver and transport the merchandise to Indiana retail stores. The taxpayer relied on *Miller Brewing Co. v. Ind. Dept. of State Revenue*, 831 N.E.2d 859 (Ind. Tax Ct. 2005) (Miller I) and *Miller Brewing Co. v. Ind. Dept. of State Revenue*, 836 N.E.2d 498 (Ind. Tax Ct. 2005) (Miller II) to support its proposition. Contrary to *Miller I* and *Miller II*, the Department found that Ind. Code § 6-3-2-2(e)(1) mandated that Indiana should source out-of-state "customer-arranged transportation" sales to Indiana's sales factor as long as the product comes directly to Indiana. While the Department agreed that *Miller I* and *Miller II* were controlling law, it found the Taxpayer's reliance on the case law misplaced because its argument was contrary to the plain language of the statute. The Taxpayer was assessed additional taxes.

The Department objected to Taxpayer's method for the reporting of Indiana source income. Taxpayer's sales to third-party retailers accounted for approximately 99% of the gross receipts received by Parent and Taxpayer. But only 4% to 17% of the net profit was allocated to Taxpayer. The Department's audit observed that this "shift in income is principally due to the markup of product which [Parent] buy[s] from foreign manufacturers then resells exclusively to [Taxpayer] at an inflated price." In lieu of requiring a combined return, the Department addressed the Parent's "excess" mark up by allocating the same ratio of net profit to Taxpayer as was applicable company wide. Taxpayer failed to show why the Department's assessment was incorrect, and so the Department's assessment adjustments to better capture the Taxpayer's income were sustained. In denying the protest, the Department noted that Taxpayer's Transfer Pricing Studies, which Taxpayer relied to justify its pricing and cost structure, failed to support Taxpayer's financial structure "because the studies themselves explicitly indicate that they were intended only to address a specific set of federal income tax issues."

Taxpayer also argued the additional assessment was unwarranted because Taxpayer did not have nexus with Indiana. Taxpayer contended that sending employees ("Visual Merchandisers") to the retail stores to maintain "fixed environments (display racks, seasonal graphics)" that were owned by the customers and located in customers' stores was mere solicitation, protected by Public Law 86-272. The Department agreed that some of the Visual Merchandisers' activities were "mere solicitation." But those employees performed additional, not-protected tasks such as conducting sales clinics and training retail sales persons. Those activities, the Department reasoned, are at least one step beyond "mere solicitation."

3. Letter of Findings No. 02-20100665, Corporate Income Tax for the Years 2005 through 2007 (May, 2011). Taxpayer was an out-of-state manufacturer. It sold products to Indiana customers and had Indiana branch offices that provided repair and maintenance services for its products. Taxpayer filed federal consolidated returns that reported approximately \$563,000,000 in federal taxable income. However, three members of the

federal consolidated group filed separate Indiana returns reporting a total loss of approximately \$21,000,000. After the Department conducted an audit review, it required the Taxpayer to file a "combined return" because Taxpayer had used subsidiaries and intercompany transactions to shield it from tax apportionments in Indiana. The decision resulted in the assessment of additional Indiana income tax.

Taxpayer argued that the Department did not have statutory authority to require it to file a combined return. Under 45 IAC 3.1-1-62, Taxpayer believed requiring it to file a "combined return" was an out-of-the-ordinary, if not extreme, measure. The Department found that Ind. Code §§ 6-3-2-2(l) and (m) provide the authority for it to require that members of a "unitary group" ("businesses owned or controlled directly or indirectly by the same interests") file a combined return. The auditor notified the Taxpayer that the filed returns were distorted due to intercompany transactions and arrangements, and the auditor requested that the Taxpayer recommend a method to address the distortion. Taxpayer declined to do so. Ind. Code § 6-3-2-2(p) allows the auditor to require combined reporting "[when] the auditor is unable to fairly reflect the taxpayer's adjusted gross income for the taxable year through use of other powers granted to the department"

During the protest, the Taxpayer suggested an alternative: "[T]he Auditor may increase such income only to the extent that such payments made by [Taxpayer] and the subsidiaries exceed an arm's-length payment, not force [Taxpayer] to file a combined return." But this was too little, too late for the Department, which explained:

Taxpayer somewhat belatedly offers an alternative having an effect presumably midway between filing separate returns and filing a combined return which would in turn more accurately reflect the unitary group's Indiana source income. However an administrative hearing is not the appropriate forum in which to second-guess the auditor, to conduct a supplemental audit of Taxpayer's business records, or reexamine the complexities of Taxpayer's internal financial transactions. It is not unreasonable to point out that the audit specifically asked Taxpayer to offer such an alternative well into the course of the audit and Taxpayer declined to do so.

Taxpayer also argued the Department had no reason to question its filing because it relied on a transfer pricing study structure prepared by a major accounting firm. It also met federal income tax standards and was supported by substantial authority. However, the Department found that this had no bearing on whether the tax reporting accurately reflected the Taxpayer's Indiana source income. Taxpayer's unitary group reported federal taxable income in excess of one-half billion dollars while the Indiana consolidated group reported a loss of approximately 21 million dollars. The Department observed: "[I]t is indisputable that this disparity – and the perceived 'distortion' – would and did have an effect on the Indiana tax liability."

4. Letter of Findings No. 02-20100412, Corporate Income Tax for the Years 2007 through 2009 (April, 2011). Taxpayer was a manufacturer of kitchen cabinets and vanities for remodeling and new home construction markets. Taxpayer operated manufacturing facilities and builder service centers in several states, including Indiana. Taxpayer filed a separate Indiana income tax return for the years at issue. The Department added back to Taxpayer's Indiana income certain interest payments Taxpayer made to a subsidiary ("Sub"), which resulted in an assessment of additional income tax and interest. Taxpayer protested the assessment of additional tax and interest, because the tax deductions were allowed by a Kentucky agency.

The formation of Sub and the loan arrangement between Sub and Taxpayer were, in the Department's opinion, a formalistic compliance with a Kentucky Economic Development Finance Authority ("KEDFA") requirement that Taxpayer finance its project as a condition to eventually receiving KEDFA's tax credits without the substantive obligations present in typical third-party arm's length financing arrangements. "Said another way, while Taxpayer had a business purpose in entering into this arrangement, Taxpayer's loan from its Sub lacked the economic substance that typically accompany lender-borrower relationships." Thus, Taxpayer should have been assessed the additional income tax.

5. Letter of Findings No. 02-20100625, Corporate Income Tax for the Years 2007 through 2009 (April, 2011). Taxpayer was an out-of-state company in the business of selling, leasing, and financing computers and software. Taxpayer rented computer equipment to Indiana customers. Taxpayer also leased computers to out-of-state customers. The Department assessed additional corporate income tax based on the sales tax Taxpayer paid to Indiana. Taxpayer disagreed with that method, because for certain of its leases Taxpayer collected all the sales tax at the beginning of the lease term. Instead, Taxpayer offered an alternative method based upon the location and value of the equipment. The Department, however, believed that Taxpayer's methodology was open to similarly imprecise results. For example, Taxpayer may have leased a computer worth \$5,000 to an Indiana customer and a computer worth \$10,000 to an Ohio customer. Based on Taxpayer's method of apportioning the income from these two leases, twice as much income should have been apportioned to Ohio, because the Ohio computer was worth twice as much as the Indiana computer. But nothing established that Taxpayer received twice as much income from the Ohio customer compared to the Indiana customer. There was no direct correlation between the lease income that Taxpayer attributed to a computer to the value of that particular computer.
6. Letter of Findings No. 01-20100226, Individual Income Tax for the Years 2006 through 2008 (March, 2011). Taxpayer was a shareholder in an S corporation that owned an Indiana subsidiary ("Business"). The Business claimed an increase in research activities during the years at issue, which resulted in a research expense credit under Ind. Code § 6-3.1-4-1, built on a similar federal credit. However, the Department determined that a portion of Business' claimed research expenses were not permitted and recalculated the credit.

Taxpayer protested the disallowance of research expenses for wages related to new projects, either for a new client or a current client. Taxpayer identified eight categories of activities performed by its research and development employees that qualified for the credit. By statute, each category had to constitute "actual conduct of qualified research" under I.R.C. § 41 for those wages to meet the requirements for the credit.

The Department found that three of the categories did not qualify for the credit. Time spent with customers discussing the feasibility of new products fell within the ambit of "qualified research," but it was not the "actual conduct" of that research; thus, it did not qualify. Time spent brainstorming production processes, both with customers and without, also did not qualify as "actual conduct" of research because it was not similar to a scientist in a lab—the baseline for the federal credit.

The Department sustained two categories subject to further verification and audit. Time spent with customers discussing the results of experimental production runs could conceivably be qualified research expenses, so until an audit finds otherwise, the credit was allowed. Similarly, time spent designing the production process may be eligible, for example, by working on the actual design of the experimental processes, but not discussing the costs of the project. Thus, the credits for these activities were allowed, subject to further verification.

The remaining three activities were eligible for the Indiana research expense credit. Time spent drawing production layouts, machining new dies, and designing quality control plans all fit comfortably within the requirements of the statutes. The activities were part of the preparation for the experiments and were often part of the experiments themselves. Thus, the time spent on these activities constituted "qualified services" eligible for the credit.

Business also argued various purchases Business made from third parties qualified for research expense credits. In particular, Business asserted that a recent federal Tax Court case, *T.G. Missouri Corp. v. Comm'r*, 133 T.C. 278 (2009), stands for the proposition that Taxpayer's costs paid to Business' vendors for certain products later transferred to Business' customers are permitted for purposes of the research expense credit. The Department disagreed, because the items either constituted "cost of goods sold" or items that were subject to depreciation and therefore were not eligible for the research expense credit under I.R.C. § 41. Business did not affirmatively establish that any particular claimed "supplies" constituted qualified research expenses. But the Department agreed that Business established it may be eligible for credit based on the particular supplies considered in *T.G. Missouri*. Thus, the claimed credit based on expenses was sustained subject to further verification.

7. Letter of Findings No. 01-20100481, Individual Income Tax for the Years 2006 through 2008 (March, 2011). Taxpayer operated an auto repair business as a sole proprietorship, and also sold vehicles and used equipment. The Department determined that Taxpayer owed additional individual income tax and under-reported its federal taxable income. The Department calculated additional gross sales by adding the total "business deposits"

in the business checking account to the total cash that was received and not deposited to the total credit and debit card sales receipts and then subtracting the reported gross sales.

Taxpayer argued that its amended returns and additional explanation proffered after the Department requested additional information sufficiently refuted the information or the results reached by the Department. The Department disagreed, because the Taxpayer had the obligation to prepare a careful, methodical, and detailed factual presentation of the evidence sufficient to refute the conclusions contained within the Department's investigation report. Taxpayer did not meet its burden by presenting amended returns, without invoices, receipts, daily recaps, or other supporting documentation. Amended returns, without more, only served as conclusory statements. Taxpayer's protest based upon the general acceptance of the amended returns was denied.

Taxpayer also argued that the additional assessment was not warranted based on additional information provided:

- a. **Additional Business Net Income.** Taxpayer protested the imposition of adjusted gross income tax from the adjustments made to Taxpayer's "business net income." Taxpayer argued that certain of its cash deposits that were made into the business checking account were not receipts of the business. Taxpayer presented additional documentation that was not available at the time of audit, which was reviewed by the audit division during the protest process. The Department agreed that, during the tax year 2007, Taxpayer received two loans in the amount of \$7,300 and \$3,800. Taxpayer's protest was sustained to the extent that these two loans were included in the calculation of additional business income.
 - b. **Additional Rental Property Net Income.** Taxpayer made a general argument that the Department incorrectly increased the rental income. Taxpayer also asserted that the Department incorrectly disallowed rental property expenses that were correctly reported on its income tax returns. The Department disagreed, because the auditor may use an alternative calculation to calculate "rental property net income" when it feels the taxes were not properly calculated by the Taxpayer. Ind. Code § 6-8.1-5-1(b). Therefore, Taxpayer's general protest to the adjustments made for additional "rental property income" was denied. Taxpayer's protest was sustained to the extent that a supplemental audit adjusts the calculation of additional "rental property net income."
 - c. **Sale of Property.** Taxpayer protested the imposition of tax from the adjustments made to Taxpayer's gain on a sale of property in 2006. Taxpayer argued that the Department must take into account IRS Form 3115 ("Form 3115") to request a change in accounting method for its depreciation that will adjust the basis of the asset. But Taxpayer had not filed this form with the IRS.
8. Letter of Findings No. 02-20090706, Corporate Income Tax for the Years 2002 through 2004 (March, 2011). Taxpayer ("Parent") was a multinational company that manufactured and sold consumer goods. Through its multi-tier corporate structure,

Taxpayer wholly or partially owned, as well as directly or indirectly controlled, its multi-tier subsidiaries. Taxpayer and some of its subsidiaries/affiliates (collectively, "Taxpayers") either filed separate or consolidated Indiana corporate income tax returns based on their Indiana activities. After an audit, the Department proposed that Taxpayers file a combined adjusted gross income tax return to fairly reflect their income derived from sources within Indiana. The auditor believed the Taxpayers maintained a unitary relationship. A combined tax filing would eliminate Taxpayers' intercompany transactions, primarily among and within several groups that were designated as Groups A, O, and B.

Taxpayers first argued that "although the corporations were engaged in a unitary relationship, because they conducted their business at arm's length and there were legitimate business reasons for their actions, combined filings could not be required." Taxpayer maintained that the intercompany transactions, having business purpose and economic substance, were based on reasonable agreements with "arm's-length" prices that were established by several independent transfer pricing studies pursuant to I.R.C. § 482. Taxpayers further argued that the Department's audit erroneously compared other states' laws and used those combined filings as benchmarks to determine whether there was distortion.

The Department rejected the argument, reasoning that a business may structure its business how it pleases, but the taxes paid must reflect economic reality. Taxpayers' complex, multi-tiered structure and the concomitant flow of multi-layered intercompany payments and expense deductions resulted in a significant deflation of the income actually earned in Indiana. Furthermore, Taxpayers' documentation showed that the money flowed through various affiliate companies in different formats but, ultimately, the money returned to the controlled affiliate groups which initially incurred the expenses. Finally, Ind. Code § 6-3-2-2(l) and (m) permitted the Department to employ "any other method to effectuate an equitable allocation and apportionment of" Taxpayers' income in order to fairly reflect and report the income derived from sources within the state of Indiana. After looking at alternatives, the auditor determined that filing a combined tax return was the best solution to capture Taxpayer's income tax in Indiana.

Taxpayers also argued that the auditor, by using information from Taxpayers' federal consolidated returns, erroneously included various qualified foreign operating affiliate companies. The Department may not, under any circumstances, require that income, deductions, and credits attributable to the Taxpayer and another entity be reported in a combined income tax return for any taxable year if the other entity is a foreign corporation. Ind. Code 6-3-2-2(o)(1). The Department agreed it was likely that the auditor mistakenly included some foreign operating affiliate companies into the combined returns. Pending supplemental audit verification, the Department agreed to remove those qualified foreign operating companies.

Taxpayers also asserted that the Department's audit erroneously included an Insurance Company subsidiary. Taxpayers maintained that, pursuant to Ind. Code § 6-3-2-2(r), the Department cannot include the subsidiary's income into the combined returns. The

Department acknowledged the subsidiary had been a captive insurance company that provided insurance coverage concerning "Workers' Compensation and Employers' Liability." However, the subsidiary only provided insurance coverage to Taxpayer and its subsidiaries. The premium paid by Taxpayer was the subsidiary's sole premium income. While the subsidiary reported its premium income, it also had investment income. Taxpayers' documentation showed the subsidiary's investment income was approximately four times that of the insurance premium income during those years. Although the subsidiary was properly registered and licensed to conduct insurance business, it did not qualify as an insurance company because its primary source of income was investment income.

9. Letter of Findings No. 09-0945, Corporate Income Tax for the Years 2005 through 2007 (March, 2011). Taxpayer is a consolidated group of corporations doing business in Indiana and several other states. For the tax years in question, Taxpayer filed consolidated Indiana corporate income tax returns that included two of its subsidiaries ("Sub A" and "Sub B"). The auditor determined Taxpayer incorrectly classified its interest and dividend income from short-term investments of its excess cash as "nonbusiness income." This distorted actual taxable income for the state of Indiana. The audit reclassified the interest and dividend income categories as "business income."

For purposes of determining a taxpayer's adjusted gross income tax liability, business income during the tax years was apportioned between Indiana and other states using a three factor formula. Ind. Code § 6-3-2-2(b). In contrast, nonbusiness income was allocated to Indiana or to another state. Ind. Code § 6-3-2-2(g)-(k). The General Assembly provided two tests for defining business income – the 'transactional' and 'functional' tests." *May Dep't Store Co. v. Indiana Dep't of State Revenue*, 749 N.E.2d 651, 662 (Ind. Tax Ct. 2001). Under the transactional test, income is classified as business income when the income arises from transactions that occur in the regular course of a taxpayer's trade or business. Under the functional test, the income arising from the sale of an asset will be classified as business income if the acquisition, management, and disposition of the property generating income constitute an integral part of the taxpayer's regular trade or business operations.

The Department found Taxpayer's interest and dividend income was business income, since Taxpayer received the income from the short-term investments of "excess corporate cash." Under the "transactional" test, this type of income is properly classified as business income, because this income is derived from activities in which taxpayer regularly engages. It would be decidedly irregular for any business entity, having access to unused cash assets, to allow those assets to remain dormant and unexploited. Although the Taxpayer is not in the business of investing cash, the income from interest and dividends is business income that satisfies the transactional test. The interest and dividends also meet the functional test requirements, because cash is an essential component within Taxpayer's diverse but integrated business operation. Finally, the sale of a business generally qualifies as business income.

10. Letter of Findings No. 02-20100467, Indiana Corporate Income Tax for the Years 2006 through 2008 (March, 2011). Taxpayer was an Indiana corporation with multi-state operations. Taxpayer filed its returns reporting Indiana net operating loss ("NOL") deductions from NOLs carried forward from the 2001 - 2006 tax years. The Department's auditor found that Taxpayer had incorrectly computed its NOL deductions for the years in question.

Taxpayer argued that it may deduct from its Indiana adjusted gross income certain foreign source dividend income. Ind. Code § 6-3-2-12. Taxpayer maintained that the deduction found in Ind. Code § 6-3-2-12 is "broadly worded" and "stands upon its own" in a way that requires its inclusion in the NOL deduction as well. But the Indiana NOL deduction begins with federal adjusted gross income and is modified according to the Indiana statute. The foreign source dividend deduction is not one of the modifications allowed by Ind. Code § 6-3-2-2.6 in arriving at the Indiana NOL deduction. Therefore, the Department concluded that Taxpayer's inclusion of the foreign source dividend deduction in the computation of its NOL deduction was contrary to Ind. Code § 6-3-2-2.6.

Taxpayer further argued that the auditor, by not including the foreign dividends deduction in the NOL deduction calculation, was taxing foreign source dividends. The Department rejected this reasoning, explaining that Taxpayer's approach would result in compounding the deductions upon one another.

Taxpayer also asserted that Ind. Code § 6-3-2-2.6 discriminates against foreign commerce in violation of the United States Constitution. Taxpayer relied on *Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 505 U.S. 71 (1992) to support its contention. The Department disagreed. Unlike the Iowa statutes in *Kraft* that did not provide for a foreign source dividends deduction, Indiana statutes have a deduction for foreign source dividends. Moreover, in *Kraft*, the Court recognized Indiana as a state adopting an acceptable approach. *Id.* 81, n.24 (referencing the appendix to Kraft's petition for writ of certiorari that contains the list of fifteen states). Finally, the Department noted that it was not the proper venue for a constitutional analysis.

11. Letter of Findings No. 10-0170, Corporate Income Tax for the Years 2005 through 2007 (February, 2011). Taxpayer was an out-of-state retailer with outlets in Indiana. Taxpayer was a limited partnership, owned by two entities ("XXX Co." and "YYY Co."). XXX Co. and YYY Co. were in turn owned by the group's holding company ("Holding Co."). For federal income tax purposes, Taxpayer reported as a consolidated group reporting under Holding Co. Taxpayer filed a separate return in Indiana. The Department concluded the tax return did not fairly represent Taxpayer's income earned in Indiana. It therefore required Taxpayer to file a combined return with an entity that sold merchandise to Taxpayer and provided certain services to the members of the group ("ZZZ Co.").

As part of a corporate reorganization, Taxpayer formed ZZZ Co. in 2003. ZZZ Co. centralized services for the group, such as merchandising, inventory management, other

procurement services, advertising, marketing, strategic planning, legal, treasury, cash management, tax, and accounting. ZZZ Co. provided Taxpayer with the creation of Taxpayer's retail environment. Taxpayer, in return, paid ZZZ Co. "an arm's length profit" based on Taxpayer's "retailing functions and risks." Taxpayer argued that the "arm's length" nature of the merchandise sales transactions between ZZZ Co. and Taxpayer was determined through a contemporaneous transfer pricing study conducted by a nationally recognized accounting firm in accordance with I.R.C. § 482. The transfer pricing study recommended a return of an invested capital ("ROIC") range for Taxpayer based on an analysis of seven comparable companies.

The auditor demonstrated that there was a distortion in profit reporting when Taxpayer represented 99 percent of the group's revenue, but less than 10 percent of the income of the group. The auditor provided Taxpayer with three options that it was considering to more fairly reflect Taxpayer's Indiana income, and requested Taxpayer's input: (1) to disallow a portion of the inter-company expenses between Taxpayer and ZZZ Co., (2) a limited combination of Taxpayer with ZZZ Co., or (3) a combination of the group's consolidated federal return. The auditor chose the second option based on lack of information regarding combination of the federal consolidated group. The auditor believed that selecting the first option failed to provide Taxpayer factor relief in the apportionment calculations. By selecting the second option, Taxpayer was afforded factor relief by the inclusion of ZZZ Co.'s components in the denominators of the apportionment calculations – an approach that fairly reflected Taxpayer's Indiana source income and that resulted in lower assessment to Taxpayer.

The Department found that Taxpayer failed to provide transfer pricing information to show the transactions were conducted at arm's length. Furthermore, the auditor demonstrated that Taxpayer's consolidated group was unitary. In particular, Taxpayer and ZZZ Co. were so intertwined as to be inseparable. And Taxpayer did not contest that there was a unitary relationship. The auditor correctly required the combined filing.

12. Letter of Findings No. 08-0545, Corporate Income Tax for the Years 2003 through 2005 (January, 2011). Taxpayer, a multinational company, as well as its subsidiaries and affiliates (collectively "Taxpayers") engaged in utility services in Indiana. Taxpayers ultimately shared the same parent company ("Parent"), an out-of-state company that owned and controlled Taxpayers through multi-tier subsidiaries. On February 8, 1985, the Department granted Taxpayers permission to file a combined Indiana Corporation Income Tax return. From then on, Taxpayers had filed combined returns as a group conducting a unitary business in Indiana. After an audit, the Department determined that Taxpayers failed to file their combined returns in a consistent manner as required by 45 IAC 3.1-1-42. The auditor disallowed reported nonbusiness income and included the income of a foreign operating company into the audit adjustment.

Taxpayers argued the income that Taxpayers received was either from limited partnerships ("LPs") (in which the subsidiaries/affiliates were limited partners) or from limited liability companies ("LLCs") (in which the subsidiaries/affiliates were non-managing members) and was nonbusiness income, because they either did not have

control over the LPs or did not actively manage the LLCs, so the companies were not unitary. Taxpayers further argued that, since the subsidiaries/affiliates were either limited partners or non-managing LLC members, their activities were not unitary and their income was nonbusiness income.

But Taxpayers' documentation showed that the partners or LLC members were, wholly and/or partially, separately and/or jointly, as well as directly and/or indirectly, owned by Taxpayers and/or Parent. Upon executing agreements, most of the partnership agreements and operating agreements were signed and executed by the same group of individuals, who served as executives for both the general partners and the limited partners of the partnerships. These executives governed managing and non-managing LLC members simultaneously. The same executives also held major executive level positions in the management within and throughout Taxpayers and Parent. Thus, the same executives, who made business decisions regarding the LPs, represented the general partners and the limited partners at the same time. The LPs and LLCs offered critical support to Taxpayers and ultimately to Parent to achieve economies of scale. The Taxpayers were unitary, and the income which Taxpayers received for those years was correctly treated as business income.

Sales/Use Tax

1. Letter of Findings No. 04-20100584, Sales and Use Tax for the Years 2007 and 2008 (April 27, 2011). Taxpayer was an Indiana corporation engaged primarily as a paving contractor. The Department found that Taxpayer had purchased two curb machines without paying sales tax at the time of purchase. Taxpayer did not subsequently self-assess use tax on the two machines. Accordingly, the Department issued a proposed assessment for use tax and interest on both curb machines, and on other purchases associated with those machines. Taxpayer protested the use tax assessment.

Taxpayer argued that the curb machines qualified for the manufacturer's equipment exemption under Ind. Code § 6-2.5-5-3. In support of this argument, the Taxpayer referred to Sales Tax Information Bulletin # 60, which states that "asphalt plants and pavers" are exempt. However, the same Bulletin states that the exemption for asphalt manufacturers does not apply to "graders, rollers, distributors, front-end loaders, and other construction equipment." Because Taxpayer's "delivery of the product, concrete, remained the same" whether or not Taxpayer used the machine, and because the Taxpayer would not have received an exemption for the materials that the curb machine replaced, the exemption in the Bulletin did not apply and use tax was owed on the machines.

2. Revenue Ruling # 2011-01ST, Sales and Use Tax for the Years 1999 through 2009 (May, 2011). Taxpayer sought an opinion as to whether its purchases of diesel exhaust fluid are exempt from sales and use tax under the exemption applicable to the use of items directly consumed in the rendering of public transportation in Indiana in 45 IAC 2.2-5-61.

Taxpayer operates a public transportation business. The Clean Air Act regulates certain air pollutants like nitrogen oxides ("NOx"), which are produced by heavy-duty diesel

engines. In 2010, NO_x emissions were limited to 0.2 grams per brake-horsepower-hour. Most diesel engine manufacturers then elected to use selective catalytic reduction ("SCR") systems on new vehicles to meet the emission requirements for NO_x. SCR technology reduces emissions of NO_x through the use of diesel exhaust fluid ("DEF") and a catalyst. The SCR system works by injecting DEF from a tank into the exhaust system where the DEF reacts with the heat from the exhaust and creates an output of ammonia and carbon dioxide. The ammonia and NO_x exhaust from the engine then pass through the SCR catalytic converter, which reduces the gas mixture to nitrogen and water vapor. DEF use is now directly related to the operation of heavy-duty diesel motor vehicles; in fact, many of these new diesel engines will shut down without the presence of DEF.

The Department ruled the Taxpayer's purchases of diesel exhaust fluid reasonably necessary to the rendering of public transportation. Accordingly, Taxpayer's purchases of diesel exhaust fluid used directly in its public transportation operations are exempt from Indiana sales and use tax.

3. Letter of Findings No. 04-20100618 and 04-20110083, Sales and Use Tax for the Years 2007 and 2008 (May, 2011). Taxpayer operated grocery stores. Two of Taxpayer's stores were audited ("Store A" and "Store B"). The Department found Taxpayer was not charging customers sales tax on the sale of prepaid phone cards. While the Taxpayer agreed with the Department that it should have collected taxes from the phone cards at Store A, it disagreed with the auditor's approach to calculating the tax due. The information for the audit was taken "from Taxpayer's POS system that purports to be the account where all phone cards were sold through the POS system. Based on his calculations, the auditor ha[d] calculated that total phone card sales were 21% of the total sales at the store location."

The Taxpayer argued its "POS system is inherently unreliable as it was implemented during the audit period and depends solely on manual input from clerks who could have misunderstood how to use the system." Taxpayer noted it had "accurate information regarding the purchases of phone cards and the average mark up used for phone card profits." Taxpayer proposed using "actual purchases . . . for the periods June 24-December 31, 2007 and all of 2008." However, "[d]ue to the fire in 2007, [the Taxpayer] ha[d] doubled the purchases from the period of June 24-December 31, 2007 to calculate estimated total purchases for 2007." From the 2007-2008 purchases, Taxpayer "calculated an average mark up price" Taxpayer's basis for this "average markup price of all phone card sales" is from one supplier, which Taxpayer claimed "should be a good representation of all the companies that [Taxpayer] buy[s] from." The Department refused to rely upon this method, because Taxpayer did not show that its proposed method was based on better information than the audit's methodology.

4. Letter of Findings No. 04-20100644, Sales and Use Tax for the Years 2005 through 2007 (May, 2011). Taxpayer operated a turkey processing plant and a feed mill plant in Indiana. Several related entities controlled the turkeys from the egg to adult turkey

stages. The processing plant produced a variety of food products such as hot dogs and lunch meat.

Taxpayer first argued the assessment of sales/use tax on the purchase of labels and labeling equipment was exempt under 45 IAC 2.2-5-14, because the labels were attached to the items it sold and become a "material or integral part" of the food product. The Department found there was insufficient information to determine whether the labels were inventory labels, shipping labels, warehousing labels, or labels placed on the outside of containers sold to wholesale customers. Taxpayer failed to show the labels were incorporated into the product sold to consumers. The equipment was thus taxable.

Taxpayer also argued that its purchases of lab coats "worn by production associates to avoid contamination of the food product by clothing fibers and other contaminants from their personal clothing" was safety equipment under 45 IAC 2.2-5-8(c)(2)(F) and exempt from sales tax. The lab coats were used "by associates who come into direct contact with the product." The Department agreed that the lab coats were exempt.

Taxpayer further argued that certain equipment that it purchased was exempt from gross retail tax under 45 IAC 2.2-5-8, because the equipment was directly used in the direct manufacture of its food products.

- a. **Organ Extraction Guns.** Taxpayer purchased extraction "guns" which were connected to a vacuum hose and performed a waste "extraction operation." The waste was removed, transported, and sold for use as dog and cat food. Originally, the Department gave a fifty percent exemption for the function of removing the lung and kidney from the turkeys as opposed to the function of transporting the waste product of the turkey, because the removal of the lung and kidney were considered a direct manufacturing use. Transportation of the waste was considered post-production. Taxpayer failed to show that the audit's fifty percent distinction between exempt and non-exempt and between production and post-production was wrong.
- b. **Ice Conveyor.** Taxpayer purchased a conveyor belt to transport ice. The belt was used to convey ice "to the grading areas where whole birds are iced prior to re-hanging as well as used to chill in-process meat heading to traypack." There was little evidence that the conveyor belt had an "immediate effect on the article being produced" and was instead best characterized as post-production equipment.
- c. **Boiler and Boiler Chemicals.** Taxpayer argued its purchase of a boiler should be 100% exempt. The audit found that the 90% of the boiler's use was attributable to manufacturing activities and that 10% of the boiler's use was intended for general heating of the manufacturing facility. The Department refused to second-guess the audit's determination that the boiler was used in both an exempt fashion and in a non-exempt function.

Taxpayer also argued that it purchased boiler chemicals "used to treat water used in production to ensure that the water is pure to prevent scale buildup in the boilers and pipes." The Department agreed, and because the boiler was used for exempt purposes 90% of the time, the chemicals were entitled to a similar, proportional exemption.

- d. **Continuous Production.** Taxpayer's turkeys moved from facility to facility. Taxpayer relied on *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991) to argue that it operated one continuous, integrated facility and that the equipment used to move its food product from one facility to the next should be exempt. The Department concluded that the equipment was not exempt under *General Motors*, because Taxpayer failed to demonstrate that the processing at its various Indiana locations constituted "one continuous integrated production process." *Id.* at 404.
- e. **Pipe Insulation.** Taxpayer argued that its purchase of pipe insulation was exempt. Taxpayer concluded that "[p]iping for processing equipment [was] exempt and the insulation [was] merely a component part of the piping system." The piping was used to transport waste products. The audit concluded that the "piping was already taxable as transporting the waste material, and the insulation was even further removed." The Department agreed with the auditor that both the pipe and the insulation were outside the production process.
- f. **Chemicals Consumed.** Taxpayer also maintained that the purchase of chemicals "added to the process chillers to prevent bacteria and to avoid contamination of the product" was exempt. Reviewing 45 IAC 2.2-5-10(c)(2)(B), the Department believed that the example appeared to refer to exempting chemicals used to treat water where the water becomes a component part of the product being produced. In Taxpayer's case, the chemicals treated water used in its chilling equipment. Since the chemicals were not introduced into and did not become part of Taxpayer's meat product and because there was no indication that the chilling equipment was directly used in the production of the food product, the Department ruled the chemicals were taxable.
- g. **Packaging.** Taxpayer claimed that its purchase of packaging equipment was entirely exempt because the equipment was within its "integrated production process." The Department found there was nothing to indicate the auditor made an "arbitrary" decision that the equipment was only 50% exempt. However, the Department suggested a supplemental review.
- h. **Dehumidification Equipment.** The auditor determined that Taxpayer's dehumidifying equipment "acts on the environment." The equipment was "one step removed from the production process." Thus, it was not exempt.
- i. **Refrigeration Equipment.** Taxpayer purchased various items of refrigeration equipment. Taxpayer argued that the "items... [we]re used principally and

predominately for refrigerated storage and process chillers and are integral and essential to the manufacturing process." Taxpayer stated the equipment was used to refrigerate food being moved from its processing plant to an out-of-state facility for "further processing." As such, Taxpayer's operated one continuous, uninterrupted production process, even though the production took place at locations inside and outside of Indiana. This was the same argument made under the continuous production section. The Department's conclusion – that Taxpayer's different facilities did not constitute a "continuous, integrated production" production unit – remained unchanged.

5. Letter of Findings No. 04-20100711, Sales and Use Tax for the Years 2005 through 2009 (May, 2011). Taxpayer was a contractor that performed water well repairs and rehabilitations. The Department assessed use tax on various chemicals used by Taxpayer.

Taxpayer asserted that it performed most of its well repair and rehabilitation work for public utility companies and other municipalities. When Taxpayer rehabilitated a well for a for-profit entity, it charged the customer sales tax on the time and material jobs or paid use tax on contracted jobs. Taxpayer argued that its consumption of chemicals used on the work performed for municipalities should eliminate taxpayer's obligation to collect sales tax for chemicals used on those jobs.

Taxpayer argued that it consumed the chemicals while performing well repair or rehabilitation services for municipal or public utility customers. Taxpayer believed that those customers provided exemption certificates or were in fact using the chemicals sold by taxpayer for exempt purposes. Taxpayer did not present any evidence to show the Taxpayer's customers incorporated the chemicals as "a material or integral part of a . . . public water, sewage, or other utility service" as required by Ind. Code § 6-2.5-5-7. On the contrary, when Taxpayer provided well repair or rehabilitation services for a customer, it did not leave any of the chemicals with its customers or transfer the chemicals to its customers.

The Department found that the definition of construction materials found in 45 IAC 2.2-3-7(b) did not include the chemicals consumed by the Taxpayer. Taxpayer did not transfer or leave the chemicals to its customers. Therefore, the exemption did not extend to customers' purchases of chemicals consumed by Taxpayer. Taxpayer must pay sales tax to the retailer from whom it purchases the materials, or, if the sales tax was not paid in that transaction, then Taxpayer must pay use tax to the state where taxpayer consumes these materials.

6. Letter of Findings No. 04-20110025, Sales and Use Tax for the Year 2008 (May, 2011). Taxpayer operated hotels, ranches, and water parks in the hospitality industry. Taxpayer protested the imposition of use tax on its purchases of "smart" wristbands. Taxpayer argued under Ind. Code § 6-2.5-5-35(a)(2), the "smart" wristbands were exempt because they were (1) used up or otherwise consumed during occupation of the room, and (2) used up or otherwise consumed by its guests. Taxpayer submitted additional documentation, including photos and video clips, to support its protest. Relying on

Indiana Dep't of Revenue v. Kitchin Hospitality, LLC., 907 N.E.2d 997 (Ind. 2009) and Ind. Code § 6-2.5-5-35(a)(2), the Department granted the exemption on the purchases of the "smart" wristbands, because the items were completely consumed by guests of the Taxpayer's establishments.

7. Letter of Findings No. 04-20110098, Sales and Use Tax for the Year 2009 (May, 2011). Taxpayer provided transportation services to its related company ("Related"). Related sold, installed, and repaired fire prevention and security solutions to several regions in the United States. The Department's audit found that Taxpayer had not paid sales tax on any purchases used in its business on the premise that it qualified for the public transportation exemption. To qualify for the exemption, the tangible personal property must be reasonably necessary to the rendering of public transportation and must be essential in directly transporting persons or property.

Taxpayer described its relationship with Related as follows:

[Taxpayer] leases the employees from [Related], but does so only for the period of time the individual is performing his role as a driver. The percentage of time spent in each role is not relevant because [Taxpayer] is only leasing the individual for his role as a driver and the individual spends 100[percent] of his time in that role for the hours he is being leased to [Taxpayer]. Moreover, the tangible personal property here in question is used exclusively to transport the property of another for consideration. Therefore, [Taxpayer]'s purchases qualify for the public transportation exemption.

Taxpayer demonstrated two things. First, Related sufficiently documented the time that its employees spent as drivers leased to Taxpayer. Secondly, Taxpayer showed that it paid Related for that time. Thus, Taxpayer was entitled to an exemption.

8. Letter of Findings No. 04-20100466, Use Tax for the Years 2007 through 2009 (May, 2011). Department assessed use tax on Taxpayer's uncoiler, a device upon which steel coils were loaded for uncoiling. Taxpayer asserted that the uncoiler qualified for the manufacturing exemption found at Ind. Code § 6-2.5-5-3. According to Taxpayer, the uncoiler was connected to the stamping machine physically and was controlled by the same computer that controlled the stamping machine, which stamped the sheets of metal being uncoiled. That single computer ensured that the proper tension was maintained on the sheet metal while it was on both the uncoiler and the stamping machine. The Department concluded that the computer constituted a single production process by which the uncoiler was directly involved in the direct manufacture of Taxpayer's marketable product. Therefore, it qualified for the exemption.

Taxpayer also argued that the scrap conveyor was a component part of various pieces of exempt equipment and qualified for the manufacturing exemption. But the Department rejected this claim. While the conveyor removed scrap from the manufacturing site, it

was not directly used in the direct production of Taxpayer's product. Any manufacturing was done before the operation of the conveyor.

The Taxpayer further contested the assessments of cranes used to move heavy materials and equipment. According to Taxpayer, the cranes were essential to moving heavy materials and equipment, and the production process could not happen without this function. The Department concluded that the cranes too were not used in the direct production of Taxpayer's product.

Taxpayer next asserted that the Department incorrectly imposed use tax on three tool changers it used to assist in the automatic changing of welding jigs. The Department granted that the tool changers qualified for the manufacturing exemption under Ind. Code § 6-2.5-5-3, because they were attached to and integrated with the exempt welders and their controls.

Taxpayer believed that ductwork and a related fan qualified for the safety equipment exemption, under 45 IAC 2.2-5-8(c), because they allowed the employees to participate in the production process without injury by clearing fumes from the parts service center. The Department observed that the equipment must allow a worker to participate in the production process without injury. The ducts and fan provide general ventilation for the entire plant. Therefore, while these items might have removed fumes from the parts service center, they were not specifically dedicated to that task. The equipment served a general ventilation purpose and therefore did not qualify for the exemption.

9. Letter of Findings No. 04-20100469, Sales and Use Tax for the Years 2007 and 2008 (May, 2011). Taxpayer was an Indiana retailer of pre-owned automobiles. Taxpayer often sold automobiles to out-of-state customers. The Department determined that Taxpayer should have collected sales tax on the sale of vehicles to out-of-state customers. Taxpayer protested the assessment, claiming that it had no knowledge of the change in law requiring vehicles sold to out-of-state residents to be physically delivered to a delivery point outside Indiana. Taxpayer also claimed it did not know that the terms and method of delivery must be indicated on the sales invoice, with the seller keeping a copy of the terms of the delivery. Taxpayer cited no legal authority that the Department was required to notify taxpayer individually of the change in law. As explained in 45 IAC 15-11-2(b), "Ignorance of the listed tax laws, rules and/or regulations is treated as negligence."

Taxpayer contended the out-of-state purchasers paid the sales tax in their home states, so collecting Indiana taxes would result in double taxation. After 2004, when out-of-state customers come to Indiana and take possession of vehicles in Indiana before they return to their home states, the transactions are deemed to have occurred in Indiana and are subject to Indiana sales tax. The Taxpayer was responsible for collecting Indiana sales tax unless the customers were entitled to an exemption. Had Taxpayer properly collected the sales tax from these out-of-state purchasers, the purchasers would have been able to apply the Indiana tax paid as a credit against their home states' tax levied on the same vehicles. Thus, Taxpayer was responsible for the taxes.

10. Letter of Findings No. 04-20100064, Sales and Use Tax for the Years 2005 through 2007 (May, 2011). Taxpayer was an out-of-state refiner and manufacturer of metal. Taxpayer operated a smelting facility in Indiana which processed and refined metal products. The Department assessed tax on some of its equipment purchases.

Taxpayer argued the equipment purchases were used to comply with the federal and state environmental quality control requirements, making the purchases exempt from sales/use tax. An exception applies if the property is predominantly used and acquired for the purpose of complying with any state, local, or federal environmental quality statutes and regulations. The Department partially agreed that Taxpayer qualified for an exemption under Ind. Code § 6-2.5-5-30 and 45 IAC 2.2-5-70 for one of its purchases, because it provided proper documentation that the equipment was one of the essential requirements for the local environmental agency to grant Taxpayer a permit to operate its facility in Indiana. Taxpayer did not provide sufficient documentation showing that the other two purchases were acquired to be used to comply with the federal and state environmental quality control requirements.

Taxpayer contended that it engaged several contractors, on a lump sum basis, to perform work which Taxpayer considered improvements to realty. These lump sum contracts were not subject to sales/use tax. Alternatively, Taxpayer argued that some of the transactions were "time and materials" contracts, and that the Department erroneously assessed use tax on the total charge of the transactions when it was only responsible to tax the materials and not the labor. The Department partially agreed that ten contracts were lump sum contracts and were not subject to sales/use tax.

The rest of the contracts were either "time and materials" contracts or the property was not statutorily exempted from sale/use tax. For the "time and materials" contracts, the contractors were responsible for separating out their labor costs from the material costs. If this was not done, the contract was considered a unitary contract subject to sale/use tax. Only one of the "time and materials" contracts followed this requirement. Taxpayer was only responsible for sales/use tax on the materials on that one contract. The rest of the "time and materials" contracts were subject to sale/use tax on the whole contracts, since the contractor did not separate materials and labor costs.

11. Letter of Findings No. 04-20100346, Sales and Use Tax for the Years 2007 through 2009 (May, 2011). Taxpayer was an Indiana company in the business of designing and manufacturing die cast molds and special tooling for use by the automotive industry in producing automotive transmissions and engine blocks. Due to the large volume of purchase invoices, Taxpayer and the auditor agreed to use a sampling methodology where invoices from October 1, 2007, through September 30, 2008, were reviewed to establish a percentage error rate. The percentage error rate was then applied to the remaining periods of the audit.

Taxpayer used dry graphite, a highly adhesive lubricant, in its direct production process to assemble and attach various parts of property that Taxpayer produced. The

Department decided this was sufficient evidence to establish that it was used during the production process.

Taxpayer also argued that its customers require the metal composition in its products to have a specific degree of hardness. Taxpayer used Teleweld testing equipment to determine whether its products met the specific degrees of metal hardness required by customers. The Department agreed that machinery, tools, and equipment used to test and inspect the product as part of the production process are exempt by 45 IAC 2.2-5-8(i).

Taxpayer further explained that its workers must wear aluminized coating to clean and maintain furnaces that Taxpayer used in its production process. Taxpayer asserted that the aluminized coating was essential for workers to determine whether the furnaces were operational. Taxpayer relied on *Dep't of Revenue v. United States Steel Corp.*, 425 N.E.2d 659 (Ind. Ct. App. 1981) for the proposition that safety equipment is exempt if the equipment was required for workers to carry out production operations. The Department observed that the maintenance work took place outside an active production process. That the protective coating may have been considered essential to the conduct of the business of manufacturing because its use was required by practical necessity did not mean that the item had an immediate effect upon the article being produced. The coating was taxable.

12. Letter of Findings No. 04-20100415, Sales and Use Tax for the Years 2007 through 2009 (May, 2011). Taxpayer operated hotels in Indiana. Taxpayer was issued exemption certificates from members of not-for-profit entities or government employees. The rooms were paid for by the individuals and not the not-for-profit or government entities. The Department assessed these transactions.

Relying on 45 IAC 2.2-8-12(b), the Department noted that sales to local, state, or federal government employees were exempt only if the government directly paid for those purchases. If the employee paid for the purchase directly, the exemption did not apply even if the employee was to be reimbursed by the government. For the exemption to apply, the individual was required to present a properly completed exemption certificate and to present payment by the exempt entity or governmental organization. The Taxpayer must then confirm that the exemption certificate is actually being used by the exempt organization listed on the exemption certificate.

Taxpayer also argued that it conducted its credit card transactions under the Payment Card Industry Data Security Standards. Taxpayer explained that these standards provide strict guidelines to help thwart fraud within the credit card industry and consider it an unreasonable requirement to keep copies of guest credit card information on hand. Taxpayer believed that the tax exemption documents should suffice in lieu of credit card information. The Department concluded that a private arrangement within a particular industry does not trump clear requirements stated by Indiana statutes and regulations. In addition, Taxpayer argued it is against the law to copy government identification, citing "US Code Title 18, Part 1, Chapter 33, Head Section 701." The federal code section the

Taxpayer relied on deals with the improper use of official badges, identification cards, and other governmental insignia. That was inapplicable to this circumstance.

Taxpayer finally argued that it should have received an exemption, under Ind. Code § 6-2.5-5-35, on some of its tangible property because Taxpayer's guests consumed the property or rendered it unusable, it was for the guests' benefit, and it was during their occupancy of Taxpayer's facilities. Taxpayer protested the imposition of use tax on room key cards and the envelopes in which the cards were inserted, as well as guest comment cards. The Department found that the keycard packets and the folders that contained the guest folio were exempt, because they had a particular guest's information written on the item itself for the benefit of the guests and were therefore not reusable by Taxpayer. But the disposable room keys could be reused by Taxpayer when recoded for new guests. Guest response cards were used by Taxpayer for Taxpayer's benefit; they were taxable.

13. Letter of Findings No. 04-20100463, Use Tax for the Years 2007 through 2009 (May, 2011). Taxpayer had not paid taxes on gift baskets that it sent to its customers, labor charges listed on one invoice, and the purchases of a drill sharpener and parts for the drill sharpener. The Department issued proposed assessments for use tax and interest on those purchases.

Taxpayer considered the gift baskets to be promotional items that should not have been assessed. Taxpayer provided documentation showing that all but one of the gift baskets were ordered from a third-party supplier and delivered from that supplier to customers outside of Indiana. The Department agreed that since all but one of the gift baskets were stored, used, or consumed outside Indiana, those items were not subject to Indiana use tax under Ind. Code § 6-2.5-3-2(a) and should be removed from the use tax calculations.

According to Taxpayer, only the costs of the parts listed on the invoice were subject to use tax and not the labor costs. Taxpayer provided additional documentation establishing that the invoice had separately stated amounts charged for materials and for labor. The Department concluded that there was not a total combined charge for all items and/or services, and it was not a unitary transaction. Accordingly, Taxpayer should only be assessed tax on the charges for materials.

Taxpayer finally asserted that the purchase of a drill bit sharpener and parts for the drill bit sharpener were exempt, because the drill bits were essential to its manufacturing process. Taxpayer explained the necessity of drilling many holes in its product during the manufacturing process, as well as the necessity of frequent sharpening of the drill bits for optimum performance and efficiency. The Department agreed that the drill bits were directly used in the direct production process and qualified for the exemption. But the sharpener was one step removed from the production process and thus was not exempt.

14. Letter of Findings No. 04-20100450, Use Tax for the Years 2007 and 2008 (April, 2011). Taxpayer was a service company providing warehouse space for medical products of other companies. Taxpayer stated it was a contract service provider in the global research and development and clinical trials industries. Taxpayer protested that the assets

in question were exempt research and development equipment under Ind. Code § 6-2.5-5-40. The first disputed item was a "walk in freezer." Taxpayer argued that it was not taxable, because some materials maintained in the freezer must remain within a very specific temperature range as dictated by the client for various reasons. The freezer was used for both exempt purposes (*e.g.* temperature excursion and thermal cycling stability studies) and non-exempt storage purposes. The Department elected to apply a partial exemption based on the percentage of exempt use.

Taxpayer also argued that the "various controlled environments within the building cannot be achieved, maintained and actively managed . . . without the use of the specifically-constructed scaffolding which organizes the lab and testing materials." The auditor considered the scaffolding to be shelving that was not exempt under Ind. Code § 6-2.5-5-40(b)(1). Taxpayer failed to show that the pallet/scaffolding was "acquired by the purchaser for the purpose of research and development activities devoted directly to experimental or laboratory research and development" under Ind. Code § 6-2.5-5-40(b)(3).

15. Letter of Findings No. 04-20090555, Sales and Use Tax for the Years 2005 through 2007 (March, 2011). Taxpayer processed scrap material, including aluminum, copper, brass, wire, steel, insulation, and plastic. Taxpayer purchased scrap, checked it for radiation and sorted the scrap. Some scrap material was sold "as is" and some scrap was processed by cutting, crushing, shredding, and granulating the scrap.

The Department assessed use tax on items that Taxpayer claimed were used in the direct manufacturing process. The Department ruled that Taxpayer merely separated and repackaged the items. Taxpayer, at most, removed parts, separated items into groupings defined by their material composition, cleaned items, and/or crushed items before bundling them into cubes. Taxpayer started with scrap aluminum, copper, brass, steel, etc., and then ended with scrap aluminum, copper, brass, steel, etc. It did not create a new product, such as a new alloyed metal. This did not constitute a new article produced.

Taxpayer also argued that its purchases of certain seals and bolts that it used to seal rail cars were exempt from sales and use tax under the "packaging" exemption, Ind. Code § 6-2.5-5-9. Taxpayer believed its rail cars were containers to which it added the items it sold to customers. Taxpayer also argued that its purchases of lumber to use in international shipping containers were exempt. Lastly, Taxpayer argued that barrels it used to fill with graded scrap to sell to customers were exempt under Ind. Code § 6-2.5-5-9. Taxpayer asserted that it did not receive the barrels back, and thus the barrels should be considered "nonreturnable containers." The Department found that the seals and bolts were used to secure the containers against theft and were actually returned to the Taxpayer. Since the seals and bolts were returned to the Taxpayer after use, they were not exempt. However, the Department found that lumber used to prevent the materials placed in non-returnable containers from spilling out of the containers during international shipping customs inspections fell loosely within the "wrapping materials" category and was therefore exempt. The Department also agreed the non-returnable barrels were exempt.

Taxpayer argued that certain charges from Metalprices.com were for services. The Department reasoned that the "true object" of MetalPrices.com's business was the provision of information to its customers in usable formats. What made the substantial amount of information usable to Taxpayer was the format – the reports – in which it was delivered. The reports were taxable.

16. Letter of Findings No. 10-0103, Sales and Use Tax for the Years 2006 through 2008 (March, 2011). Taxpayer was engaged in the business of manufacturing and distributing medical implants and surgical instruments used in the medical industries. During a sales and use tax audit, Taxpayer filed a claim for refund of use taxes paid on various items. At the conclusion of the audit, the Department denied a portion of the claim for refund. The Department also assessed additional use tax, interest, and penalty.

- a. **Sales and Use Tax Exemption – Inventory Withdrawals.** Taxpayer withdrew inventory, both products that were in development and products that were finished, which Taxpayer claimed were used for research and development purposes. These items included implants, both the finished items and individual components of those items, as well as surgical instruments used to install the implants. Taxpayer remitted use tax on these withdrawals. Taxpayer then requested a refund taxes paid on these inventory withdrawals, claiming the withdrawn items were used for research and development and were exempt from the gross retail tax.

Taxpayer argued the inventory that it withdrew should be considered "testing equipment" for purposes of Ind. Code § 6-2.5-5-40. The Department concluded that, since the items in question were inventory, they could not be considered equipment. Further, Taxpayer's inventory was not acquired for the "purpose of research and development," but was instead acquired first as Taxpayer's own inventory and used for quality control. Since the Inventory used for purposes of quality control, it was not considered research and development. Ind. Code § 6-2.5-5-40(a).

Taxpayer also argued that it should receive a credit for items that were pulled and resold. That Taxpayer ultimately sold the inventory was beside the point. The sale was a separate transaction. Thus, no tax credit existed for the Taxpayer.

- b. **Sales and Use Tax – Research and Development Exemption.** Taxpayer believed that its purchase of storage racks and cabinets used in its laboratories qualified for the research and development exemption. Ind. Code § 6-2.5-5-40. The Department found that the racks and cabinets were used for storing items. They were not devoted directly to laboratory research and development. They were at least one step removed from the process of research and development.

Taxpayer also contended that its purchase of its competitors' products used in its own laboratories should qualify for the research and development exemption.

Taxpayer explained that these products were "used for clinical trials and other testing or experimental purposes." But Taxpayer did not sufficiently describe what the competitor products were or how they could be considered testing and laboratory equipment, beyond declaring that they were so. Therefore, Taxpayer did not prove that this equipment should be exempted.

Taxpayer asserted that its purchases of human body parts and cadavers qualified for the research and development exemption. Taxpayer explained, "[H]uman body parts and cadavers are used in conjunction with new and improved implants and instruments for research and testing purposes." In "simulated surgeries," the purpose of the cadavers and body parts was to test the implant. The Department agreed that human body parts and cadavers could be considered "equipment" according to Black's Law Dictionary. However, Taxpayer also provided evidence showing that some of the cadavers and body parts were used in training exercises for surgeons, which allowed the surgeons to better learn how to insert and attach the implants within the human body. This indicated that the cadavers and other body parts were not devoted to research and development. Although Taxpayer provided evidence to show that the cadavers and other body parts had a useful life of over one year, these are still expensed items which are useful only a few times at most. Therefore, the protested items did not qualify for the research and development sales tax exemption pursuant to Ind. Code § 6-2.5-5-40.

Taxpayer purchased software from Siemens Product Lifecycle Management ("PLM"). This software was an integrated system of several different programs that "manage[d] the entire lifecycle of a product efficiently and effectively." Taxpayer pointed to Ind. Code § 6-2.5-5-40(b)(1)(B) & (C), which provide that research and development equipment "means tangible personal property that . . . (1) consists of or is a combination of . . . (B) computers [and] (C) computer software" But the Siemens product pamphlet that Taxpayer provided did not indicate that the software was "devoted directly to experimental or laboratory research and development." In fact, it covered a variety of tasks, including research and development, quality control, and manufacturing. Since Taxpayer did not explain to what extent this software was devoted to research and development versus other activities, the software did not qualify for the research and development sales tax exemption.

- c. **Sales and Use Tax – Promotional Exhibits.** Taxpayer purchased promotional exhibits from out-of-state vendors that were brought to medical conventions outside Indiana. Taxpayer was assessed use tax on these purchases. Taxpayer argued these convention exhibits were stored in Indiana, but they were only used outside Indiana. But exhibits left Indiana for five days in 2008 and five days in 2009 before they *returned* to Indiana for storage. Ind. Code § 6-2.5-3-2(e) does not contemplate items spending a majority of their storage in Indiana. Thus, the use tax was properly assessed on the purchases of the exhibits.

- d. **Sales and Use Tax – Computer Based Information Technologies.** Taxpayer used three different web-based information services. The audit determined that these services were web-based software, which Taxpayer paid a fee to access and which were not exempt from use tax. Taxpayer maintained that there was a subscription fee, but that they were strictly services based on the internet.
- i. **GHX.** Global Healthcare Exchange, Inc. ("GHX") provided a web-based service, wherein customers inputted data for a purchase order for Taxpayer to GHX, who in turn "reconfigured" the data in the purchase order for Taxpayer to access. Taxpayer then used the reconfigured data from GHX to fulfill the order for its customers. After that, Taxpayer inputted data to GHX for Company A to bill the customer for Taxpayer. GHX referred to this "on-line, independent electronic trading system" as the "Exchange." GHX charged a subscription fee for access to the Exchange. But Taxpayer explained, "Neither tangible personal property, nor software or updates were ever transferred to [Taxpayer] as a result of [Taxpayer's] purchase of this web-based service." Pursuant to the terms of the user agreement between Taxpayer and GHX, GHX retained ownership of Exchange. The user agreement specifically provided that Taxpayer obtained only "a non-exclusive right and license to access and use" Exchange. The Department agreed that GHX was providing a service, for which Taxpayer was paying, without having to acquire any sort of tangible personal property in the form of software in order to gain access to this service. Therefore, Taxpayer's protest as it related to purchases from GHX was sustained.
 - ii. **Verispan LLC.** Taxpayer also used the services of Verispan LLC ("Verispan"), a company that maintained "certain de-identified healthcare data in proprietary databases developed by Verispan through the application of methods and standards of judgment, from which Verispan has developed a variety of data products useful in the healthcare industry." Verispan monitored and managed data, and provided its customers customizable reporting through its web site for a fee. Taxpayer argued that because it did not receive the transfer of property that has been compiled or packaged for sale to the general public, the service fees charged by Verispan were not subject to sales or use tax. The Department disagreed, because the sale of statistical reports, graphs, diagrams or any other information produced or compiled by a computer and sold or reproduced for sale in substantially the same form as it is so produced is considered to be the sale of tangible personal property. Sales Tax Information Bulletin 8. Taxpayer did not furnish the "information from which [the] reports [were] compiled." The company's reports were subject to tax.
 - iii. **Dun & Bradstreet.** Taxpayer also used the services of Dun & Bradstreet ("D & B"), which charged a service fee to Taxpayer for customized

information services. According to Taxpayer's description of the arrangement, Taxpayer requested specific customer information through D & B's web-based application. Taxpayer inputted specific criteria from which customized reports were produced. Taxpayer argued that the reports were not compiled or packaged for sale to the public as canned reports. The Department disagreed for the same reasons above. Taxpayer was paying for reports, which were taxable.

- e. **Sales and Use Tax – Tank Rentals.** Taxpayer rented gas tanks and cylinders that were used in the production and research and development processes. The auditor assessed use tax on the rental of these gas tanks and cylinders. Taxpayer purchased gas, contained in "returnable containers," and was not purchasing the containers. Therefore, the rentals were exempt under Ind. Code § 6-2.5-5-9.

Taxpayer also argued that both the gas and the tanks and cylinders that hold the gas are used in research and development, and therefore qualified for the research and development exemption. The gas did not meet the definition of "equipment," nor did it have a useful life of over one year. The gas canisters were not used exclusively in research and development activities, and they were used and returned on a continual basis, meaning they were used previously in Indiana. Therefore, neither the gas nor the canisters and tanks qualified for the research and development sales tax exemption pursuant to Ind. Code § 6-2.5-5-40.

17. Letter of Findings No. 04-20100348, Use Tax for the Years 2007 and 2008 (March, 2011). Taxpayer protested the imposition of use tax on promotional items that it purchased and distributed exclusively at out-of-state conferences. The promotional items included items such as books and pamphlets, name badge holders, lanyards, totes, and tee shirts. The Department agreed that the promotional items qualified for the temporary storage exemption. Ind. Code § 6-2.5-3-1. While the undistributed promotional items were returned to Indiana, they were then taken to another state and distributed there. This resulted in a series of temporary storages without Indiana "use." The Department noted that this exemption only applied to the promotional items that were distributed. It did not apply to items such as booths or tables that a taxpayer "used" in other states but did not distribute, because they can be stored and reused in Indiana.
18. Letter of Findings No. 04-20100359, Sales and Use Tax for the Years 2007 and 2008 (March, 2011). Taxpayer provided a roll grinding service to customers that needed both new and used work rolls repaired. Taxpayer purchased several items for use in its grinding operations. Taxpayer received work rolls from customers for repair. Two work rolls are used together to make flattened products: steel products, food, wood, etc. Taxpayer's customers included both the companies that use the work rolls in their business operations, as well as the original equipment manufacturers. The audit concluded that Taxpayer is performing a repair service, rather than remanufacturing the work rolls to make new products.

Taxpayer argued the manufacturer's exemption applied. To be eligible for this exemption, Taxpayer must have had repair activity that was directly involved in the creation of a product. *Rotation Products Corp. v. Indiana Dept. of State Revenue*, 690 N.E.2d 795 (Ind. Tax Ct. 1998). In addition, usually a substantial amount of work is performed to transform materials with only scrap value into serviceable and marketable products. Thus, the remanufacturing process will "result in an 'end product' that is 'substantially different from the component materials used.'" *Id.* at 802. The court established a four part test: 1) substantiality and complexity of the work done on the existing article and the physical changes to the existing article, including the addition of new parts; 2) A comparison of the article's value before and after the work; 3) how favorably the performance of the remanufactured article compares with the performance of newly manufactured articles of its kind; and 4) whether the work performed was contemplated as a normal part of the life cycle of the existing article. *Id.* at 802-03. Taxpayer had to satisfy all four factors to be considered a remanufacturer of rolls. It could not do so. The Taxpayer failed to establish that the first factor was satisfied. Although Taxpayer demonstrated that its process of grinding and examining the work rolls was complex, Taxpayer's work did not significantly change the work rolls. Taxpayer grinded away the imperfections found in the work rolls. But it neither removed tangential items connected to the work rolls nor adds items to the work rolls. Any new value added to the rolls was added by another company. Nothing new was created.

19. Letter of Findings No. 10-0482, Sales and Use Tax for the Years 2006 through 2008 (March, 2011). Taxpayer was a foreign limited partnership (LP) in the retail grocery business. Taxpayer operated approximately 2,469 retail stores in 31 states during the tax years in question. Taxpayer operated approximately 179 retail grocery stores and a distribution center. During an audit, Taxpayer signed successive extensions of time to keep the 2006 tax year open while the Department continued reviewing Taxpayer's extensive records. A few weeks after beginning its investigation, the Department indicated that some form of sampling would provide a more efficient method of producing useful information and figures. At this stage, Taxpayer agreed with the Department. As the Department continued its investigation, the Department encountered numerous instances in which Taxpayer could not produce batches of records in response to the Department's queries. Finally, the Department completed a statistical sample for Taxpayer's capital assets purchased during the tax years, offering the sample to Taxpayer for approval. Taxpayer elected not to sign the Department's agreement to the projected results. As a result of its investigation, the Department assessed additional use tax on taxpayer's asset purchases.

The Department prepared the use tax assessments based upon authority contained within Ind. Code § 6-8.1-5-1(b), which states: "If the department reasonably believes that a person has not reported the proper amount of tax due, the auditor shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available." The Taxpayer did not provide any additional documentation to show that the auditor did not devote a reasonable period of time to investigate Taxpayer's records. While Taxpayers may have varying degrees of facilitating record keeping, and in maintaining those records, the records of any taxpayer must be sufficient to permit the

Department to reconstruct that taxpayer's business. Here, the investigation report supported the auditor's use of a statistical sample. The Taxpayer agreed with the auditor's proposed list of accounts from which to devise and compile the statistical sample and to the Department's use of a statistical sample. The Taxpayer only objected after seeing the proposed results. When the Taxpayer objected, it became its burden to show that the sampling method was wrong. Taxpayer failed to demonstrate clear error on the part of the investigation. It should have requested an alternative methodology during the audit.

20. Letter of Findings No. 09-0764, Gross Retail Tax for the Years 2005 through 2007

(February, 2011). Taxpayer is a C corporation that sold heavy equipment, vehicles, trailers, forklifts, backhoes, trucks, buses, and other similar, related equipment. It operated from two Indiana locations. Both locations were registered with the Bureau of Motor Vehicles as "authorized" dealers.

- a. **Overhead Bridge Cranes – Gross Retail Tax.** In 2006, Taxpayer sold two overhead bridge cranes to a Michigan customer. The invoice indicated that Taxpayer was paid \$41,000 for the cranes but that the "Customer will provide Tax Exemption information prior to close of this sale." Taxpayer indicated that the sale was "cancelled" and that the Michigan business resold the cranes without having taken delivery. The cranes were then resold to an Alabama company. Taxpayer argued it was not required to collect sales tax because the Michigan customer could verify the transaction was exempt, and the customer provided a statement indicating that, "[u]nder the laws of the state of Michigan, [he was] exempt from sales tax on my purchase." In addition, Taxpayer asserted that Michigan does not issue exemption certificates. The Michigan customer was incorrect that Michigan does not issue exemption certificates. Furthermore, Indiana requires the customer to present the Taxpayer with the exemption certificate. Ind. Code § 6-2.5-8-8(a). The Department found that it was immaterial whether the Alabama customer was exempt, because the auditor was assessing tax on the purchase by the Michigan customer.
- b. **Equipment Sales – Gross Retail Tax.** The auditor found that Taxpayer sold its single shareholder cars, equipment, and a truck but that no sales tax was collected. Taxpayer argued that these sales were booked incorrectly because the items were actually given by the shareholder to Taxpayer. According to Taxpayer, "These items were never taken from [Taxpayer's] inventory, simply used to adjust large note balance and show the bank [shareholder] held some collateral against notes." Taxpayer also stated that shareholder "never removed the asset from [Taxpayer's] inventory, but simply added the money to his loan and in exchange kept the [vehicle] listed as collateral to satisfy the bank that [shareholder] has some collateral against loans to [Taxpayer]." Taxpayer further explained that each sale "was written as an alternative means of lending money to [Taxpayer] without having it get 'lost' in the course of doing business and never repaid. By charging a specific vehicle against the money, the item was held by [shareholder] until sold and then it's put back on the books, the sale registered through [Taxpayer] and sales tax collected when applicable." Taxpayer never provided auditor

verification that the vehicles were never sold. Thus, based on information the Department was reviewing, Taxpayer sold these items to its shareholder, the shareholder traded in equipment as part of the sales transaction, and the shareholder paid for the items by check. These items were subject to tax.

- c. **Exemption Certificates.** Taxpayer argued that it could provide exemption certificates and that these certificates should be accepted by the Department. Taxpayer produced one exemption certificate received from the purchaser of a "1977 GMC Grain Bed Truck." But the certificate stated the exemption did not apply to the purchase of a vehicle. Taxpayer also produced an exemption certificate for the sale of a "Cummins Engine," an exemption certificate for the sale of a "Case W-18," and an exemption certificate for which there is no specific related transaction. The Department agreed Taxpayer provided sufficient information to establish it properly accepted an exemption certificate covering the sale of the Cummins Engine. However, Taxpayer did not provide information sufficient to establish that the remaining transactions were either exempt or that an exemption certificate was properly accepted for the related transactions.
 - d. **Computational Changes – Gross Retail Tax.** Taxpayer argued the audit contained certain computational and procedural errors. Taxpayer suggested that certain audit items "appeared post audit were not on the original list presented to the taxpayer." However, in a memo submitted following Taxpayer's original protest, the auditor noted that all items were sent to Taxpayer's representative "before the audit was finally written and turned in." The Department rejected this claim, because there was nothing substantive to bolster Taxpayer's contention that the audit fabricated items contained within the original audit report.
21. Letter of Findings No. 10-0483, Sales and Use Tax for the Years 2007 through 2009 (February, 2011). Taxpayer specialized in full service direct marketing. Taxpayer protested assessments attributable to the cost of postage, contending that it was a service provider when it provided assembly and mailing services. Taxpayer further argued that those services include the pass-through of the postage costs. The Department noted that the definition of "gross retail income" in Ind. Code § 6-2.5-1-5(a) includes "delivery charges" when those delivery charges are incurred in a retail transaction involving the transfer of tangible personal property. Ind. Code § 6-2.5-1-5 includes postage as a type of delivery charge. When the Taxpayer contracted to print the materials to be mailed for the customer, the taxable amount of the retail unitary transaction included all charges for materials, services and postage. Thus, taxes should have been collected, and the auditor's assessment was proper.
22. Letter of Findings No. 10-0407, Sales and Use Tax for the Years 2007 through 2009 (February, 2011). Taxpayer was an Indiana manufacturer. The auditor selected a sample of Taxpayer's purchases and projected the resulting error/compliance rate to the entire three-year audit period. The auditor imposed use tax on the items after determining that the items constituted pre-production equipment, post-production equipment, or capital assets, none of which qualified for the manufacturing exemption. The auditor determined

that Taxpayer's production process began after the placement of raw material on the production machinery and ended with the manufacture of Taxpayer's product as marketed.

Taxpayer argued that the items under protest were all parts of an integrated process. The first group of items under protest included poly ink rolls and a type wheel assembly. Taxpayer believed that the poly ink rolls and type wheel assembly served the same function as the aluminum-measuring equipment discussed in 45 IAC 2.2-5-8(c), example (2)(G). That example is an automated scale process that measures quantities of raw aluminum for use in the next production step of the casting process in the foundry. Taxpayer argued the manufacturing process includes tracking of materials used in the manufacturing process. The Department disagreed, because the poly ink rolls and type wheel assembly helped Taxpayer to track the materials but did not become an integrated part of Taxpayer's product. Unlike the aluminum-measuring equipment described in example (2)(G), the poly ink rolls and type wheel assembly did not measure out pieces to be integrated into the end product.

Taxpayer next argued the inventory scanners should be exempt, since they performed their functions during the production process and allowed Taxpayer to track its product grade and quantity. The Department concluded that the scanners had no direct effect upon the product.

Similarly, computer terminals that Taxpayer's employees used to sequence its inventory of rolls of raw material for production had no direct effect on the items being produced. Therefore, the sequencing scanners did not qualify for the manufacturing exemption.

Taxpayer also argued the thermal transfer labels for inventory were necessary for inventory identification purposes during production. The labels listed the size and grade of raw materials. Taxpayer believed that the functional interrelationship of the various steps and the flow of the work-in-process made the maintenance of such information an integrated part of the production process. Further, Taxpayer claimed that toner/ink cartridges for work-in-process measurement labels were exempt. Taxpayer pointed out that these labels were printed directly on the product and were printed before strapping. The Department found that these items were not used in the direct production process and were not used for the purpose of becoming an integrated part of Taxpayer's product. 45 IAC 2.2-5-14. The fact that they were printed on the product before the strapping of the product for shipping was not determinative. The production process had ended by the time these labels were printed.

Taxpayer also protested clamp trucks and clamp truck repair parts, which Taxpayer stated were 75% of the time in an exempt manner. Taxpayer explained the clamp trucks moved materials from the loading docks to the production area, in between stages in the production process, and from the packaging station to the outgoing truck beds for delivery. Taxpayer provided calculations to explain how it arrived at the 75 percent exemption rate. The Department rejected the calculations, because the Taxpayer made a

mistake. The clamp trucks did not move the work-in-process and were not a part of the production process.

Taxpayer contested the assessment of use tax for dock locks, which secured truck trailers to the loading dock. Taxpayer believed the dock locks allowed its employees to participate in the production process without injury by preventing movement of the truck trailers and were exempt under the safety exemption. 45 IAC 2.2-5-8(c). The Department explained that the dock locks were used on the loading dock, either before or after the production process has taken place. Therefore, even if the locks prevented injury, they were not required to allow workers to participate in the production process and did not qualify for the safety exemption.

Taxpayer also argued that communication equipment qualified for the safety equipment exemption. Taxpayer believed that the communication equipment was necessary for its workers to participate in the production process without injury. The Department agreed with the Taxpayer, because the communications equipment, used in conjunction with hearing protection equipment, allowed the workers to be on the production line and to participate in the production process without suffering hearing loss. Thus, the communication equipment was part of the hearing protection system and was exempt.

23. Letter of Findings No. 10-0218, Sales and Use Tax for the Years 2007 and 2008

(January, 2011). Taxpayer operated a full service travel center in Indiana. The Department determined that Taxpayer had not collected and remitted the proper amount of sales tax on sales of diesel fuel during the tax years. Also, the Department determined that Taxpayer slightly overstated its prepaid sales tax on purchase of fuel from its supplier. Taxpayer protested the proposed assessments relating to the sale of diesel fuel on the grounds that some of the diesel sales were to exempt customers.

Taxpayer argued that it did not have to collect exemption status paperwork, because the statute does not make it an absolute requirement. Specifically, Taxpayer refers to the use of the word "may" in section V of the Department's Sales Tax Information Bulletin 15. This suggested that a taxpayer "may" or "may not" collect exemption certificates. Otherwise, Taxpayer asserted, the language would be rendered superfluous. Taxpayer was directed to the specific language of section IV of the same Information Bulletin where the requirement to collect exemption certificates is clearly stated. Furthermore, and most importantly, the legislature's directive was clearly stated in Ind. Code § 6-2.5-7-3(b).

Taxpayer also complained that the requirement to collect exemption certificates was burdensome due to the volume of its business. Taxpayer estimated that each day about one hundred trucks used its exempt diesel fuel pumps. If the Department required Taxpayer to collect an exemption form from each customer, Taxpayer would have to collect thousands of exemption forms every month. However, the Department noted that Taxpayer, per Ind. Code § 6-2.5-8-8(c) could accept blanket certificates. Taxpayer also had the option of approaching the Department with a request for a formulary agreement which would be based on Taxpayer's verifiable facts and specific record maintenance

requirements. In the absence of other statutory guidance, the legislature's directive to require the collection of exemption certificates was clear as stated in Ind. Code § 6-2.5-7-3(b) and as reflected in the Information Bulletin under section IV.

24. Letter of Findings No. 09-1038, Sales and Use Tax for the Years 2006 through 2008 (January, 2011). Taxpayer was a non-profit organization that distributed and sold electricity. Taxpayer also sold heaters and surge protectors, as well as commission sales of telephone and internet services. Taxpayer was not regulated by the Indiana Utility Regulatory Commission. After an audit, the Department found that Taxpayer had overpaid sales tax and credited Taxpayer for the overpayments. But the audit found that Taxpayer had underpaid use tax on several items and assessed additional use tax, penalty and interest accordingly.
- a. **Use Tax – Imposition – Credit Reports.** Taxpayer argued that the costs for the credit reports constituted non-taxable services. Taxpayer stated that it subscribed to services from TransUnion, a vendor-repository that provided credit reports to Taxpayer. Essentially, Taxpayer requested an individual credit report for one of its potential customers and was billed for each credit report requested or was charged a flat fee for either unlimited access or a maximum number of records depending on the type of arrangement. Relying on Sales Tax Information Bulletin 8, the Department found Taxpayer purchased the completed products, i.e., credit reports, after the vendor compiled and furnished standard information in the standard report formats. Therefore, the reports were subject to tax.
 - b. **Use Tax - Imposition – National Information Solutions Cooperative ("NISC") Billing Services.** Taxpayer contracted with an outside entity to send its monthly billing statements to its customers. The outside entity printed, folded, stuffed the envelopes, addressed the envelopes, put postage on the envelopes, and puts them into the mail. The entity charged sales tax on the paper and envelopes but did not charge sales tax on processing fees and postage. The auditor assessed tax on the remaining charges because it constituted a retail transaction for personal property used in Indiana. 45 IAC 2.2-3-4. Since the services were performed before the transaction, tax was properly assessed on the items. The "postage" portion of the charge was addressed in Ind. Code § 6-2.5-1-5(a), which states that gross retail income is money received in a retail transaction without any deduction for delivery charges. The Department found that postage was a delivery charge for purposes of calculating gross retail income and was subject to the sales tax.
 - c. **Use Tax – Imposition – Computer Software Maintenance and Support Service Contracts.** The auditor found that Taxpayer had purchased "software maintenance agreements" without paying sales tax at the time of the purchase or remitting use tax to the Department. Taxpayer asserted that these software maintenance agreements were for services and were not subject to use tax.

Taxpayer referred to Sales Tax Information Bulletin 2, which states software maintenance agreements and optional warranties are not subject to use tax if Taxpayer can show tangible personal property in the form of updates was not received. The maintenance agreement specifically stated that Taxpayer would have to separately purchase any subsequent updates. Thus, the Department agreed that this should not be taxed.

25. Letter of Findings No. 04-20100339, Gross Retail Tax for the Years 2005 through 2007 (May, 2011). Taxpayer was an Indiana retailer that sold new and pre-owned recreational vehicles ("RVs"). The Department determined that Taxpayer failed to collect and remit the sales tax on several RVs which Taxpayer sold to out-of-state customers and which were picked up at Taxpayer's Indiana location.

Taxpayer argued that it made out-of-state customers sign affidavits that they would pay the equivalent use tax in their home states when they registered their vehicles. This requirement relieved the Taxpayer from having to collect and remit sales tax to the Department. The Department pointed out that the law applying to sales to out-of-state purchasers where delivery was taken in Indiana changed during the years at issue. The exemption Taxpayer was claiming, under Ind. Code § 6-2.5-5-15, was repealed as of July 1, 2004.

For sales from January 1, 2005 through June 30, 2005, Indiana dealers were required to collect sales tax on all retail transactions of RVs delivered in Indiana regardless of where the purchasers lived or where the vehicle was going to be titled and registered. During this period, Taxpayer sold vehicles that were picked up at Taxpayer's Indiana location. Although the affidavits did not meet the new requirements, the Department gave Taxpayer credit where Taxpayer had a record that sales tax was paid in the home jurisdiction. The Department assessed sales tax on all other transactions where no sales tax was paid and delivery was taken in Indiana.

Effective July 1, 2005 until June 30, 2006, the purchase of a recreational vehicle or trailer by an out-of-state customer, which was to be registered and or titled outside Indiana, was afforded an exemption in an amount that would cause the buyer to pay no more state sales tax than would have been due if the buyer had made the purchase in the state the vehicle was to be registered and/or titled. Ind. Code § 6-2.5-5-39. The auditor found that Taxpayer failed to collect sales tax at the applicable rate of the purchaser's home state on two sales. The auditor assessed additional sales tax using either the foreign jurisdiction's rate or Indiana's, whichever was lower.

Effective July 1, 2006, Ind. Code § 6-2.5-5-39 provided an exemption for sales of motor homes, RVs, and travel trailers to residents of forty-two states and the District of Columbia, because these jurisdictions had reciprocating agreements with Indiana. For the period July 1, 2006 through June 30, 2007, Taxpayer was obligated to collect Indiana sales tax in its sales to residents of California, Massachusetts, North Carolina, Florida, Michigan, South Carolina, Maine, Mississippi, Canada, and Mexico, because these jurisdictions did not have reciprocal agreements with Indiana. The auditor found that

Taxpayer had made sales to purchasers from these jurisdictions without collecting sales tax. The auditor also made adjustments for those transactions where delivery was taken in Indiana. However, the auditor did not give credit for those transactions Taxpayer was able to verify sales tax had been paid in the home jurisdiction, because there was no reciprocal agreement. The Department determined that these assessments were warranted because sales tax should have been collected on those purchases. The Department agreed with the Taxpayer that the negligence penalty was not warranted because of the frequent changes in the application of the law during the periods at issue.

26. Letter of Findings No. 04-20100519, Gross Retail Tax for the Years 2007 and 2008 (April, 2011). Taxpayer was in the business of providing prescription medicine and supplies to "long term care facilities" (nursing homes) and to the patients in those facilities. Taxpayer also sold supplies directly to the nursing for use in or by the nursing homes. The Department noted that Taxpayer "consistently reported zero taxable sales and zero sales tax liability." The auditor found the sales of certain items such as "diabetes test strips, meters, lancets, sharps containers, wound measuring guides, refrigerators, positioners, pill crushers, skin prep wipes, syringe, batteries, iv-sets, tubing, wipes, isolation gowns, and external pump" were not exempt because these items were "[s]upplies used by the nursing home in rendering health care services [and] subject to sales tax and constitute taxable sales." Taxpayer protested part of the Department's assessment.

Taxpayer argued that it had received exemption certificates for the items purchased. The auditor found that all the exemption certificates produced were signed by the same person and contained a blanket exemption claim for "medical supplies and nutritionals for the period 2007-2009." Although the Department noted that this was ambiguous, it determined the purchases related to medical supplies and nutritionals should have been exempted. But taxes should have been collected on items outside these categories.

Taxpayer also purchased "AM/PM" labels that were attached to prescription cards which aided nursing home personnel. Taxpayer argued that certain of its packaging labels were entitled to exempt status under 45 IAC 2.2-5-15 and 45 IAC 2.2-5-16, because the labels were affixed to the tangible personal property actually transferred to the recipients for whom the prescriptions were written. Taxpayer did not show that the AM/PM labels were anything other than a convenience provided to the nursing home. The labels were taxable.

Taxpayer also purchased certain "capital assets" which were "to be utilized in the establishment of a clean room for manufacturing certain pharmaceuticals." Taxpayer asserted that the Department erred in assessing sales/use tax, because the purchases were exempt under the manufacturer's exemption since they were used "for the direct production manufacturing fabrication or finishing . . . of various drugs by the company." Ind. Code § 6-2.5-5-3. The Taxpayer formed a new company separate and distinct from it that manufactured pharmaceuticals. The Department concluded that the new company could assert the exemption, but the Taxpayer could not because it was not a

manufacturer. Even so, the items seemed to fall outside the exemption, because they did not appear to be used in the direct production of manufacturing the pharmaceuticals.

27. Letter of Findings No. 04-20090541, Gross Retail Tax for the Years 2006 and 2007 (March, 2011). Taxpayer was an Indiana manufacturer which produced plastic pellets. After a sales/use tax audit of Taxpayer's business records and a tour of the Taxpayer's manufacturing facility and laboratory facility, the Department issued proposed assessments of additional sales/use tax. After reviewing the Taxpayer's written protest, the Department's Audit Division conducted a supplemental review of the original audit conclusions. This follow-up review included a second on-site visit to Taxpayer's facility. The supplemental review made adjustments to the original findings and issued a report to that effect. Taxpayer continued to disagree with some of the Department's remaining conclusions.

Taxpayer protested the assessment of sales/use tax on "purchases of various pieces of testing and inspection machinery and equipment which are essential and integral to the [Taxpayer's] integrated production process," under the manufacturer's exemption. Ind. Code § 6-2.5-5-3(b). The auditor found that the particular items of equipment used by the Taxpayer were employed after Taxpayer's production process was complete. The Department upon protest refused to second-guess the determination of the auditor who had the advantage of visiting Taxpayer's manufacturing facility, touring the production process, hearing an explanation of that process directly from Taxpayer's personnel, and witnessing first-hand the manner in which testing and laboratory equipment were used.

Taxpayer also protested the assessment of sales/use tax on equipment used to transport its plastic pellets from one of its production lines to the "de-dusting" equipment located outside the production plant and near the waiting railcars. Taxpayer cited 45 IAC 2.2-5-8(f)(3), which states "[t]ransportation equipment used to transport work-in-process or semi-finished materials to or from storage is not subject to tax if the transportation is within the production process." The railcars were used to transport Taxpayer's plastic pellets to Taxpayer's customers. The "de-dusting" equipment was used to remove dust from Taxpayer's pellets and to remove "snakeskins" from the pellets. The Department agreed with Taxpayer's assertion that this particular equipment was exempt, because it was used to move pellets within the production process.

Taxpayer also argued its purchase of certain vacuum pump carts were exempt from sales/use tax, because the carts were "custom fabricated" and used to support and transport "Busch vacuum pumps and their control panels" within Taxpayer's manufacturing facility. Taxpayer stated the carts also allowed Taxpayer to rapidly and conveniently move the pumps between production runs from one line to another. The Department found this statement implied the carts were not used during the production run. The carts were ancillary equipment at least one step removed from the "direct" production process and not subject to the manufacturer's exemption. Ind. Code § 6-2.5-5-3(b).

Taxpayer further protested the assessment of sales/use tax on the purchase of safety equipment and clothing which – as Taxpayer described – was "worn by production operators to prevent bodily injury during the integrated production of plastic pellets for sale." Taxpayer contended that this was safety clothing used for the worker to work without injury or prevent contamination of the product during production. 45 IAC 2.2-5-8(c)(2)(F). The auditor agreed the items were exempt but found that the items were also used by nonproduction personnel. The auditor made an adjustment based on the Taxpayer's spreadsheet to determine the allocation of exempted use of the equipment and non-exempted use of the equipment. The Department concluded that the evidence and information presented during the protest was insufficient to warrant adjusting the audit's original determination.

The Taxpayer finally objected to the methodology of performing the audit. The auditor chose to use a statistical sample with an adjustable error of their January 1, 2006 through December 31, 2007 use tax purchases on transactions other than assets. The Taxpayer reflected little use tax paid and did not have accounting that appeared to be familiar with use tax regulations. While the Department agreed with the Taxpayer that using a different methodology could give a different taxing result, it found that Taxpayer failed to show that the initial audit results were incorrect.

28. Letter of Findings No. 40-20100253; 04-20100254, Gross Retail Tax and Utility Receipts Tax for the Years 2006 through 2008 (March, 2011). Taxpayer was an Indiana municipal utility. Taxpayer provided water and sewage service to business and household consumers. Taxpayer also charged its customers a regular, fixed fee to maintain its public fire hydrant system ("maintenance fee"). The Taxpayer argued the "maintenance fees" were a separate, line item on the consumers' water bills, were segregated in the Taxpayer's financial records, and were used for the maintenance and update of the public fire hydrant system. The Department found that the "maintenance fees" were not subject to the state's gross retail tax because the fees were separately stated and did not represent the transfer of "tangible personal property." The "maintenance fees are the municipality's method of allocating the cost of maintaining the hydrants and its fire protection services to the municipality's residents."

29. Letter of Findings No. 04-20100597, Gross Retail Tax for the Years 2007 through 2009 (March, 2011). Taxpayer was a medical practice specializing in the practice of gastroenterology. The Department concluded Taxpayer should have been paying sales tax on the purchases of devices used in Taxpayer's medical practice. Taxpayer purchased a device called "PillCam SB." "PillCam SB [was] the most widely used patient-friendly tool for visualization of the entire small bowel and was the standard of care for detecting small bowel abnormalities." Taxpayer argues that "PillCams [were] purchased by the Taxpayer and resold to patients pursuant to a prescription issued by one of [Taxpayer's] physicians." Taxpayer pointed out that the PillCams were "new technology replacing x-ray dyes, which have been traditionally treated as exempt medical supplies." Taxpayer concluded that the PillCams were "used by the patient and qualify for the exemption as a medical supply." Ind. Code § 6-2.5-5-18. The Department reasoned that the PillCams were properly thought of as "medical equipment" that were not "directly required to

correct or alleviate injury to malfunction of, or removal of a portion of the purchaser's body." As an item of diagnostic equipment, the PillCams were subject to sales tax pursuant to 45 IAC 2.2-5-36. PillCams did not act to alleviate the patients' medical condition. Instead, the PillCams were a diagnostic tool purchased by the healthcare provider. As such, they were taxable.

30. Letter of Findings No. 04-20100498; 09-20100499; 10-20100500, Gross Retail Tax, County Innkeeper Tax, Food and Beverage Tax for the Years 2008 and 2009 (March, 2011). Taxpayer owned an approximately 500 room hotel in Indiana. Within the hotel, Taxpayer operated a restaurant, lounge, "business center," and gift shop. Taxpayer provided meeting, convention, catering, and banquet facilities. Taxpayer also rented audio visual equipment to its customers. The Department issued proposed notices of additional sales tax, county innkeepers' tax, and food & beverage tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect.
- a. **Hotel Accommodations – Innkeepers' Tax/Gross Retail Tax.** Taxpayer argued that it was not required to collect sales or Innkeepers' Tax from organizations that presented Taxpayer an exemption certificate when the organizations rented individual guest rooms. However, the Department has stated that hotel accommodations rented for the private benefit of the recipient are outside the purview of the not-for-profit exemption. Sales Tax Information Bulletin 10. To receive the exemption, Taxpayer must do a step process. The first step is to have the customer present a properly completed exemption certificate. The second step is to present payment by the exempt organization or governmental organization and confirm that the exemption certificate is actually being used by the exempt organization listed on the exemption certificate. Both steps are necessary.
- Taxpayer also argued that it was not required to collect either sales tax or Innkeepers' Tax when it sold meals to not-for-profit organizations providing Taxpayer with an exemption certificate. Ind. Code § 6-2.5-5-25. 45 IAC 2.2-5-55(b)(3) adds, "The article purchased must be used for the same purpose as that for which the organization is being exempted. Purchases used for social purposes are never exempt." If meals are prepared and served by a qualified nonprofit organization as a fundraising activity, the proceeds of which are used for the purpose for which the organization is granted exemption from sales tax, and the organization does not conduct selling activities of any nature on more than 30 days in a calendar year, the organization is not required to collect sales tax. The Department found Taxpayer had not shown that the meal service served the purposes of the respective exempt organizations. Taxpayer was not a nonexempt organization and should have collected taxes on the rented rooms.
- b. **Meeting Rooms – Food and Beverage/Gross Retail Tax.** The Department agreed that the rental of meeting rooms by non-profit organizations is typically exempt under Ind. Code § 6-2.5-5-25 because meeting rooms –

unlike individual guest rooms – are typically used "to carry on or to raise money to carry on [the organization's] not-for-profit purpose."

- c. **Government Agencies – Gross Retail Tax.** Taxpayer argued that it was not required to collect sales tax on the rental of hotel rooms to federal governmental agencies. But the fact that the U.S. government may ultimately reimburse an employee who paid the tax does not exempt the purchase. The employee must pay for the lodging with a credit card in the name of and billed directly to a federal government agency. Taxpayer provided credit card receipts which evidenced transactions between itself and the U.S. Government. The Department agreed that no tax should be assessed upon verification.
- d. **Additional Room Charges – Innkeepers' Tax/Gross Retail Tax.** Taxpayer stated that it was not required to collect sales or Innkeepers' tax when it rented its customers movies, refrigerators, and rollaway beds. It also maintained that it was not required to collect taxes on long distance phone calls made from the room under Ind. Code § 6-2.5-4-4. The Department rejected Taxpayer's argument, explaining that the provision of movies, telephones, refrigerators, and rollaway beds fell within the definition of services which are regularly provided in furnishing the accommodation of a hotel room.
- e. **Catered Meals – Food and Beverage Tax.** Taxpayer argued that it was not subject to Food and Beverage Tax on the price paid by not-for-profit organizations for catered meals. The organizations presented the Taxpayer with valid exemption certificates. But the Department concluded that providing catered meals to the organizations' constituents and/or guests did not – on its face – advance the not-for-profit's purpose.

Withholding Tax

1. Letter of Findings No. 03-20100722P, Withholding Tax for the Year 2009 (May, 2011). Taxpayer was an Indiana corporation. A third party representative filed Taxpayer's withholding return, form WH-3, timely and payment was remitted; however, the representative used the incorrect TID (taxpayer identification number) for Taxpayer. Upon notice, Taxpayer corrected the filing. The Department imposed a failure to file information return penalty. Upon protest, the Department agreed that the Taxpayer timely filed its return and remitted taxes. A typographical error did not change the fact the return was timely filed.
2. Letter of Findings No. 03-20100523, Withholding Tax for the Years 2007 through 2009 (May, 2011). Taxpayer was an Indiana corporation. The Department determined Taxpayer had not withheld Indiana county income taxes on several employees. The Department issued proposed assessments for county income tax. Taxpayer protested the imposition of withholding tax on all except two of the employees.

Taxpayer withheld Indiana adjusted gross income tax for all employees. Because the county income tax is imposed depending on the county of residence or employment as of January 1 for any particular tax year, Taxpayer did not withhold Indiana county income tax on all employees for all years. Taxpayer believed that, since these employees did not start work until after January 1 of the respective years, then their counties of employment could not be determined for those years.

Taxpayer was unable to provide documentation on the counties of its job site locations. The employees in question were out-of-state residents, so the Department elected to use the county income tax rate of Taxpayer's home Indiana county to determine the amounts of county income tax which should have been withheld. That particular county's resident and non-resident rates were identical.

Under that circumstance, the Department reasoned that it was reasonable for the auditor to believe that those employees worked in an Indiana county and had Indiana county income tax due. The Taxpayer did not provided documentation to prove the Department's proposed assessments were incorrect.

Utilities Receipt Tax

1. Letter of Findings No. 40-20100253, Utility Receipts Tax for the Years 2006 through 2008 (March, 2011). Taxpayer, a municipal agency, provided water and sewage services to its customers. The Department discovered that Taxpayer failed to file its Utility Receipts Tax ("URT") Returns. Taxpayer protested the Department's assessments relating to "Fire Protection," "Reconnect Fees," and "NSF Fees" accounts.

Taxpayer argued the charges under the "Fire Protection" account were charges relating to fire hydrant maintenance. The Department observed that Taxpayer's "Fire Protection" contained three categories: (1) private hydrant, (2) public hydrant, and (3) automatic sprinklers. Among those categories, the charges relating to private hydrants and sprinklers systems were considered "the retail sale of utility services for consumption." Although Taxpayer's documentation showed that it charged its customers a fixed fee for hydrant maintenance, the Taxpayer's documentation failed to show that the "Fire Protection" account only represented the receipts for charges of maintaining public hydrants.

Taxpayer further claimed that reconnection fees and NSF fees were not subject to URT for the same reason. The Department noted that the charges were for the connection or reconnection of a customer to the lines for delivery of the water. Thus, these charges "directly relate to the delivery of utility services" pursuant to Ind. Code § 6-2.3-3-10. The receipts received from these service charges were subject to the URT. But the Department agreed that the NSF fees from Taxpayer's customers who paid with checks that were returned because of insufficient funds in their accounts were not the type of charges that were subject to the URT. They were not receipts received attributable to the provision of water utility services for consumption.

Underground Storage Tank Fees

1. Letter of Findings No. 43-20100695, Underground Storage Tank Fees for the Years 1999 through 2009 (May, 2011). Taxpayer operated a gas station and convenience store in Indiana. At Taxpayer's gas station were three underground storage tanks. These tanks were purchased by Taxpayer and installed at Taxpayer's gas station in 1998. But it was not until 2010 that Taxpayer discovered that it was required to pay an annual underground storage tank registration fee for each year going back to 1999. Ind. Code § 13-23-12-1. The Department assessed registration fees for each year from 1999 to 2010, a ten percent penalty and interest on each registration fee. The Department also assessed a total of \$126,000 in "environmental penalties."

The Taxpayer argued that it registered the storage tank in 1998. However, the Taxpayer had no confirmation that it actually sent the form to the Department. Taxpayer could not provide confirmation that the form was received by the Department. Therefore, without records to the contrary from Taxpayer, Taxpayer could meet its burden of proof to show that the Notification for Underground Storage Tanks was filed.

Taxpayer also contended that the State was aware that the underground storage tanks existed, and that Taxpayer should have been billed much earlier. Even if one could argue that one State agency's knowledge that the underground storage tanks existed imputed knowledge to all other agencies of the State, that argument was irrelevant. The environmental penalties were assessed because Taxpayer failed to pay six consecutive annual \$90 registration fees for each of its underground storage tanks. Taxpayer did not pay the annual registration fees, and therefore the environmental penalties were properly assessed.

Taxpayer finally contended that it did not know about the underground storage tanks registration fee requirements. Taxpayer stated that since it paid other fees or taxes to the State, presumably it would not have deliberately avoided paying this one fee; however, ignorance of the law is no excuse for not paying what is owed to the State. Since the annual registration fees were not paid, the environmental penalties were properly assessed. The Department also could not set aside the fees on equitable grounds of fairness to the Taxpayer. The penalty had been assessed in accordance with what was provided for in the statute as passed by the legislature.

LEGISLATIVE CHANGES AFFECTING THE ADMINISTRATION OF TAXES

1. Public Law 99-2011 – Tax Liens

- Ind. Code § 6-8.1-8-2, effective July 1, 2011, requires the Department to release a judgment if: (1) it has been fully satisfied; or (2) the tax assessment or issuance of the tax warrant was erroneous.
- Ind. Code § 6-8.1-8-2, effective July 1, 2011, also provides that a tax lien on real property is void if the person owing the tax provides written notice to the Department to file an action to foreclose the lien, and the department fails to file an action to foreclose the lien not later than 180 days after receiving the notice.

2. Public Law 172-2011 – State and Local Administration

- Ind. Code § 6-8.1-8-16, effective May 10, 2011, prohibits the Department from taking an action to collect a protested listed tax until the later of the time to file a tax appeal has expired or a final decision is made in a tax appeal.
- Ind. Code § 6-8.1-9-1, regarding refund claims, adds: "If the person disagrees with a part of the decision, the person may file a protest and request a hearing with the department. The department shall mail a copy of the decision to the person who filed the protest." The amendment further adds that that the Tax Court does not have jurisdiction to hear a refund appeal if the appeal is filed more than 90 days after the later of the decision of denial of the claim or the decision made on the protest of the refund claim denial.

LEGISLATIVE CHANGES AFFECTING INCOME TAXES²

1. Public Law 172-2011 – State and Local Administration

- Ind. Code § 6-3-2-1, effective July 1, 2011, decreases the corporate income tax rate from 8.5% to 6.5% over four years.
- Ind. Code § 6-3-1-3.5, effective January 1, 2012, provides that the adjusted gross income tax applies to interest on state and local bonds that are issued by a state other than Indiana, or a political subdivision of such a state, and that are acquired by the taxpayer after December 31, 2011.
- Ind. Code § 6-3-2-2, effective January 1, 2011, revises the attribution rules applicable to business income and sales receipts from certain intangibles under the adjusted gross income tax. Income from intangible personal property is derived from sources within Indiana "to the extent that the income is apportioned to Indiana under [6-3-2-2] or if the income is allocated to Indiana or considered to be derived from sources within Indiana under [6-3-2-2]."
- Ind. Code § 6-3-2-2.5, effective January 1, 2012, eliminates the carryback of net operating losses under the adjusted gross income tax.

² To view the Department of Revenue's *Synopsis of 2011 Legislation Affecting the Indiana Department of Revenue*, please visit the Department's web site at www.in.gov/dor/reference/files/summary2011.pdf.

LEGISLATIVE CHANGES AFFECTING SALES AND USE TAXES

1. Public Law 84-2011 – Streamlined Sales and Use Tax Conformity

- Ind. Code § 6-2.5-4-13, effective April 28, 2011, makes changes concerning calling services under the state gross retail and use taxes to bring the state into compliance with the Streamlined Sale and Use Tax Agreement.
- Ind. Code § 6-2.5-5-18, effective April 28, 2011, makes changes concerning durable medical equipment under the state gross retail and use taxes to bring the state into compliance with the Streamlined Sale and Use Tax Agreement.
- Ind. Code § 6-2.5-11-10, effective April 28, 2011, makes changes concerning reliance on the department of state revenue's taxability matrix under the state gross retail and use taxes to bring the state into compliance with the Streamlined Sale and Use Tax Agreement.

2. Public Law 172-2011 – State and Local Administration

- Ind. Code § 6-2.5-5-5.1, effective July 1, 2011, provides that a claim for a sales tax refund must be filed within 18 months if the claim is based on the predominant use of electrical energy, natural or artificial gas, water, steam, and steam heat by certain businesses or based on the sales tax exemption for these services or commodities.

LEGISLATIVE CHANGES AFFECTING PROPERTY TAXES

1. Public Law 46-2011 – Wind Power Device Exemption

- Ind. Code § 6-1.1-12-29, effective January 1, 2010, specifies that a wind power device does not qualify for the assessed value deduction if it is owned or operated by: (1) a public utility; or (2) another entity that provides electricity at wholesale or retail for consideration, other than a person who participates in a net metering program offered by an electric utility.

2. Public Law 157-2011 – Tax Representatives

- Ind. Code § 6-1.1-15-17.3, effective July 1, 2011, provides that certain local officials of a county or their employees or contractors may not serve as a tax representative for any taxpayer with respect to property subject to property taxes in the same county before the county Property Tax Assessment Board of Appeals or the Indiana Board of Tax Review.
- Ind. Code § 6-1.1-15-17.3, effective July 1, 2011, also provides that this prohibition does not prohibit a contract employee or contractor of a tax official from serving as a tax representative unless the contract employee or contractor personally and substantially participated in the assessment of the property.
- Ind. Code § 6-1.1-15-17.3, effective July 1, 2011, specifies that an individual who is a former assessor or a former employee, contract employee, or contractor of an assessor may not represent or assist another person in an assessment appeal before the IBTR or a county PTABOA if, while the individual was an assessor or an employee, contract employee, or contractor of an assessor, the individual personally and substantially participated in the assessment of the property.

3. Public Law 172-2011 – State and Local Administration

- Ind. Code § 6-1.1-12-37(o), effective March 1, 2011, requires a county auditor who determines that a property is ineligible for the standard deduction to inform the property owner of the county auditor's determination in writing.
- Ind. Code § 6-1.1-3-7.5(l), effective May 15, 2011, extends the time for amending a personal property tax return and provides for a reduction in a refund or credit based on the time of filing, from 6 months to 12 months.
- Ind. Code § 6-1.1-15-17, effective July 1, 2011, provides that when assessed value is increased by more than 5% over the assessed value for the immediately preceding assessment date, the county assessor or township assessor making the assessment has the burden of proving that the assessment is correct.

4. Public Law 173-2011 – State and Local Administration

- Ind. Code § 6-1.1-10-24, effective January 1, 2008, provides that the property tax exemption for fraternity or sorority property applies to property used for administrative purposes, including property owned by a national or international headquarters, fraternity or sorority foundations, and housing corporations; specifies that the exemption applies only if the property is owned by a fraternity or sorority (or a national or international headquarters, foundation, or housing corporation related to a fraternity or sorority) that is exempt from federal income taxation under Section 501(c)(2), Section 501(c)(3), or Section 501(c)(7) of the Internal Revenue Code.

DEPARTMENT OF LOCAL GOVERNMENT FINANCE
MEMOS/PUBLICATIONS/NEWS RELEASES

Memos:

Exhibit	Subject	Date
1	Abnormal Obsolescence (Personal Property) Frequently Asked Questions	April 19, 2011
2	Reassessment Following a Disaster (Form 137R) and Permanently Flooded Property Reassessments (Form 137PF)	April 29, 2011
3	Golf Course Guidance	May 5, 2011
4	Homestead Standard Deduction, HEA 1004-2011	May 11, 2011
5	Legislative Changes to Maximum Permissible Levies	May 16, 2011
6	Exemptions, HEA 1004-2011	May 19, 2011
7	Property Tax Assessment and Credit Appeals	May 20, 2011
8	Amended Personal Property Tax Returns	June 1, 2011
9	Voting for Agreements to Join or Establish a Fire Territory; Fire Territory Tax Rates; Public Hearing and Notice Requirements	May 27, 2011
10	Tax Representation	June 1, 2011
11	Deduction for Residence in Inventory	June 2, 2011
12	Legislative Changes to Referenda and Petition and Remonstrance Statutes	June 2, 2011
13	Release of 2012 Cost Information for the General Reassessment	July 1, 2011

Publications / News Releases:

Exhibit	Title	Date
14	Assessment Appeals Frequently Asked Questions – Volume 2	January 4, 2011
15	Property tax bills on-time in 90 counties	April 29, 2011
16	State partnership advances transparency for Hoosiers	July 8, 2011

INDIANA DEPARTMENT OF REVENUE
2011 UPDATED BULLETINS & NOTICES

Exhibit	Title	Date
17	Income Tax Bulletin #70 – Disability Income Deduction	March 2011
18	Sales Tax Bulletin #67 – Exemption Available to Professional Motor Racing Teams	March 2011
19	Sales Tax Bulletin #60 – Construction Contractors Tax Responsibility	April 2011
20	Departmental Notice #2 – Prepayment of Sales Tax on Gasoline	June 1, 2011