Indiana Real Property Tax Appeals: 2012 Update on Procedural, Jurisdictional, Burden-Shifting, & Exemption Issues

December 6, 2012

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TABLE OF CONTENTS

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INDIANA TAX COURT DECISIONS[1]

1. **Tax Court analyzes Ind. Rule of Professional Rule of Conduct 3.7 in dismissing Department of Revenue's request to re-open discovery.** (originally posted at *www.taxhatchet.com* on April 13, 2012).

   Indiana Department of Revenue may not use Rule of Professional Conduct as a "procedural weapon"

   It's rare to find a rule of professional conduct at the heart of a tax ruling. But that was the case when the Indiana Tax Court rejected the Department of Revenue's efforts to disqualify counsel for the taxpayer (Utilimaster) as "necessary witnesses" in a sales and use tax refund appeal. *See Utilimaster Corp. v. Indiana Department of State Revenue*, Cause No. 71T10-1008-TA-43 (April 17, 2012). The Court rebuked the Department's efforts to invoke a rule of professional conduct as a thinly veiled effort to overcome the Department's failure to conduct depositions in the time allotted under the Court's case management plan. The Court admonished: "The Department has invoked Professional Conduct Rule 3.7 in an attempt to conceal its failure to timely pursue discovery as well as to remove Utilimaster's attorneys from the case, calling their professionalism into question." Slip op. at 9-10.

   Utilimaster manufactures commercial vehicles, using sealants and adhesives in its manufacturing process during the refund period that required an ambient air temperature

[1] Opinions of the Indiana Supreme Court, Indiana Court of Appeals, and the Indiana Tax Court can be viewed at: *http://www.in.gov/judiciary/2730.htm* (last visited November 3, 2012).

of between 60 and 80 degrees Fahrenheit to properly cure. That required the purchase of natural gas. Essentially, Utilimaster claimed a refund of sales and use tax paid on its purchases of natural gas that it asserted was predominantly used for manufacturing. To support its request, Utilimaster's refund claim relied upon a consultant's report (a "utility study") showing that production equipment used more than one-half of the natural gas purchased. The refund claim was signed by the consultant's president. The Department granted a partial refund, and Utilimaster appealed. Utilimaster's counsel on appeal to the Tax Court had served as president and vice-president for the consultant.

The Department's counsel served written discovery but conducted no depositions. More than a month following the close of discovery, the Department filed a motion to reopen discovery, claiming that three days earlier Utilimaster's counsel had admitted to preparing the utility study. The Department wanted an opportunity to depose Utilimaster's counsel/consultants. One day later – and without giving the Court a chance to rule on the motion to reopen discovery – the Department filed a motion to disqualify Utilimaster's counsel under Indiana Professional Conduct Rule 3.7, which provides that a lawyer shall not act as an advocate at a trial in which he or she is likely to be a necessary witness (unless one of three factors irrelevant to this decision are present).

Rule 3.7's purpose is to reduce the potential of confusing the trier of fact, which may have difficulty determining whether statements by an advocate-witness should be taken as proof or as an analysis of the proof. Slip op. at 5. But that concern, the Court explained, is "more appropriate in the context of a jury trial than in a bench trial." *Id.* The Court further noted that "courts have recognized that litigants sometimes improperly use the rule as a means to gain a tactical advantage in litigation." *Id.* (citing *Beller v. Crow*, 742 N.W.2d 230, 234 (Neb. 2007)).

The Tax Court first explained that the threshold question under Rule 3.7 is whether Utilimaster's attorneys are likely to be "necessary" witnesses. Slip op. at 6. That requires a two-prong showing: (1) the Department must show that the testimony it seeks from taxpayer's counsel "is more than marginally relevant to the issue or issues being litigated"; and (2) "it must show that [counsel's] testimony will result in evidence that cannot be obtained elsewhere." *Id.* Neither prong was met. The Department argued that it needed to call counsel to elicit testimony about their "subjective mindset" in preparing the utility study and that this evidence could not be obtained from any other source. This argument, the Court observed, "misses the mark." Slip op. at 7. The utility study provided the square footage of Utilimaster's facility and the portion thereof used in manufacturing – "information [that is] readily ascertainable, objective numbers." *Id.* Sources other than taxpayer's counsel/consultants, such as knowledgeable company employees, could prove the accuracy of this information. Slip op. at 8. Thus, the counsel/consultants are "not necessary witnesses pursuant to Professional Conduct Rule 3.7." *Id.* (emphasis in original).

The Court also concluded that the Department's motion to disqualify counsel must fail because Rule 3.7 "has not been used for its intended purpose of preventing the Court from being misled or confused about Utilimaster's attorneys' role." Slip op. at 8. Rather,

the Department's argument focused on how the Department had been "ambushed" and "unfairly prejudiced" by the counsel/consultants. The facts, however, did not support these claims: the refund claim *had been signed* by one of the counsel/consultants, and the refund claim was accompanied by a power of attorney granting the counsel/consultants authority to act on Utilimaster's behalf. Slip op. at 9. The Department's counsel "had ample evidence to alert him that he may want to conduct depositions to know more." *Id.* The Department chose not to pursue depositions until after discovery closed, and the Court would not allow the Department to correct its mistake through re-opening discovery or disqualifying Utilimaster's counsel.

2. **Indiana Tax Court grants assessor's motion to dismiss due to taxpayers' failure to timely file the agency record under Ind. Tax Court Rule 3(E)** (originally posted at *www.taxhatchet.com* on June 19, 2012).

Indiana Tax Court dismisses real property tax appeal due to taxpayers' failure to timely file the agency record, where agency issued sufficient notice and taxpayers' "own inaction" was not "excusable neglect"

Indiana Tax Court Rule 3(E) requires the appealing party to request a certified copy of the agency record from the Indiana Board of Tax Review within thirty days of filing the petition. And the rule further directs: "The petitioner shall transmit a certified copy of the record to the Tax Court within thirty (30) days after having received notification from the Indiana Board of Tax Review that the record had been prepared." *Id.* In *Bosamia v. Marion County Assessor*, Cause No. 49T10-1108-TA-52 (Ind. Tax Ct., June 19, 2012) (*see* http://1.usa.gov/NfTxv6), the relevant events unfolded in 2011 as follows:

1. **August 24th** – The Bosamias (Husband and Wife) filed their original tax appeal and paid a $50 deposit to the Indiana Board towards payment of the copying cost for the administrative record. (They challenged the Indiana Board's final determinations upholding the March 1, 2007 and 2008 real property tax assessments of their commercial property.)

2. **September 8th** – The Indiana Board mailed an invoice to the Bosamias, stating that that record was prepared and that a balance of $161.00 was due.

3. **October 2d** – "[Husband] learned that [a family member was] gravely ill, and he traveled to England to visit her. [Wife] remained in Indianapolis to manage their restaurant and to care for their family." Slip op. at 2.

4. **October 18th** – Husband returned to Indianapolis.

5. **October 21st** – The Bosamias paid the balance due to the Indiana Board.

6. **October 22d** – The Bosamias traveled to England due to the family member's illness, returning on November 3d.

7. **November 7th** – The Assessor moved to dismiss the appeal, claiming that the Bosamias failed to comply with Tax Court Rule 3(E).

8. **November 9th** – The Bosamias filed the agency record with the Tax Court.

The parties agreed that, if the Indiana Board's invoice constituted adequate notice, the Bosamias had until October 11th to file the record with the Court. Conceding that they missed this deadline, the Bosamias nevertheless argued that the motion to dismiss should be denied for two reasons. First, they argued that their October 21st payment – not the invoice, which they claimed was inadequate – triggered the thirty-day filing deadline under Tax Court Rule 3(E), and their November 9th filing was timely. The Indiana Board's invoice stated that the agency record "has been prepared." Slip op. at 5. That alone was sufficient to trigger the thirty-day filing period, the Court reasoned. *Id.* (*citing Wayne County PTABOA v. United Ancient Order of Druids-Grove #29*, 847 N.E.2d 924, 929 (Ind. 2006)). But the Board's invoice went "even further by stating 1) how the Bosamias could obtain the record (payment of the invoice) and 2) that their receipt of the invoice triggered their thirty days to file the record." *Id.* The invoice was "sufficient notice." *Id.*

Second, the Bosamias argued that their failure to timely file the record should be excused under Ind. Trial Rule 6(B)(2) as the result of "excusable neglect." That phrase, the Court noted, is not defined by the trial rule or its federal counterpart. Slip op. at 6. And Indiana case law interpreting the phrase is "scarce." The available authority suggests that "excusable neglect" applies when a failure to act is due to "some unexpected or unavoidable hindrance or accident" or is "caused by some event or action outside a party's control." *Id.* (quotations and citations omitted). In this case, the Bosamias filed the record more than three weeks passed when they learned of the family member's illness. Moreover, Wife had nearly another week to file the record before the October 11th deadline. *Id.* The Court explained that it "sympathizes with the unfortunate circumstances that befell the Bosamias; however, the failure to timely file was not because of [the family member's] illness, but was the result of their own inaction." Slip op. at 7. The Court concluded: "Given these facts and circumstances, the Court cannot employ its discretion to enlarge the Bosamias' time to file" the agency record. *Id.* The Court granted the motion to dismiss. *Id.*

As a silver lining to the taxpayers' stormy cloud, however, the Court in a footnote observed: "Each tax year stands alone. Consequently, the Bosamias may protest their property assessment next year." Slip op. at 7 n.10 (citations omitted).

3. **Tax Court refused to dismiss Taxpayer's original tax appeal petition, where Taxpayer's officer filed the petition.** In *Wireless Advocates, LLC v. Indiana Dep't of State Revenue*, Cause No. 49T10-1109-TA-60 (August 17, 2012), the Taxpayer appealed the Department's denial of its adjusted gross income tax refund claim. The petition was filed by the Taxpayer's vice-president and chief financial officer, who also was a member of the limited liability company. The Department of Revenue filed a motion to dismiss

for failure to state a claim upon which relief can be granted, arguing that the company could not initiate the appeal itself. The Department did so while acknowledging that Indiana does not require limited liability companies to be represented in court by counsel.

The Court declined the invitation to "invent such a rule where one does not currently exist." Slip op. at 3. The Court noted that, when a corporation prosecutes or defends a case *pro se*, Indiana courts generally have given the corporation an opportunity to retain counsel, which the corporation must refuse before dismissal of the action. *Id.* (citation omitted). Appeal by a non-attorney on a corporation's behalf is a curable procedural defect. Slip op. at 4. (citation omitted). The Court further explained that dismissal is not a remedy favored in Indiana. Slip op. at 5 (citation omitted). The Court further reasoned: "[Taxpayer's] petition reveals nothing to defeat an equitable result – there is no evidence of undue delay, bad faith, or dilatory motive on either [Taxpayer's] or [the corporate member's and officer's] part in obtaining counsel." Slip op. at 5. Taxpayer had retained counsel only nine business days after the Department filed its motion.

Moreover, the Court held that the Department's administrative review of Taxpayer's refund claim was "not a substitute for [Taxpayer's] right to be heard in this Court." Slip op. at 5.

4. **Tax Court dismisses income tax refund claim that was filed eleven days too late** (originally posted at *www.taxhatchet.com* on November 1, 2012).

Hoosier Taxpayer's "honest mistake" on personal income tax returns was insufficient grounds to allow her late-filed refund claim.

While sympathetic to an Indiana taxpayer's plight, the Tax Court dismissed her refund claim because it was not timely filed. The taxpayer (Gibson) erroneously reported her personal income tax for a dozen years, improperly adding back certain local property tax payments following a 1999 change of law. Gibson discovered the error in 2011 and was told by the Department of Revenue that she could seek a refund "going back three years." On April 26, 2011, she filed refund claims by submitting amended returns for the 2007 through 2009 tax years. The Department rejected the 2007 refund claim as untimely.

The Tax Court in a decision issued November 1st concurred and granted summary judgment in favor of the Department. The refund statute required a person to file the claim with the Department within three years after the latter of the return's due date or the date of payment. *See* Ind. Code 6-8.1-9-1. For the 2007 tax year, Gibson's return was due on April 15, 2008. Accordingly, to be timely Gibson's refund claim for 2007 was due on or before April 15, 2011. But Gibson's amended returns (serving as her refund claims) were filed eleven days later – too late for the 2007 tax year.

Gibson argued that "principles of equity rather than the strict letter of the law should guide the Court in resolving this matter." Slip op. at 3. She should not be punished for making an "honest mistake in attempting to comply with Indiana's ever-evolving tax

laws." *Id.* Line 2 of the tax return (for the add-back) had not materially changed since 1993, so Gibson contended the Department had not provided sufficient notice of the 1999 change of law (even though the Department's income tax instruction booklet stated, "Do not add back any property taxes on this line"). And this lack of notice was "even more egregious" because the Department failed to identify Gibson's reporting error for twelve years. Slip op. at 4. She asked the Court to refund her income tax overpayments for the 1999 through 2007 tax years.

The Court dismissed the appeal. Acknowledging the "challenges Indiana citizens have in understanding the changes to, and complexities of, our tax system" and expressing sympathy for Gibson's situation, the Court nevertheless held "it must apply the laws as they are written." Slip op. at 5 (citation omitted). Moreover, "courts of equity aid the vigilant, not those who have slept upon their rights." *Id.* (citation omitted). Gibson's 2007 refund claim was untimely, and she provided no excuse for her late filing. *Id.*

The Tax Court's decision in *Gibson v. Indiana Department of State Revenue*, Cause No. 49T10-1204-TA-20, can be viewed at http://www.in.gov/judiciary/opinions/pdf/11011201tgf.pdf.

INDIANA BOARD OF TAX REVIEW – FINAL DETERMINATIONS[2]

1. **Indiana Board lacked jurisdiction to hear complaint about property tax amount (as opposed to assessed value).** *Milo v. Starke County Assessor*, Pet. No. 75-002-09-1-5-00001 (Jan. 1, 2012) (March 1, 2009 assessment) [Small Claims Docket]. "To the extent that the Milos contest the taxes, as opposed to the property's assessment, the Board lacks jurisdiction to hear their claim. . . . [N]o statute authorizes the Board to review the propriety of local tax rates." (Page 6, ¶ 15(i).)

2. **Location of comparable properties goes to weight of testimony, not its admissibility.** *Short Homeplace Family LTP v. Delaware County Assessor*, Pet. No. 18-017-08-1-5-00001 (Jan. 11, 2012) (March 1, 2008 assessment) [Small Claims Docket]. "Mr. Short objected to the Assessor's exhibits on grounds that the Assessor's purportedly comparable properties are not located anywhere near Mount Pleasant Township. The Board overrules Mr. Short's objection because it goes to the weight rather than the admissibility of the Assessor's evidence." (Page 5, ¶ 12.)

3. **Form 133 can be used to challenge removal of developer's discount.** *Throgmartin Henke Development, LLP v. Hamilton County Assessor*, Pet. Nos. 29-015-08-3-5-00010 and -11 (Jan. 24, 2012) (March 1, 2008 assessment). Taxpayer claimed that the assessor erroneously removed the developer's discount allowed under Indiana Code § 6-1.1-4-12 from two vacant lots. Indiana Code § 6-1.1-4-12(h) states in part, "[L]and in inventory may not be reassessed until the next assessment date following the earliest of: (1) the date on which title to the land is transferred by: (A) the land developer; or (B) a successor land developer that acquires title to the land; to a person that is not a land developer; (2) the date on which construction of a structure begins on the land; or (3) the date on which a building permit is issued for construction of a building or structure on the land." The purpose of the discount was described as: "encouraging developers to buy farmland, subdivide it into lots, and resell the lots." (Page 10, ¶ 29) (citations omitted.) Here, the builders erroneously had applied for building permits without the developer's permission. The Indiana Board concluded that the builders had neither actual nor apparent authority to apply for building permits for the lots owned by the developer. (Page 14, ¶ 39.)

   The Indiana Board concluded that the developer could use a Form 133 petition to claim that the developer's discount was improperly removed from its land. (Page 15, ¶ 42.) Form 133 petitions are governed by Indiana Code § 6-1.1-15-12, and Indiana Code § 6-1.1-15-12(a)(6) provides taxpayers with a remedy when their "taxes, as a matter of law, [are] illegal." (Page 14, ¶ 41.) The Board explained: "To determine something 'as a matter of law' simply means to apply the law to undisputed, material facts." *Id.* (citation omitted). The facts in this appeal were undisputed, and the Board held, *see* Page 15, ¶ 42:

[2] Final Determinations of the Indiana Board can be viewed at *http://www.in.gov/ibtr/2332.htm* (last visited November 3, 2012).

> Where property in inventory has not been transferred to a non-developer, where no construction has begun and where no valid building permit has been issued, it is improper for an assessor to reassess a property on a lot basis. Therefore, the taxes on the [Taxpayer's] properties were illegal as a matter of law and a Form 133 was a proper vehicle for the [Taxpayer] to bring its appeals.

4. **Objection regarding realtor listing went to weight of evidence, not its admissibility; Indiana Board admits "merely cumulative hearsay" evidence; credibility of non-appraiser valuation witness hurt by his status as taxpayer's vice-president**. *K L Presnell Companies Office Building LLC v. Johnson County Assessor*, Pet. Nos. 41-026-07-1-4-40163 *et al.* (Jan. 31, 2012) (March 1, 2007 assessment date) [Small Claims Docket]. "The Petitioner objected to the 2008 realtor listing, claiming it is not relevant to the 2007 assessed value or the valuation date of January 1, 2006. This objection, however, goes more to the weight of the evidence, not its admissibility. Accordingly, this exhibit is admitted into the record." (Page 3, ¶ 10(c) n.1).

   The assessor objected to testimony regarding plans or rumors about renovations to the main street making it difficult to get and keep tenants, pointing out that no city official was available for cross examination on that point. The testimony involved matters that are hearsay and matters that are not. The Indiana Board observed that some of the testimony was not sufficiently clear to distinguish one from the other. (Page 3, ¶ 11(c) n.2). But hearsay evidence may be admitted. *Id.* (citing 52 IAC 2-7-3). Moreover, the assessor did not object to Petitioner Ex. A, which the Board noted contained substantially the same kind of hearsay. The Board ruled, "This objection went to evidence that is merely cumulative. Therefore, the Respondent's hearsay objection is overruled." *Id.*

   The Indiana Board rejected the owner's income capitalization approach. The witness who performed the calculation was the owner's vice-president and not a certified appraiser. That undercut the credibility of his work and valuation opinion. (Page 6, ¶ 14(e).) Further, the owner did not show that its evidence – the effective gross income, the net operating income, and the 12% capitalization rate – conformed with generally accepted appraisal principles. (Page 7, ¶ 14(f)). Specifically, the owner failed to show that its historical income and expenses represented market data. (Page 7, ¶ 14(g)). And its capitalization rate was supported only by a "limited, conclusory explanation." (Page 8, ¶ 16(j).) The owner's failure to relate 2001 and 2004 data to the valuation date at issue "entirely destroys the probative value" of the witness's income capitalization approach. *Id.*

5. **Taxpayer failed to show it was entitled to homestead credit or standard deduction; Indiana Board warns that their arbitrary removal "might violate due process"**. *DNK2 Properties LLC – Dan Estes v. St. Joseph County Assessor*, Pet. No. 71-018-07-1-5-01986 (Jan. 31, 2012) (March 1, 2007 assessment) [Small Claims Docket]. The Indiana Board held that the taxpayer failed to make a prima facie showing that it was entitled to the homestead credit or standard deduction. (Page 5, ¶ 17.) The Board relied on its decision in *Fuller v. Cass County Assessor*, Pet. No. 09-014-08-1-5-00001 (Ind.

Bd. Tax Rev. Nov. 10, 2010), *aff'd Fuller v. Cass County Assessor*, Cause No. 49T10-1011-TA-68 (Ind. Tax Ct. Nov. 9, 2011). The Board further noted that the taxpayer did not buy the subject property until after the assessment date for which it sought a homestead credit and standard deduction, and it never used the property as a homestead. But the IBTR further stated: "The Board does not mean to imply that local officials can arbitrarily and without notice rescind an owner's homestead credit or standard deduction once that credit or deduction has been granted for a given assessment year. Doing so might violate due process." (Page 5, ¶ 17 n.3.)

6. **Indiana Board allows public records into evidence not provided to assessor in advance of hearing, where Board saw no prejudice to the assessor; Board finds that taxpayers responsible for paying tax bill had "sufficient interest" to appeal the disputed assessment.** *Tate v. Delaware County Assessor*, Pet. No. 18-017-08-1-5-00002 (Feb. 10, 2012) (March 1, 2008 assessment). The assessor objected to all of the Tates' exhibits because the Tates did not provide the assessor with copies of those exhibits before the Indiana Board's hearing. The Board noted that it may exclude evidence based on a party's failure to meet the pre-hearing disclosure deadlines found in 52 IAC 2-7-1. (Page 3, ¶ 11.) But the Board may waive those deadlines for materials that were submitted at the PTABOA hearing. *Id.* Here, three of the taxpayer's exhibits were offered at the PTABOA hearing. Regarding the last two documents (Exhibits D and E), the Board explained, *see* Page 4, ¶ 14:

> It, however, does not appear that the Tates offered Exhibit D, Form 115 determinations for 2008-2010, or Exhibit E, assessment and tax information for a neighboring property, at the PTABOA hearing. Nonetheless, it is difficult to see how the Assessor could be prejudiced by the Tates failing to provide her with those documents. Those documents are public records that the Assessor either maintains or at least can easily access. The Board therefore overrules the Assessor's objection to Petitioner's Exhibits D-E.

The assessor claimed that taxpayers did not have authority to appeal the assessment because they did not own the property on the assessment date. Board disagreed, reasoning that the taxpayers "paid the taxes that were based on the subject property's March 1, 2008, assessment . . . [and] therefore have sufficient interest in the subject property's March 1, 2008, assessment to appeal that assessment." (Page 8, ¶ 28.)

7. **Indiana Board lacked authority to hear Form 132 petitions filed more than 45 days after receipt of tax bill.** In *GCH, LLC v. St. Joseph County Assessor*, Pet. No. 71-018-09-2-8-00004 (Ind. Bd. Tax Rw., March 19, 2012) (March 1, 2008 and 2009 assessment dates), the Indiana Board of Tax Review considered the application of a property exemption in a case with a "convoluted history." (Page 1, ¶ 1.) The property was transferred to the owner GCH, LLC (GCH) sometime after August 2008. During the relevant periods at issue, the property was leased to the United States Social Security Administration. It had received the exemption for several years. Only upon receipt of the November 2009 tax bill did GCH receive notice that the exemption had been

removed. On March 17, 2010, GCH filed a Form 132 petition with the Assessor. In November 2010, GCH mailed a Form 132 petition to the Indiana Board. GCH's filings, the Board noted, "have caused much confusion," and "other things have contributed to the procedural morass" facing the Board. (Page 6, ¶¶ 18 & 19.) Those "other things" included" (1) the property's exemption had been removed without notice to the taxpayer; (2) the property tax appeal statutes "do not spell out how a taxpayer should challenge such an action"; (3) GCH initially filed Form 132 petitions in different places and did not fill in the assessment date at issue on one petition; and (4) GCH ignored the Board's notice of defects regarding the Form 132 petitions.

The Indiana Board dealt only with the procedural issue before it, i.e. whether procedural defects prevented the Board from reaching the merits of GCH's exemption claim. The Board observed that it knew of no statute which excused GCH from filing an exemption application. (Page 8, ¶ 24.) And GCH could not rely upon the apparent errors of local officials in applying the exemption without an application. (Page 8, ¶ 25.) While GCH's failure to file Form 136 applications for 2008 and 2009 "might be a good defense" to its claims for exemption, the Board concluded that GCH was required to – and failed – to file its Form 132 petition within 45 days of receipt of the tax bill showing removal of the exemption. (Pages 11 & 12, ¶¶ 31 & 33.)

At the time of the Indiana Board hearing, GCH had pending at the local level a Form 133 petition regarding its exemption claims. The Board may yet reach the merits of GCH's exemption claims on appeal of the Form 133 petitions, but that was a "question for another day." (Pages 11-12, ¶ 32.)

8. **Board addresses "advocate as witness" rule of professional conduct.** *Linda L. Miller Trust v. Kosciusko County Assessor*, Pet. No. 43-028-09-1-5-00035 (April 3, 2012) (March 1, 2009 assessment) [Small Claims Docket]. The Board was troubled by the fact that counsel for each party chose to act simultaneously as an advocate and a witness. The Board noted that Rule 3.7 of the Indiana Rules of Professional Conduct "appears to include" IBTR proceedings because, while the rule refers to a "trial," the comments refer to a "tribunal" rather than a "court" or "judge." However, neither side objected to the other attorney's testimony, and because the Board did not rely significantly on either attorney's testimony, the Board did not decide whether the Rule applied and whether the attorneys violated it.

9. **Indiana Board had jurisdiction to consider proper application of property "tax caps." Homeowner could use Form 133 to challenge application of the "tax caps".** *Fred W. Heaney v. St. Joseph County Assessor*, Pet. No. 71-001-08-3-5-00001 (April 19, 2012) (March 1, 2008 assessment). Heaney applied for a "mortgage exemption" for the subject property, his primary residence. Although he had no receipt, Heaney claimed that he applied for what he alternatively called a "homestead exemption," "homestead deduction," and "homestead credit." Because the assessor did not receive an application for the standard deduction for the property's 2008 assessment, Heaney did not receive the homestead "tax cap," and the property was taxed at more than 2% of its assessed value.

The "tax cap" is a credit equaling the amount that the property taxes exceeded 1.5% of a homestead's assessment. (Page 5, ¶ 9.)

Heaney filed a Form 133 petition for correction of error. The assessor, auditor, and PTABOA all denied the petition because Heaney did not apply for the credit. The assessor argued that because Heaney did not apply for the standard deduction, the auditor had no way to know whether a property qualifies as a homestead.

The Indiana Board disagreed with the assessor's position. (Page 8, ¶ 16.) A homestead under the tax cap statute is simply a homestead that is eligible for the standard deduction, not a homestead that is the subject of an application for, or that has been granted, the standard deduction. *Id.* A homeowner's failure to apply for a standard deduction can lead to an auditor erroneously failing to apply the tax cap, but if a taxpayer brings that error to the auditor's attention, the auditor can and must correct the error. (Page 9, ¶ 17.) Because Heaney's property qualified for the homestead tax cap, the Board held that the credit must be applied in determining Heaney's 2008-pay-2009 tax bill. (Page 9, ¶ 19.)

Additional jurisdictional note: The Board held that it had jurisdiction because it has statutory jurisdiction over property tax credits, and because the correction of error statute allows for review of any credit permitted by law. Although "tax cap" suggests that it is a limit on property taxes, the cap is actually a credit for all taxes above a certain percentage. *See* (Pages 5-6, ¶¶ 10-12.)

10. **Appraisals were "hearsay" and could not, standing alone, support reduction in home's assessed value.** In *Thiry v. Dearborn County Assessor*, Pet. No. 15-020-10-1-5-0001 (May 17, 2012) [Small Claims Docket], the Indiana Board considered the assessor's objection to the admission of the homeowners' two appraisals as "hearsay." Indiana Rule of Evidence 801(c) defines "hearsay" as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay can be either oral or written statements. (Page 3, ¶ 14.) By rule, hearsay evidence "*may* be admitted." *Id.* (quoting 52 IAC 3-1-5(b) (emphasis added)). It "may form the basis for a determination," but "if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting [assessment appeal] determination may not be based solely upon the hearsay evidence." *Id.* The Board observed that the word "may" is "discretionary, not mandatory" and that the Board "can permit hearsay evidence to be entered in the record, but it is not required to allow it." (Page 4, ¶ 14.)

The appraisals were hearsay, the Board concluded. (Page 4, ¶ 16.) The Board admitted them into evidence "subject to the limitations in the Board's procedural rules." *Id.* The valuation date for the first appraisal was April 19, 2010 – less than two months after the March 1st assessment date. The appraisal concluded to a value of $353,000, which was lower than the $388,500 assessed value but higher than the $324,000 requested by the owner. While the appraisal "might support" a reduction in value, there was "no non-hearsay evidence in this record that supports a valuation of $353,000." (Page 5, ¶ 20(c).)

The appraisal thus stood alone and could not support a reduction of the home's assessed value. *See id.*

The Board did not consider the second appraisal, which valued the property at $357,410 as of February 24, 2012 – almost two years after the assessment date at issue.

The Board further observed that the home's 2007 purchase price of $376,000 was not helpful, because "[n]othing in the record establishes how that price relates to value as of [the valuation date,] March 1, 2010." (Page 5, ¶ 20(d).) For a sale to be a reliable indicator of market value, the buyer and seller must be typically motivated, well informed and acting in their own best interests. (Page 5, ¶ 20(d) n.1) (citing the Indiana Assessment Manual, at 10.) The record failed to show that the owners' purchase price was a "reliable indication of the market value in this case." *Id.*

And one owner's conclusory testimony that the home should be valued at $324,000 was not probative evidence supporting a reduction in value. (Page 5, ¶ 20(e).)

Because the owners produced no substantial evidence, the assessor's duty to support the contested assessment with his own substantial evidence was not triggered. (Page 5, ¶ 21.)

11. **Indiana Board finds that date on tax notice trumped unsworn testimony of deputy treasurer in finding that appeal was timely filed** (originally posted at *www.taxhatchet.com* on June 6, 2012).

Taxpayer wins battle of dueling dates - Indiana Board of Tax Review finds that date on property tax bill notice (and not the unsworn testimony of deputy treasurer) supports ruling that appeal was timely filed

Regardless of tax type, appeal deadlines are important. A taxpayer must meet its appeal deadline or risk losing the right to challenge an assessment. But what happens when the "trigger date" for the appeal deadline is in dispute? A newly issued decision from the Indiana Board of Tax Review addresses that question.

In *Universal Forest Products v. Elkhart County Assessor*, Pet. No. 20-009-07-1-3-00221 (Ind. Bd. Tax Rw., May 18, 2012), *see* http://1.usa.gov/JXHi6o, Universal Forest Products (Universal) challenged the assessments of several light manufacturing and storage structures for the March 1, 2007 assessment date. The valuation was not at issue. If Universal had filed its appeal on time at the local level, the parties agreed that the property's value should be reduced from $1,790,000 to $1,056,000. Universal appealed from the tax bill and the Form TS-1A that accompanied its tax bill. That form included the following statement: "DATE OF NOTICE FOR 2007 PAY 2008 TAXES 12/2/2008." Based on that entry, Universal filed its appeal on January 16, 2009 – 45 days after December 2, 2008.

To rebut the date on Form TS-1A, the assessor submitted an unsworn letter from a deputy treasurer stating that the 2007-pay-2008 tax bills were mailed on November 14, 2008.

The assessor also submitted a copy of the property's tax bill showing that the first of two installments was due December 2, 2008. Because the tax bill would not have been mailed on the same day that taxes were due, the date on Form TS-1A was a misprint. Consequently, the assessor argued that Universal was required to file its appeal within 45 days of November 14, 2008.

Under the statutes in effect, Universal was required to file its appeal "not later than forty-five (45) days after" it received a notice of assessment change. *See* Ind. Code § 6-1.1-15-1(c). If no notice was issued, Universal had to file the appeal within 45 days of "receipt by the taxpayer of the tax bill resulting from" the assessment change. *See* Ind. Code § 6-1.1-15-13. The Indiana Board presumed that Form TS-1A and the tax bill were mailed on December 2, 2008. (Page 7, § 20, *citing Tibero v. Allergy Asthma Immunology of Rochester*, 664 F.3d 35, 37 (2nd Cir. 2011) ("There is a presumption that a notice provided by a government agency was mailed on the date shown on the notice.")). The Board concluded that the deputy treasurer's unsworn letter was not proof of mailing, explaining: "[The deputy's] assertions were unsworn and she was not subject to cross examination. Moreover, [the deputy] did not claim to have personally mailed any of the tax bills, much less Universal's bill, or that the treasurer followed routine business practices in mailing Universal's tax bill by a given date." (Page 8, § 22) (citations omitted).

But what if the assessor had clearly established that the tax bill and Form TS-1A had been mailed on November 14th? Could Universal have then been permitted to rely on the December 2d date included on Form TS-1A? The Board reserved that question for another day. (Page 8, § 23.)

Because the parties disputed only the timeliness of the appeal, the Board accepted the stipulated assessed value for the property and reduced the assessment to $1,056,000.

12. **Proceed with Caution, Part II (August, 2012): Indiana Board of Tax Review rulings - standing and procedure in real property tax appeals** (originally posted at *www.taxhatchet.com* on September 25, 2012).

The Indiana Board of Tax Review issued the following three decisions discussing standing, limits on the assessor's authority, and restrictions on raising new issues in small claims cases.

Buyer had standing to appeal property taxes. *Masterson v. Tippecanoe County Assessor*, Pet. No. 79-156-10-1-5-00001 (August 24, 2012) (March 1, 2010 assessment) [Small Claims]. Masterson did not own the home under appeal on the assessment date. The estate had paid a portion of the property taxes, which were pro-rated at the date of sale. But the taxes were pro-rated based on the prior year's assessment, which was 10% less than the current assessment. The purchase agreement recognized that Masterson "might be responsible for unreimbursed taxes for the 2010 assessment year." (Page 6, ¶ 17). By rule, a "party" to an Indiana Board of Tax Review appeal includes the property's owner *or* the "taxpayer responsible for the property taxes payable on the subject

property." (Page 6, ¶ 16) (citing 52 IAC 2-2-13). Masterson was responsible for a portion of the March 1, 2010 unreimbursed property taxes, he received the bill for those taxes, and "ultimately paid" the taxes. (Page 6, ¶ 17). The Board, therefore, held that he had standing to bring the appeal. *Id.* *See* http://1.usa.gov/OQu26I.

Assessor lacks authority to change assessment unilaterally on appeal. *Smith v. Allen County Assessor*, Pet. No. 02-075-11-1-5-00027 (August 30, 2012) (March 1, 2011 assessment). At the administrative hearing, the Assessor submitted a property record card showing an assessed value of $139,400, a value lower than the $140,800 determined by the County Board (the "PTABOA"). The Indiana Board observed, "It is unclear whether the Assessor actually intended to change the assessment to that amount or is merely conceding that the assessment should be lowered. Regardless, the Assessor lacks the authority to unilaterally change a determination of the PTABOA." (Page 5, ¶ 9 n.3). But the Board agreed to change the property's value to the $139,400 conceded by the Assessor. (Page 15, ¶ 33). *See* http://1.usa.gov/UkbSai.

Trust could not raise new issue in small claims action, but Board orders Assessor to consider issue on remand. *Richard G. Robinson Irrevocable Family Trust v. Carroll County Assessor*, Pet. No. 08-011-10-1-5-00007 (August 6, 2012) (March 1, 2010 assessment) [Small Claims]. The Trust claimed that the Assessor incorrectly assessed the home under appeal for a basement when, in fact, it was located on a crawl space. But the Trust had not raised that issue in front of the PTABOA or its Form 131 petition. "By electing to proceed in small claims, the parties agreed that the issues were substantially the same as those presented to the PTABOA and that no new issues would be raised before the Board." (Page 5, ¶ 14(g) n.2) (citing 52 IAC 3-1-2(b)). While not formally objecting, the record showed that the Assessor did not consent to try that issue. The Board concluded, "Given the lack of notice to the Assessor, the issue of whether the home is incorrectly assessed as having a basement is not before the Board." (Page 5, ¶ 14(g)). However, because of the Assessor's agreement to do so, the Board ordered her to inspect the property to determine if it has a basement or crawl space and to make the appropriate corrections. *Id.* *See* http://1.usa.gov/VF4etN.

13. **Proceed With Caution, Part III (August, 2012): Indiana Board of Tax Review rules on objections regarding hearsay, statements in settlement discussions, and the use of multiple listing sheets in property tax appeals** (originally posted at *www.taxhatchet.com* on September 28, 2012).

The Indiana Board of Tax Review ruled on the following evidentiary questions in final determinations issued in August.

Statements made in settlement discussions omitted from evidence. *Schafer v. Porter County Assessor*, Petition Nos. 64-002-07-1-3-00001 and 64-002-07-1-4-00004 (August 8, 2012) (March 1, 2007 assessment). The owner of two adjacent lots in an industrial park testified that the assessor considered lowering the value of the improvements on one

lot during an informal meeting. The Indiana Board sustained the Assessor's objection, holding "Statements made in settlement negotiations should not be in evidence." (Page 5, ¶ 14(C) n.1) (citing Ind. Evidence Rule 408, which states "Evidence of conduct or statements made in compromise negotiations is . . . not admissible."). *See* http://1.usa.gov/QAyGSs.

Hearsay evidence can't be sole basis for decision if party properly objects to it. *Smith v. Allen County Assessor*, Pet. No. 02-075-11-1-5-00027 (August 30, 2012) (March 1, 2011 assessment). The Assessor objected to two of the homeowners' exhibits, claiming they should not be admitted on hearsay grounds. The Indiana Board noted that it may admit hearsay; but, if a party objects, the Board may not base an order *solely* on that evidence. (Page 3, ¶ 5 n.1) (citing 52 IAC 2-7-3). The Board explained: "Consequently, because the Assessor properly objected, Petitioners Exhibits 33 and 34A and Mr. Smith's related testimony, while admitted into the record, cannot serve as the sole basis for the Board's determination." *Id. See* http://1.usa.gov/UkbSai. The Board made the same observation in *Lach Living Trust v. Porter County Assessor* Petition No. 64-005-10-1-5-00007, Page 5, ¶ 14(B) n.1 (Aug. 29, 2012) (March 1, 2010 assessment), and *Robinson v. Monroe County Assessor*, Petition No. 53-013-08-1-5-00001, Pages 4-5, ¶ 13 (August 23, 2010) (March 1, 2008 assessment), overruling the assessors' objections and admitting the disputed evidence. *See* http://1.usa.gov/TsyPgU and http://1.usa.gov/Qfrheg.

Multiple listing sheet went to weight of testimony. *Hukill v. Monroe County Assessor*, Petition No. 53-005-06-1-4-00076 (August 23, 2012) (March 1, 2006 assessment). Owner's representative objected to the 2011 multiple listing sheet for the commercial property under appeal, because the owner was contesting the March 1, 2006 assessment. The objection goes to the weight of the evidence rather than its admissibility, the Board ruled. (Page 4, ¶ 7 n.2) (citing 52 IAC 2-7-2). *See* http://1.usa.gov/TsBW8y.

14. **Holders of tax sale certificates lacked standing to bring real property tax appeals** (originally posted at *www.taxhatchet.com* on November 3, 2012).

Indiana Board of Tax Review rules that holders of tax sale certificates lacked standing to bring real property tax appeals

In *Tom Terry et al. v. Delaware County Assessor*, Pet. Nos. 18-003-06-1-5-01316 *et al.* (September 4, 2012) (March 1, 2006 assessment), several appeals were consolidated for the Indiana Board of Tax Review to consider one issue: "whether tax sale purchasers who hold a tax sale certificate but who do not hold title to a property as of the applicable assessment date or tax billing date have standing to appeal the 2006 assessment" of the property. (Page 5, ¶ 3.) The Assessor sought to dismiss the appeals, arguing that the petitioners lacked standing and were not the real parties in interest because they (a) did not own the appealed properties as of the assessment date, (b) were not billed for the

2006 taxes payable in 2007, and (c) were not responsible for making the 2007 tax payments under any contract with the owners.

The tax sale process. Petitioners acquired the properties in tax sales. They were required to pay the taxes due on the properties. Following a tax sale, the purchaser holds a certificate of sale – not a deed. The property owner may redeem the property within one year of the tax sale. The tax sale purchaser acquires a lien against the real property for the entire amount paid. Once the redemption period expires and the property has not been redeemed, the tax sale purchaser has six months to file a verified petition asking a court to direct the county auditor to issue a tax deed. (Pages 8-10, ¶ 11.)

Property tax appeal triggers. A taxpayer may appeal under Ind. Code § 6-1.1-15-1(a)(1) the "assessment of the taxpayer's tangible property." The taxpayer must appeal within 45 days of the Assessor's notice of the property's assessment. *See* Ind. Code § 6-1.1-15-1(b) & (c). Under Ind. Code § 6-1.1-15-13, the "receipt by the taxpayer of the tax bill resulting from [the assessment] is the taxpayer's notice for the purpose of determining the taxpayer's right to obtain a review or initiate an appeal." Thus, if an assessor does not issue a notice of assessment (usually a Form 11 notice), then a taxpayer may appeal from receipt of the tax bill.

The Indiana Board first concluded that the term "taxpayer" under Ind. Code § 6-1.1-15 must be given its commonly understood meaning, i.e. a "person or entity who pays or is liable for a tax." (Page 13, ¶ 16.) The Board further noted that its procedural rules define a "party" as the property owner or the taxpayer responsible for the property taxes. *Id.* (citing 52 IAC 2-2-13.) In this appeal, a petitioner is a "taxpayer" if the petitioner "paid the 2006 pay 2007 taxes on the property he, she or it bought at tax sale." *Id.*

Being a "taxpayer" is not enough. The appeal statutes provide for a review of the "taxpayer's tangible property." Holding a tax sale certificate "does not constitute an interest in tangible property." (Page 13-14, ¶ 18.) The person holding a tax sale certificate during the redemption period "is not a legal or equitable owner of the property." (Page 14, ¶ 19) (citation omitted.) "The tax sale creates a lien against the property that may ripen into full ownership at some later time by the issuance of a tax deed." *Id.* (citation, quotation omitted.) Here, for all cases but two, the record established that the appeals were filed *before* the petitioners acquired tax deeds for the properties. In the majority of cases, the Assessor demonstrated that petitioners lacked an interest in tangible property and therefore had no standing to appeal. (Page 14, ¶ 20.)

Finally, the Assessor submitted a declaration stating that the petitioners were neither responsible for nor billed for the 2006 pay 2007 taxes for the properties. Petitioners did not contest this statement. Consequently, the Board held that Ind. Code § 6-1.1-15-13 did not provide a basis for the petitioners' standing. (Pages 14-15, ¶ 21.)

Additional procedural note: In footnote no. 2, the Board stated that the cases should not have been consolidated, because the Assessor claimed that some of the appeals were not filed by the entity who was the tax sale purchaser and that some of the appeals were

untimely. The Board explained: "At this point a single, across-the-board determination about those issues is impossible in the context of the pending motions on the consolidated cases. This order does not preclude the [Assessor] from raising those issues in regard to the specific facts of any individual case where the standing issue is not dispositive." (Page 8, ¶ 10 n.2.)

The Board's final determination can be viewed at http://bit.ly/U1OT31.

15. **Property taxes are a lien against the property. Owners of home purchased after assessment date were responsible for taxes on the value of previously omitted improvements.** *McElwee and Hale v. Marion County Assessor*, Pet. Nos. 49-800-07-3-5-00095 and 49-800-07-1-5-01873 (Sept. 7, 2012) (March 1, 2007 assessment). In this appeal, Owners purchased a home in 2008 that was constructed in 2004. They did not own the as of the March 1, 2007 assessment date. Owners filed a Form 133 Petition for Correction of an Error claiming the 2007-pay-2008 property taxes for the home as applied against them were illegal as a matter of law.

The Indiana Board noted that property taxes are a lien on the property that attaches as of the assessment date and that the sale or the property does not affect the lien. (Page 14, ¶ 62) (citing Ind. Code § 6-1.1-22-13(a)). Owners may have a possible claim against the prior owner of the home for the amount of taxes paid, but that was not an issue for the Board. (Page 15, ¶ 63.)

Owners claimed that they were "bona fide purchasers" and therefore not liable for the 2007-pay-2008 taxes under Ind. Code § 6-1.1-9-4(b), which provides: "With respect to real property which is owned by a bona fide purchaser without knowledge, no lien attaches for any property taxes which result from an assessment or an increase in assessed value, made under this chapter for any period before his purchase of the property." But Owners were aware that the home had not been assessed, having called the assessor about the omission. Owners had knowledge of the oversight and therefore were responsible for the taxes. (Page 18, ¶ 74.)

Additional note regarding rejection of amended petition. Owners had also filed a Form 131 appeal petition. They submitted an amended appeal petition less than 15 days before the administrative hearing. "The Board will not approve an amended appeal filed fewer than 15 days before the hearing unless the opposing party agrees." (Page 2, ¶ 7) (citing 52 IAC 2-5-2). Because the Assessor objected to the amended petition, the Indiana Board refused to consider it as evidence.

Additional note regarding rejection of exhibit that was not timely exchanged. Owners did not provide a copy of its Exhibit 12 (2006 – 2008 Price Analysis Reports and Trend Charts) before the administrative hearing. The Indiana Board's rule requires that copies of documentary evidence must be exchanged at least five business days before the hearing. *See* 52 IAC 2-7-1(b)(1). The purpose of the rule "is to allow parties to be informed, avoid surprises, and promote an organized, efficient, fair consideration of

cases." (Page 4, ¶ 15.) The Board sustained the Assessor's objection to Exhibit 12 and refused to consider it in determining the outcome of the case. *Id.*

16. **"Marginally relevant" exhibits admitted; property record cards relating to "waived claim" excluded but cards relating to burden-shifting question admitted; "beyond the scope" testimony struck from record.** *Waterford Development Corp. and Hoogenboom Nofziger Realty Corp. v. Elkhart County Assessor*, Pet. Nos. 20-015-08-1-4-00241 and -00242 (Sept. 25, 2012) (March 1, 2008 assessment). The parties made several objections in this appeal of Owners' "big box" building and "in-line" retail centers. Owners used the two parcels together as the Goshen Commons Shopping Center and jointly contested the parcels' values for the March 1, 2008 assessment date. The Board concluded:

    - **Exhibits admitted but given no weight.** A 1998 settlement statement and 2010 property analysis for the property were found to be "marginally relevant, at best." (Page 5, ¶ 13.) Owners failed to show how the exhibits related to the parcels' January 1, 2007 valuation date. The Board assigned the exhibits "no weight" but allowed them into evidence, since they were fully addressed at the hearing. (Page 6, ¶ 13.)

    - **Property record cards relating to waived issue excluded.** The Board excluded property record cards offered to support the Owners' contention that the property was not assessed uniformly and equally with other properties in the county. "Nothing in the [Owners'] Form 131 petitions even remotely refers to constitutional or statutory requirements for uniformity and equality. [Owners] have therefore waived that claim." (Page 6, ¶ 15.)

    - **Exhibits belatedly offered into evidence admitted into record, where they had been discussed during the hearing.** Owners offered an aerial map into evidence after resting their case. The Assessor did not offer a property record card into evidence until after the close of evidence. The Board allowed both exhibits. (Page 6,7, ¶ ¶ 16, 18.) In both cases, witnesses had testified to the documents during the hearing without objection. *Id.* The property record card was relevant to the issue of burden of proof, because it showed the increase of the property's value between 2007 and 2008. The Board reasoned that the card, "relates to an important procedural question about which the Board should be fully informed." (Page 7, ¶ 18.)

    - **Expert testimony excluded.** The Board struck testimony of the Assessor's expert that went beyond the scope of the Assessor's question on cross examination. (Page 7, ¶ 17.)

17. **Indiana Board admits property record cards as exhibits, where parties failed to offer them into evidence but discussed them at length during hearing; unsubstantiated value in appraisal was not probative evidence.** *Fuller v. Cass County Assessor*, Pet. Nos. 09-014-10-1-5-00001 *et al.* (Oct. 3, 2012) (March 1, 2010 assessment). Neither party offered the property record cards as exhibits. "But in an extended colloquy, both the ALJ and [Owner] repeatedly referred to information on those cards. The Indiana Board therefore includes them as a Board Exhibit." (Page 3, ¶ 7 n.2.)

    In this appeal, the Owners offered a farm appraisal with a line item stating the homesite's value. The underlying analysis for that value was contained in another appraisal not submitted as evidence. The Board explained:

    > The Board is therefore left with [the appraiser's] entirely conclusory assertion about the homesite's market value, without any evidence to show that he arrived at his opinion by applying generally accepted appraisal principles. Such conclusory assertions, even when made by an appraiser, lack probative value.

    (Page 7, ¶ 20.)

18. **Indiana Board would not make case for Taxpayer who presented no substantial argument regarding his contention that Assessor failed to properly recognize a withdrawal of its appeal.** *Jackson Leasing Co. v. Clark County Assessor*, Pet. No. 10-005-09-1-4-10005 (Oct. 17, 2012) (March 1, 2009 assessment) [Small Claims Docket]. Owner filed an appeal of the 2009 assessment of its nursing home on May 7, 2010. He attempted to withdraw his appeal on or about July 30, 2010. The Assessor did not recognize the validity of the withdrawal and argued on appeal to the Indiana Board that the Owner had no "absolute right" to withdraw its appeal. (Page 4, ¶ 13.) The Assessor relied upon the Tax Court's 1997 decision in *Joyce Sportswear Co. v. State Bd. of Tax Commissioners*, 684 N.E.2d 1189 (Ind. Tax Ct. 1997) to support her position. The Board opined, "[T]hat decision may not establish the clear, absolute rule against voluntary withdrawal as suggested" by the Assessor. (Page 5, ¶ 13.) The Board explained that in *Joyce Sportswear* the Court found that the taxpayer had no absolute right to withdraw its petition, but a substantial part of the Court's reasoning "was tied to the advanced stage of the proceedings—two evidentiary hearings had been held." *Id.* Neither party addressed whether the relevant statutes and administrative rules had changed since 1997. In the present case, the Owner's attempted withdrawal took place at a much earlier stage. The Court refused to do the Owner's work, explaining: "[Owner] offered no substantial argument on the point and we will not make a case for either party. In the absence of substantial, relevant facts and argument related to withdrawal of the appeal, [the Board] make[s] no determination on that point." *Id.*

19. **Relying on not-for-publication opinions from the Tax Court, Indiana Board states it will not reject appraisals because they value just the land or improvements.** *Kooshtard Property I, LLC v. Monroe County Assessor*, Pet. No. 53-017-08-1-4-00002 *et al.* (Oct. 19, 2012) (March 1, 2008, 2009 and 2011 assessment appeals). For the three assessment dates at issue, the Owner challenged only the land value – not the value of the improvements comprising its gas station and convenience store. The Assessor argued that offering an appraisal that values only the land and then adds the assessed value of the improvements is "mixing and matching techniques" – an approach which the Board has previously rejected. (Page 1, ¶ 31) (citations omitted.) While conceding to its prior treatment of the issue, the Board observed, "[T]he Tax Court has expressed in several opinions that a taxpayer may solely challenge the land value or the improvement value of a property." *Id.* (citations omitted). The Board relied on two 2009 not-for-publication opinions from the Tax Court in reaching its decision, reasoning that the Court's position is "clear that a taxpayer's evidence should not be rejected simply because it values only a part of the property." *See id.* (citations omitted).

20. **Indiana Board disfavors attorneys serving as witnesses and advocates.** *Fisher v. Carroll County Assessor*, Pet. No. 08-011-10-1-4-00001 (Oct. 22, 2012) (March 1, 2010 assessment). The Indiana Board observed, "The Board has several times noted that it disfavors attorneys acting as both a witness and advocate at the Board's hearings. Nonetheless, the Assessor neither objected to [counsel's] testimony nor moved to disqualify him, and the Board ultimately does not rely on [counsel's] testimony in reaching its decision." (Page 2, ¶ 4 n.1.)

Additional notes on hearsay objection and the Board's *de novo* review: The Board admitted, over taxpayer's hearsay objections, an appraisal report and an email from an appraiser, as well as the Assessor's testimony reading from the email. Hearsay is "a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evid. R. 801. The Board's regulation provides, "[I]f the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the Board's final determination cannot be based solely upon the hearsay evidence." (Page 5, ¶ 12) (quoting 52 IAC 2-7-3). The Board found the exhibits and testimony to "fit squarely within the definition of hearsay." (Page 5, ¶ 13.) The Board allowed the evidence, observing that it "frequently deals with [this type of] evidence" but further noting that its "determination cannot be based solely on those exhibits or on the Assessor's testimony in which she read from one of those exhibits." *Id.*

That the taxpayer had presented the very appraisal report to the County Board that she was now objecting to before the Indiana Board did not alter the Board's ruling on taxpayer's hearsay objection. The Board's proceedings are *de novo*, so the "Board will only base its decisions on evidence offered in its own proceedings." (Page 5, ¶ 14.) Because the taxpayer objected to the evidence at the Board's hearing, the Board "must abide by the limitations in its procedural rules on how it may treat that evidence." *Id.*

21. **Owner of vacant lot could not later object to photograph that was previously offered and admitted without objection.** *Hudson v. Jennings County Assessor*, Pet. Nos. 40-004-08-1-4-00001 and 40-004-09-1-4-00001 (Oct. 30, 2012) (March 1, 2008 and 2009 assessments). The Indiana Board explained,:

> All of Respondents Exhibits 1-9 were offered and admitted without objection. Later in the hearing, [Petitioner's tax representative] attempted to object to Exhibit 9 because the date the photograph was taken was not specified. [The representative] claimed he previously had reserved the right to object after hearing the testimony, but that claim is not accurate. He did not. Exhibit 9 was already admitted without objection. The admissibility of that photograph will not be reopened because of [the representative's] question about when it was taken.

(Page 2, ¶ 9 n.1.)

22. **Indiana Board excludes from evidence a stipulation agreement regarding the prior year's assessment of property under appeal.** *Coutar Remainder VI LLC v. Johnson County Assessor*, Pet. No. 41-009-09-1-4-01392 (Oct. 30, 2012) (March 1, 2009 assessment) [Small Claims Docket]. The Assessor objected to a stipulation agreement for the property's assessment as of March 1, 2008 being entered into the record and to the tax representative's testimony regarding the stipulation. The representative had been involved in a prior case where use of a settlement agreement as evidence was rejected by the Indiana Board. The representative was "fully aware" that he could not use the stipulation agreement as evidence in the present case. (Page 2, ¶ 10 n.1.) The objection was sustained, and the Board refused to consider the stipulation. *Id.*

Additional note on burden of proof: In this appeal, the parties agreed that the Assessor had the burden of proof. (Page 4, ¶ 14.). The Board further explained:

> Initially it was Respondent's burden to prove the 2009 assessment was correct given that the assessment increased by more than 5%. Respondent, however, agreed that the 2009 assessment was excessive and should be reduced to the prior year's assessed value. Then, because Petitioner requested a lesser value than the prior year's assessment, it became Petitioner's burden to establish a lesser amount by making a prima facie case.

(Page 5, ¶ 16.)

23. **Owner of Gas Station / Convenience Store failed to submit copies of property record cards for alleged comparable properties and thus could not prove property's value was excessive in comparison under Ind. Code 6-1.1-15-18.** *Fleetwood v. Monroe County Assessor*, Pet. Nos. 53-005-08-1-4-00021 and 53-005-09-1-4-00012 (Oct. 30, 2012) (March 1, 2008 and 2009 assessment dates). Property owner challenged the 100% positive influence factor applied to land assessment for the property, a "Big Foot" gas station and convenience store. The owner's tax representative argued that the subject land was over-valued compared to the land value on seven properties located in the same area. To support this argument, the representative submitted an assessment analysis, a map of the properties' locations, and a property assessment detail report for each property. But he did not submit property record cards for the comparables.

Ind. Code § 6-1.1-15-18 provides in part, "To accurately determine market-value-in-use, . . . a taxpayer . . . may in a proceeding concerning property that is not residential property, introduce evidence of the assessments of any relevant, comparable property." The Indiana Board held: "To compare the assessed values of comparable properties, however, at a minimum the proponent must provide property record cards to show how the various properties were assessed in the years at issue." (Page 9, ¶ 27.) The evidence submitted by the tax representative was "not the kind of report that would allow the Board to determine how a property was assessed and whether the subject property was assessed differently." *Id.* The representative "failed to present any evidence to show what base rate was applied to each parcel and what adjustments were applied to that base rate for each property." *Id.* The Board had "no means of comparing" the disputed land's assessment to the comparable properties' assessments. *Id.* The owner failed to make a prima facie case that his property was over-valued for either assessment date. (Page 10, ¶ 30.)

24. **Tax Representatives may not practice law before the Indiana Board of Tax Review.**

A. **Evidentiary objections may cross the line into the unauthorized practice of law.** *Parker-Hannifin Corporation v. Allen County Assessor*, Pet. Nos. 02-047-10-1-3-00002 etc. (September 5, 2012) (March 1, 2010 and 2011 assessment dates). In this appeal of a manufacturing facility's assessment, the Tax Representative objected to an appraisal introduced by the Assessor on grounds the appraisal stated that its use was limited to a specific person. The Indiana Board observes that "by making an evidentiary objection, [Tax Representative] at least approached the line demarcating the practice of law, and may have crossed over that line." (Page 10, ¶ 24 n.3) (citing 52 IAC 1-2-1(b)(4).) The Board overruled the objection. (Page 10, ¶ 24.) The Tax Representative identified no authority "to support the proposition that a document that is being used for something different than its originally intended purpose, or by someone different than its originally intended user, is not admissible as evidence." *Id.* And the Tax Representative made no argument that the appraisal was confidential or constituted any "privileged communication" under Ind. Evidence Rule 501(b). *Id.*

B. **Arguing lack of uniformity and equality of assessments "clearly getting close" to the unauthorized practice of law.** *Coutar Remainder VI LLC v. Johnson County Assessor*, Pet. No. 41-009-09-1-4-01392 (Oct. 30, 2012) (March 1, 2009 assessments)

[Small Claims Docket] and *Coutar Remainder VI LLC v. Johnson County Assessor*, Pet. Nos. 41-037-08-1-4-01438 & 41-037-09-1-4-01388 (Oct. 30, 2012) (March 1, 2008 and 2009 assessments) [Small Claims Docket]. In these appeals involving the assessments of
gas stations / convenience stores, the Tax Representative failed to prove that the properties' assessments must be reduced based on a lack of uniformity and equality. The Board notes that "its rules concerning tax representatives . . . also apply to small claims procedures." (Page 5, ¶ 18 n.2; Page 6, ¶ 20 n.3) (citing 52 IAC 3-1-4(b)). Next, the Board states, "A tax representative cannot practice before the board regarding claims of the constitutionality of an assessment or any other representation involving the practice of law." *Id.* (citing 52 IAC 1-2-1(b)(3) & (4)). And the Tax Representative's uniformity argument, the Board explains, "appears to be in reference to the Indiana Constitution." *Id.* Finally, the Board concludes that it "is not saying whether [Tax Representative's] argument does or does not cross the line of the illegal practice of law, but it is clearly getting close." *Id.*

25. **The Indiana Board of Tax Review's application of the 5% burden shifting rule at Ind. Code § 6-1.1-15-17.2 (formerly 6-1.1-15-17, which was repealed because two different provisions had been codified under the same code section).**

A. **Board accepts agreement that assessor has burden and adds admitted value of new "special features" to prior assessment, where the assessor failed to meet her burden.** *Indiana Bank & Trust Company v. Scott County Assessor*, Pet. No. 72-003-09-1-4-00001 (Jan. 20, 2012) (March 1, 2009 assessment) [Small Claims Docket]. Taxpayer challenged the 2009 assessment of its bank. The property record card showed an increase of the property's assessment of more than 5% between the March 1, 2008 and 2009 assessment dates. Taxpayer claimed that the assessor had the burden of proof. (Page 1, ¶ 9.) The assessor agreed and presented her case first. *Id.* The Board accepted the parties' agreement. The assessor failed to make a prima facie case. (Page 5, ¶ 15.) But the bank had added special features to the property between the assessment dates. Taxpayer agreed that the value of these features should be added and admitted that an assessment of approximately $250,000 would be appropriate. "Lacking probative, market-based evidence about what the actual market value-in-use really is, the Board will accept the value admitted by the Petitioner." (Pages 5-6, ¶ 16.)

B. **Taxpayer had the burden to support a value lower than the prior year's assessed value.** *Robison v. Steuben County Assessor*, Pet. Nos. 76-011-07-1-5-00067 *et al.* (Feb. 28, 2012) (March 1, 2007 and 2008 assessment) [Small Claims Docket]. Taxpayer challenged the March 1, 2007 and 2008 assessments of three parcels. The parties both addressed the parcels as two separate economic units: (1) the home site (consisting of two parcels); and (2) a stand-alone vacant parcel.

i. Neither unit's value changed from the 2007 to the 2008 assessment dates. Accordingly, taxpayer had the burden to prove she was entitled to a reduction for the March 1, 2008 assessments. (Page 8, ¶ 14.)

ii. The units' values increased well above 5% between the March 1, 2006 and 2007 assessment dates. Thus, the assessor had the burden of proof for the March 1, 2007 appeals, "at least to the extent that Ms. Robison sought to have those assessments returned to their 2006 levels." *Id.*

iii. But taxpayer sought an even greater reduction, so "she bore the burden of proving that the parcels assessments should be reduced below their 2006 levels." *Id.*

Taxpayer used an appraisal to reduce the home site's March 1, 2008 assessment to $260,000. (Page 13, ¶ 20.) But the appraisal was insufficient to show that the home site's value for March 1, 2007 should be less than its assessed value for March 1, 2006. *Id.* Thus, when the assessor failed to justify the 2007 assessment, the Board reduced the assessment to its 2006 level of $315,700. *Id.*

As to the vacant parcel, taxpayer failed to meet her burden of proof concerning the parcel's March 1, 2008 assessment. (Page 13, ¶ 21.) So the Board therefore affirmed that assessment. *Id.* But, based on the taxpayer's appraisal, taxpayer proved that the vacant parcel's March 1, 2007 assessment should be reduced. *Id.*

C. **Indiana Board declines to address how change of property's use impacts application of 5% rule.** *Edward Wineinger v. Dubois County Assessor*, Pet. No. 19-006-09-1-5-00019 (April 12, 2012) (March 1, 2009 assessment) [Small Claims Docket]. The Indiana Board first found that the Assessor had the burden of proof, because the property's valuation increased more than 5%. (Page 6, ¶ 18.) Though the Assessor argued that the property's use had changed between 2008 and 2009, and thus the burden-shifting rule would not apply, the Board noted that the Assessor did not show that the use had changed, so it need not answer the question of whether a change in use affects whether the burden shifts. (Page 6, ¶ 19(c).)

D. **Assessor had the burden to support the contested value, where the property's assessment had increased by more than 5%.** *CVS Corporation #6252-02 v. Vanderburgh County Assessor*, Pet. No. 82-020-09-1-4-07415 (April 12, 2012) (March 1, 2009 assessment). The taxpayer filed a pre-hearing motion to determine which party had the burden of proof. The Indiana Board found that the assessed value increased by more than 5% over the previous year, so the Assessor had the burden of proving that the assessment was correct. (Page 3, ¶ 9.)

Additional Note: As to the Assessor's use of CVS' valuation opinion, the Board noted that an expert's valuation analysis is not purely mathematical, and that a party cannot merely "plug in" different data to show what would have been the expert's result by using that different data. (Page 11, ¶ 26.) Therefore, the Assessor failed to show that the assessment was correct, and the assessment was reduced to the prior year's assessed value. (Page 11, ¶ 28.)

E. **5% burden-shifting rule applied to two contiguous parcels effectively used as one property.** *Grabbe v. Carroll County Assessor*, Pet. Nos. 08-002-10-1-1-00001 and -00002 (May 10, 2012) (March 1, 2010 assessment) [Small Claims Docket]. The properties under appeal were two contiguous parcels containing agricultural land, three hog confinement barns and a utility shed. The Indiana Board held: "Here, both parcels were purchased together and are effectively used together. Therefore, the Board views the two parcels as a single property. . . . Thus, the value of the two parcels together increased [over 11%] between 2009 and 2010. . . . The Assessor therefore has the burden of proving the assessment was correct for 2010." (Page 7, § 15.)

F. **5% burden-shifting rule did not apply after developers sold property to non-developer and lost "developer's discount"** (originally posted at *www.taxhathet.com* on June 25, 2012).

"Fiction" trumps "facts" in the application of the 5% burden-shifting rule. Once sold by developer, subdivided lots were not the "same property," so buyers had the burden to prove the lots' property tax assessments were incorrect

Indiana Assessors have the burden of proof on appeal to show that their assessments are correct, "if the assessment that is the subject of the review or appeal increased by more than five percent (5%) over the assessed value determined by the [assessor] for the immediately preceding assessment date for the same property." Ind. Code § 6-1.1-15-17.2 (formerly Ind. Code § 6-1.1-15-17, emphasis added). This is a relatively new provision, becoming effective nearly a year ago. As I have posted (*see* April 22, 2012 post at http://bit.ly/MhkYWd), this burden-shifting rule applies to any appeals pending before the Indiana Board of Tax Review as of July 1, 2011. The Indiana Board of Tax Review has frequently analyzed the provision over the last several months (*see e.g.* http://bit.ly/PVmV9M), and last month in two final determinations the Board considered the 5% rule's application to an assessment increase caused by removal of the developer's discount.

Both cases involved vacant lots in Howard County acquired from a developer at auction by non-developers. In *Paul B. and Mirella A. Markiewicz Revocable Living Trust v. Howard County Assessor*, Pet. Nos. 34-002-10-1-5-00020 and -00021 (May 31, 2012), the properties under appeal were two vacant lots bought for a total of $6,000 but assessed at $52,800 as of the March 1, 2010 assessment date. *See* http://1.usa.gov/MJDotA. In *Norris v. Howard County Assessor*, Pet. Nos. 34-002-10-1-5-00149 and -00151 (May 31, 2012), the two lots were bought for a total of $4,500 but assessed at $71,000 for this same assessment date. *See* http://1.usa.gov/LNEnrG.

In both cases, the Indiana Board resolved the lots' disputed assessments by relying on their purchase prices. The Board's analysis in *Norris* is explained at http://bit.ly/PVqahr. The evidence and analysis were substantially similar in *Markiewicz*, and the results in the two appeals were the same. In *Markiewicz*, the Indiana Board identified the key facts as: (1) the developer's inability to sell a single lot for construction in five years; and (2) the high number of lots – 144 – offered for sale in the auction. (Page 9, ¶ 19(c).) The Board

also referenced hearsay testimony by the Trust's witness in *Markiewicz* that three brokers had listed lots in the neighborhood for sale for as little as $5,000 without success. The "totality of the circumstances" indicated that the purchase price was "some evidence of the properties' market value-in-use." *Id.*

In both cases, the purchase prices supported reductions in the contested values. In both cases, the lots' 2010 values were more than 5% above their 2009 values. But the Board concluded in both cases that the property owners – not the assessor – had the burden of proof on appeal. I will cite to the paragraphs in *Markiewicz*, but both decisions apply the same reasoning, focusing on the requirement in the burden-shifting statute that the "same property" be at issue.

The Indiana Board characterized the "developer's discount" as a "fiction" that allows developers to maintain the lower, agricultural land base rate for farmland that the developer acquires, subdivides into lots and then resells for residential purposes. (Pages 7-8, ¶ 16) (citing Ind. Code § 6-1.1-4-12). The statute prohibits the reassessment of the developer's "land in inventory" until the next assessment date following the earliest of: (1) the date on which title to the land is transferred by a developer or successor developer to a non-developer; (2) the date on which construction of a structure begins on the land; or (3) the date on which a building permit is issued for construction of a building or structure on the land. Ind. Code § 6-1.1-4-12(h).

The Indiana Board reasoned that the lots in 2009 were not the "same property" as the lots in 2010. (Pages 8, ¶ 18.) As of the March 1, 2009 assessment date, the lots were owned by the developer and infrastructure for the residential neighborhood was being constructed. But they were assessed as agricultural land under the "developer's discount." After the lots were sold at auction, they were "no longer entitled to the protections of the developer's discount." *Id.* The assessor was required to assess the lots for their new use as residential property. *Id.* According to the Board:

> Thus, the assessor was assessing agricultural property in 2009 and residential property in 2010. Because the assessor was not assessing the "same property" in 2010 as she assessed in 2009, the Board finds that the Petitioner has the burden to prove its properties' assessed values were incorrect in this case.

(Page 8, ¶ 18.) As noted above, the Board opines that the "developer's discount" creates an assessment that is "fiction," i.e. "land in inventory" that is not farmed is nevertheless valued (much lower) as agricultural land. In other words, the vacant land is valued as something (agricultural land) it is not. But between the 2009 and 2010 assessment dates, the record does not show that the lots at issue changed either physically or in their use. Both in 2009 and 2010, the vacant lots were held for future residential use. The lots appear to be the "same property." Regardless of the "facts," however, the Board concludes that the "fiction" controls. In the eyes of the Indiana General Assembly, for purposes of assessment and the burden-shifting provisions, the same vacant lots had different uses – agricultural in 2009 and residential in 2010. Because the legally

determined uses were different, the vacant lots in 2009 were not the "same property" under appeal for 2010.

The final determinations issued in *Markiewicz* and *Norris* seemingly address a question that the Indiana Board in the prior month had left for another day. On April 12, 2012, the Board concluded in *Wineinger v. Dubois County Assessor*, Pet. No. 19-006-09-1-5-00019 [Small Claims Docket] that because the assessor had produced no proof that the subject property's use had changed between assessment dates, "The Board therefore need not decide if an intervening change in a property's use affects whether Ind. Code § 6-1.1-15-17.2's burden-shifting provision is triggered in the first place." See http://1.usa.gov/LtHgy0. (Page 6, ¶ 19(c) n.3.) Based on the rulings in *Markiewicz* and *Norris*, the answer appears to be "yes": an intervening change in the property's use means that the property under appeal is not the "same property" from the prior assessment date, so the taxpayer has the burden of proof.

G. **Indiana Board would not rely on settlement agreement resolving prior year's assessment appeal for a parcel in determining application of the 5% burden-shifting rule to the same parcel's current assessment appeal** (originally posted at *www.taxhathet.com* on August 9, 2012).

Avoiding the "chill" in resolving property tax appeals: Indiana Board of Tax Review refuses to use settlement agreements to determine application of the 5% burden-shifting rule in property tax appeals.

Settlement agreements are common in all types of litigation, including in property tax appeals. As this blog has previously discussed, the Indiana General Assembly passed a law which became effective on July 1, 2011, that shifts the burden of proof on appeal to the assessor, where the disputed property's assessment has increased by more than 5% over the previous year's value (as determined by the assessor). Specifically, Indiana Code § 6-1.1-15-17.2 provides:

> This section applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal increased the assessed value of the assessed property by more than five percent (5%) over the assessed value determined by the county assessor or township assessor (if any) for the immediately preceding assessment date for the same property. The county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court.

What happens when the previous year's value was determined by a settlement agreement between the assessor and the taxpayer? The Indiana Board addressed that question in three final determinations issued last month.

Assessment returned to the prior year's original value, not to the stipulated value. In *Greenwood West Partners v. Johnson County Assessor*, Petition No. 41-026-09-1-4-01382 (July 25, 2012), the owner (Greenwood) challenged the March 1, 2009 assessment for its property, which consisted of a convenience store, service station, and car wash. *See* http://1.usa.gov/NOi0UG. The parties agreed that the 2009 assessment was more than 5% over the property's March 1, 2008 assessed value, so the assessor had the burden of proof on appeal. The assessor "did not even attempt to prove the existing 2009 assessment is correct" and conceded that the 2009 value should be reduced. (Page 3, ¶ 16.) But reduced to what number? The 2009 assessment was $882,100, a 6.9% increase above the property's original 2008 assessment of $824,800. The 2008 value, however, "was corrected by a stipulation agreement to $455,400." (Page 2, ¶ 12(b).) In the stipulation, Greenwood agreed to withdraw its 2008 appeal petition before the Indiana Board in exchange for lowering the assessed value.

Greenwood argued that nothing in the record demonstrated why the assessment almost doubled from 2008 to 2009, that no annual adjustments were made in the neighborhood for 2009, and that the stipulated $455,400 value therefore should be carried forward to 2009. The Indiana Board noted that the burden-shifting statute is "silent" as to what happens when the assessor has the burden of proof and fails to meet that burden. In those cases, the Board has returned the assessment "to the value determined by the county assessor for the immediately preceding assessment date." (Page 3, ¶ 17.)

The Board would not reduce the assessment to the stipulated value. In addition to the statute's "silence," the Board noted that "nothing in the terms of the agreement itself supports using the agreed value for a subsequent assessment year." (Page 3, ¶ 18.) The Board further found that policy reasons supported its decision, reasoning:

> Judicial policy strongly favors settlement agreements. They allow courts to operate more efficiently and allow parties to fashion the outcome of their disputes through mutual agreement. Our Supreme Court has held that "[t]he law encourages parties to engage in settlement negotiations in several ways. It prohibits the use of settlement terms or even settlement negotiations to prove liability for or invalidity of a claim or its amount." *Dep't of Local Gov't Fin. v. Commonwealth Edison Co.*, 820 N.E.2d 1222, 1227 (Ind. 2005). The strong policy justification for denying settlements precedential effect in a property tax case is that allowing parties to use the settlement would have a chilling effect on the incentive of the parties to resolve cases. *Id.* at 1228.
>
> Coupled with Ind. Code § 6-1.1-15-17.2, this case presents an unusual scenario. Nevertheless, general principles about the limitations of settlements still are persuasive. There are many reasons for parties to make such agreements. We will not speculate what those reasons might have been and we will not apply the settlement to other matters. This agreement is merely a settlement

whereby the 2008 appeal was withdrawn in exchange for a specified adjustment. It does not dictate what the 2009 will be.

(Page 4, ¶¶ 20-21) (citations omitted).

Settlement agreement would not establish "baseline" for applying 5% burden-shifting rule. In the above case, there was no question that the assessor had the burden of proof. In two other decisions issued on the same day involving a convenience store operator's March 1, 2008 assessments, the Board cited the same policy considerations and concluded, "[T]he settlement agreement for 2007 did not establish a new base line for purposes of the 5% rule in the burden shifting statute to the other appeals."

H. **Proceed with Caution, Part I (August, 2012): Indiana Board of Tax Review decisions regarding the 5% burden shifting statute** (originally posted at *www.taxhathet.com* on September 24, 2012).

"Proceed with Caution" posts will highlight developments on various procedural, jurisdictional, and evidentiary issues. This inaugural installment will discuss last month's decisions from the Indiana Board of Tax Review addressing application of the burden shifting statute found at Indiana Code § 6-1.1-15-17.2.

Where a home's assessment did not change, owner had burden of proof. *Lach Living Trust v. Porter County Assessor*, Petition No. 64-005-10-1-5-00007 (August 29, 2012) (March 1, 2010 assessment). Under Indiana Code § 6-1.1-15-17.2, the burden of proof on appeal shifts to the assessor in cases where the disputed assessment has increased by more than 5% over the previous year's assessment. The Board concluded, "In this case, the parties agreed that the assessed value of the Petitioner's property did not increase from 2009 to 2010. The Petitioner, therefore, has the burden of proving the property's 2010 assessment was incorrect." (Page 8, ¶ 14). *See* http://1.usa.gov/TsyPgU. *Accord Gentry v. Hancock County Assessor*, Petition No. 30-012-10-1-5-00001, Page 5, ¶ 20 (August 24, 2012) (March 1, 2010 assessment). *See* http://1.usa.gov/UAGt86.

Home's assessment increased by 23% between assessment dates, so Assessor had burden of proof. *Nowosielski v. Porter County Assessor*, Petition No. 64-011-10-1-5-00006 (August 6, 2012) (March 1, 2010 assessment). "In the case at hand, the parties agreed that the [owners'] property's assessment increased from $301,500 in 2009 to $370,700 in 2010, which is an increase of 23%. The Assessor, therefore, has the burden of proving the assessment was correct for 2010." (Page 8, ¶ 16). *See* http://1.usa.gov/S4mwEz.

Home was constructed on parcel during year between assessment dates. Property was not the "same property" as prior year, so owners had burden of proof. Indiana Board declined to decide whether burden shifting statute applied to deduction appeals. *Robinson v. Monroe County Assessor*, Petition No. 53-013-08-1-5-00001, (August 23, 2010) (March 1, 2008 assessment). The parties agreed that the property's

value increased from $25,000 in 2007 to $149,500 in 2008, an increase greater than 5%. But the Assessor submitted evidence showing that a single-family residence was built on the property between the March 1, 2007 and 2008 assessment dates. Consequently, the owner had the burden of proof. (Page 9, ¶ 25). The Board reasoned:

Under the plain language of Indiana Code § 6-1.1-15-17.2, the burden shifts to the assessor when the assessed value of the *same property* increases by more than five percent. Therefore, because the property's 2008 assessment accounted for the addition of a house to the property; whereas the property was not assessed for any improvement in 2007, the assessor was not assessing the "same property" in 2008 as she did in 2007. Thus, Indiana Code § 6-1.1-15-17.2 does not apply in this case and the Petitioners maintain the burden to prove their property's assessed value was incorrect for 2008.

Id. The issue before the Indiana Board was whether the County Board (also called the Property Tax Assessment Board of Appeals or "PTABOA") improperly denied the owners' claim for the model residence deduction in 2008. The Board noted, "Because the Board finds that the five percent burden shifting provision does not apply on other grounds, the Board need not decide if Indiana Code § 6-1.1-15-17.2 applies to a deduction appeal." (Page 9, ¶ 25 n.4). *See* http://1.usa.gov/Qfrheg.

Property was remodeled between assessment dates and thus was not the "same property." *Oliver v. Carroll County Assessor*, Pet. No. 08-018-10-1-5-00005 (August 6, 2012) (March 1, 2010) [Small Claims]. The parties agreed that the owners "significantly restored and remodeled the home between 2009 and 2010 after it was damaged by severe flooding"; accordingly, it was not the "same property" and the owners retained the burden of proof on appeal. (Page 4, ¶ 13). *See* http://1.usa.gov/Q3gBvv.

Two adjacent lots treated as a single property for purposes of burden shifting analysis. The Indiana Board in *Schafer v. Porter County Assessor*, Petition Nos. 64-002-07-1-3-00001 and 64-002-07-1-4-00004 (March 1, 2007 assessment) similarly concluded that the property owners retained the burden of proof, where two adjacent lots were assessed as vacant land in 2006 but one lot was assessed as an improved parcel in 2007. The lots were not the "same property" in both years. (Page 8 ¶ 17). They were contiguous lots, and there was no evidence that they were used as separate economic units. Therefore, the Board treated the two lots as a single property in its burden shifting analysis. (Page 8 ¶ 17 n.3). *See* http://1.usa.gov/QAyGSs.

Assessor fails her burden, homeowner meets his burden to prove lower value. *Masterson v. Tippecanoe County Assessor*, Pet. No. 79-156-10-1-5-00001 (August 24, 2012) (March 1, 2010 assessment) [Small Claims]. In the appeal of this single-family residence, the property's value increased by approximately 10% over its 2009 assessment. Accordingly, under Indiana Code § 6-1.1-15-17.2 the Assessor had the burden on appeal to support the home's 2010 assessment of $72,000. (Page 5, ¶ 14). To validate her assessment, the Assessor presented fourteen sales from the neighborhood and

an adjacent neighborhood that occurred in 2009 and Multiple Listing Service (MLS) information from four sales. She asserted that the sales were of single-family homes similar in size, age, location, and style to the homeowner's property. These sales had an average value of $75 per square foot, whereas the subject home's 2010 assessed value was $51 per square foot. But the Assessor's testimony was insufficient to prove the alleged comparable properties were, in fact, comparable. The Indiana Board found:

[T]he proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. Similarly, the proponent must explain how any differences between the properties affect their relative market values-in-use. This the [Assessor] did not do. [She] merely testified that the properties were similar in characteristics and location to the subject property. This falls far short of the burden to show comparability between the properties.

(Page 7, ¶ 18(b)) (citations omitted). The Board concluded that the home's value must be reduced to its 2009 assessment of $65,000. (Page 7, ¶ 18(c)).

The inquiry did not end there, as Masterson pressed for an even lower value. He had purchased the home on February 28, 2011, for $19,000. The Board noted, "The sale of the subject property is often the best evidence of the property's value." (Page 7, ¶ 19(a)) (citation omitted). However, this was one year after the March 1, 2010 assessment date. "[B]y itself, the [homeowner's] purchase price is not probative of the property's true tax value." *Id.* Masterson testified that the home was originally listed for $52,900, but the listing price decreased to $24,500. The house was vacant for eighteen months before he purchased it; during that period, the plumbing froze and the "house was trashed." (Page 7, ¶ 19(b)).

The Board explained: "By themselves, listings typically do little to show a property's market value-in-use, but an eighteen-month listing that ultimately results in a sale at or below the list price is much more persuasive; particularly where, as here, the property was actively listed on the relevant valuation date." (Pages 7-8, ¶ 19(b)). And the Tippecanoe County Circuit Court had determined the home's value to be $19,000 in an order dated December 2, 2010 – approximately nine months after the assessment date. The Board ruled: "Considering the totality of the evidence, the Board finds that Mr. Masterson raised a prima facie case that the subject property's true tax value was no more than $19,000 for 2010." (Page 8, ¶ 19(b)). *See* http://1.usa.gov/OQu26I.

Burden shifting statute applied to appeals pending as of July 1, 2011. Because the Assessor had the burden of proof, she could not move for an involuntary dismissal. *Hukill v. Monroe County Assessor*, Petition No. 53-005-06-1-4-00076 (August 23, 2012) (March 1, 2006 assessment). The Assessor argued that Indiana Code § 6-1.1-15-17.2 (effective July 1, 2011) only applied prospectively to Indiana Board appeals "absent clear and expressed language to the contrary." (Page 11, ¶ 30). The Board observed: "Indiana

Code § 6-1.1-15-17.2 does not change the rules or standards for determining whether an assessment is correct. Nor does the statute make any change to the assessor's duties in making assessments." (Page 12, ¶ 31). And the Board further concluded: "If the General Assembly had not intended the law to apply to pending appeals, it could have inserted language to that effect, stating that the law only applied to future assessments. This the legislature did not do." (Page 13, ¶ 32). The burden shifting statute thus applied to all appeals pending as of July 1, 2011. (Page 13, ¶ 34). The commercial property's assessed value for 2006 increased by more than 5% over its 2005 assessed value, so the Assessor had the burden of proof. *Id.*

The Assessor's counsel moved for an involuntary dismissal under Trial Rule 41(B) of the Indiana Rules of Trial Procedure (the trial rules apply to Indiana Board proceedings to the extent they don't conflict with the Board's rules). Trial Rule 41(B) provides:

After the plaintiff *or party with the burden of proof upon an issue*, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief.

(emphasis added). Here, the owner conceded that he possessed no sales information, no evidence on comparable properties in the neighborhood, and no other evidence of the property's market value-in-use. (Page 6, ¶ 16). The Indiana Board stated, "There is little question that, had the [owner] had the burden of proof in this appeal, the case presented by his representative would have fallen far short of the burden to prove the [owner's] property's assessment was in error." (Page 14, ¶ 36). Because the Assessor had the burden of proof, the owner's petition could not be involuntarily dismissed under Indiana Trial Rule 41(B). *Id.* The Assessor's motion was denied. *Id. See* http://1.usa.gov/TsBW8y.

In an earlier decision involving the same owner's service station in the same county for the same assessment date, the Board also denied the Assessor's motion for involuntary dismissal. *Hukill v. Monroe County Assessor*, Petition No. Petition No. 53-009-06-1-4-0022, Page 13, ¶ 35 (August 15, 2012) (March 1, 2006 assessment). The property's assessment had increased by more than 5% over its 2005 value, so the Assessor had the burden of proof. (Page 12, ¶ 31). In denying the motion, the Board reasoned, "The [Assessor] cannot sidestep the requirements of the burden shifting law, by seeking to dismiss a petition it deems insufficient to make a case." (Page 13, ¶ 35). The Board also remarked, "Trial Rule 41(B) allows a party to move for involuntary dismissal *after* the presentation of evidence" and the Assessor's counsel had moved for dismissal *before* the Petitioner had presented evidence. (Page 13, ¶ 34) (emphasis added). *See* http://1.usa.gov/RdiY29.

The Indiana Board reached the same conclusions in *South Central Leasing v. Monroe County Assessor*, Petition No. 53-012-06-1-3-00004, Pages 7-11, ¶ ¶ 20-30 (August 17, 2012) (March 1, 2006) (holding that the Assessor had the burden of proof and denying her motion for involuntary dismissal). In this case, however, the Board *increased* the vacant industrial land's assessment from $289,800 to $300,000 based on the property's sale price on March 31, 2005. (Pages 12-13, 14 ¶¶ 34, 38.) In so doing, the Board explained that the Board has "the authority to increase the assessed value of property where the evidence shows the assessment is in error and the value of the property is in excess of its assessed value." (Page 12, ¶ 34) (citations omitted). *See* http://1.usa.gov/Sj4i2g.

I. **Where improvement existed but was erroneously omitted from assessment for prior year, the burden-shifting statute does not apply in appeal of current year's assessment.** *McElwee and Hale v. Marion County Assessor*, Pet. Nos. 49-800-07-3-5-00095 and 49-800-07-1-5-01873 (Sept. 7, 2012) (March 1, 2007 assessment). Owners' home was constructed in 2004, but it was not placed on the assessment rolls until 2007. The Indiana Board held: "Therefore, . . . the 2006 and 2007 assessments are not for the *same property* and Ind. Code § 6-1.1-15-17.2 does not shift the burden to the Respondent." (Page 6, ¶ 25) (emphasis added). However, the Board further explained: "[I]f the Assessor attempts to claim that the assessed value should be anything *over* the value determined by the PTABOA, then the Assessor, and not [Owners], must prove that the PTABOA's assessment is incorrect." (Page 6, ¶ 26) (emphasis added).

J. **Burden-shifting provision did not apply to "significantly remodeled" property.** *Basic American Convalescent Center v. Madison County Assessor*, Pet. No. 48-003-08-1-4-00003 (Sept. 24, 2012) (March 1, 2008 assessment) [Small Claims Docket]. The Owner challenged the 2008 assessment of its nursing home. The parties agreed that the property's value increased from $775,300 in 2007 to $2,783,300 in 2008. But the nursing home was "significantly remodeled in 2007." (Page 6, ¶ 15) Building permits showed that Owner had "re-roofed the building, replaced the windows, updated the interior drywall and ceiling and floor finishes, updated the wiring in the building, and installed a central ventilation unit." *Id.* Owner described this as simply "normal maintenance." *Id.* The Indiana Board disagreed and found that the nursing home as assessed in 2008 – after being "significantly remodeled" – was not the "same property" that was assessed in 2007. (Page 6, ¶¶ 15, 16.) Ind. Code § 6-1.1-15-17.2 did not apply to shift the burden to the Assessor. (Page 6, ¶¶ 16.)

K. **Indiana Board's final determination reverses ALJ's decision on application of burden-shifting rule, where prior assessment's final value was based on a settlement.** *Menefee v. Noble County Assessor*, Pet. No. 57-006-10-1-5-00006 (Oct. 30, 2012) (March 1, 2010 assessment date) [Small Claims Docket]. At the administrative hearing, the ALJ preliminarily determined that because the home's assessment increased from $146,500 in 2009 to $165,300 in 2010 (more than 5%), the Assessor had the burden of proof. (Page 5, ¶ 14.) For the March 1, 2009 assessment date, the Assessor had initially valued the property at $178,200 – higher than the property's disputed 2010 assessed value. The Assessor and homeowner later stipulated to the $146,500 value to

settle the 2009 appeal. Indiana law "strongly favors settlements," and that "strong policy justifies denying settlements precedential effect in property tax cases." (Page 5, ¶ 16) (citing *Dep't of Local Gov't Fin. v. Commonwealth Edison Co.*, 820 N.E.2d 1222, 1228 (Ind. 2005)). "The Board therefore will not apply a settlement agreement to set a baseline for comparison to future assessments, especially where, as here, the agreement does not contain any language clearly indicating that the parties intended such a result." *Id.*

Furthermore, the home was assessed as 62% complete in 2009 and as 100% complete in 2010. The Indiana Board concluded that in 2010 the home was not the "same property" as was appealed and settled for 2009. (Page 5, ¶ 17.) The burden-shifting statute only applies if the "same property" is under appeal for the current and prior years. *Id.* The homeowner had the burden of proof on appeal to the Board. (Page 5, ¶¶ 14, 17.)

L. **Where property under appeal was carved out of larger parcel from prior year, the burden of proof does not shift to the Assessor under either Ind. Code § 6-1.1-4-4.4(b) or Ind. Code § 6-1.1-15-17.2.** *Centra Credit Union v. Clark County Assessor*, Pet. Nos. 10-009-07-1-4-10000 *et al.* (Oct. 9, 2012) (March 1, 2007 to 2010 assessment dates) [Small Claims Docket]. Owner appealed the assessments of its credit union property in Jeffersonville for the 2007 to 2010 tax years. The building was built new in 2006 on land that was carved out of a larger parcel; it was first assessed as of March 1, 2007. At the local hearing, the County Board changed the building's grade factor and thereby increased the assessed value from $840,900 to $1,000,200. For the March 1, 2007 assessment date, Owner argued that the Assessor had the burden of proof under two provisions, Ind. Code § 6-1.1-4-4.4 and Ind. Code § 6-1.1-15-17.2. Under Ind. Code § 6-1.1-4-4.4, the assessor has the burden to prove that each change to the "underlying parcel characteristics, including age, grade, or condition, of a property," is valid. Under Ind. § 6-1.1-15-17.2, the Assessor has the burden to prove that the property's assessment is correct where the assessment increased "by more than five percent (5%) over the assessed value determined by the [Assessor] for the immediately preceding assessment date for the same property."

The Board observed, "To shift the burden of proof under either statute the assessment under appeal is compared to the *previous year's* assessment." (Page 4, ¶ 14) (emphasis added). Here, there was *no 2006 assessment for the property*. Consequently, regarding the property's 2007 assessment, the Board held:

> The parcel under appeal was part of a bigger parcel on March 1, 2006. The improvements were not built until after March 1, 2006. Neither statute shifts the burden to the assessor for the assessment of a new property. The Petitioner has the burden of proof in the 2007 appeal.

Id. For the subsequent tax years, the Board held:

- The Assessor admitted that the property's 2008 assessment increased by more than 5% over its 2007 value. The Assessor had the burden of proof for 2008. (Page 5, ¶ 15.)

- The parties disputed the assessment assigned to the property by the Assessor for 2008 assessment. Relying on the value stated in the Owner's Form 130 appeal petition and the County Board's Form 115 notice of its determination, the Board concluded that the property's assessed value had not increased by more than 5% from 2008 to 2009. Owner had the burden of proof. (Page 5, ¶ 16.)

- The property's assessed value dropped from 2009 to 2010. Owner had the burden of proof. (Page 5, ¶ 17.)

UPDATE ON PROPERTY TAX EXEMPTIONS

Indiana Tax Court decision

1. **Assisted living facility owned by non-profit and leased to for-profit did not qualify for exemption.** In *Tipton County Health Care Foundation, Inc. f/k/a Tipton County Memorial Hospital Foundation v. Tipton County Assessor*, Cause No. 49T10-1101-TA-6, Indiana Tax Court, February 16, 2012, property owned by a non-profit hospital foundation was leased to a for-profit entity for exclusive operation as an assisted living facility. The Indiana Tax Court found that the property was not exempt from property tax. The Tax Court said the record did not indicate whether the lessee had either a "charitable purpose" or a "profit motive" as its motivation for the lease arrangement.

Indiana Board of Tax Review – Final Determinations

1. **Fraternal group failed to show that its office building qualified for charitable, educational or religious purposes exemption** (originally posted at *taxhatchet.com* on June 12, 2012).

   No Joke? Providing 'mirth' insufficient to support property tax exemption for fraternal group

   "Mirth is God's medicine. Everybody ought to bathe in it." - Henry Ward Beecher

   Laughter may be the best medicine, but apparently it is not the best prescription for a property tax exemption. The Indiana Board of Tax Review denied an exemption for property used to promote "mirth" in *International Royal Order of Jesters, Inc. v. Marion County Assessor*, Pet. Nos. 49-600-08-2-8-00010 and 49-600-10-2-8-01551 (Jan. 9, 2012) (March 1, 2008 and 2010 assessment dates). *See http://1.usa.gov/AmIAxk.* The International Royal Order of Jesters, Inc. (the Jesters), which was exempt from federal tax under 501(c)(3) and (c)(10), claimed a 100% exemption for an office building used as both a headquarters and museum. Counsel for the Jesters described the organization as a "domestic fraternal organization operating under a lodge system devoted entirely to religious, charitable, educational and fraternal purposes." (Page 7, ¶ 20.) The Executive Director testified that the Jesters organization was part of the Masonic fraternity and that there were "191 subordinate courts in the United States, Canada, Mexico and the Republic of Panama, with approximately 20,500 members." (Page 7, ¶¶ 20 & 21.) The Director also testified, "The purpose of the Jesters is spreading the gospel of mirth, merriment and cheerfulness, promoting fellowship and fraternity among members, and extending good cheer and assistance to the general public, which furthers the Masonic principles of brotherly love, belief and truth." (Page 7, ¶ 21.) According to the Director, "[']Mirth is king['] explains to the world the purpose of our existence." *Id.*

To be exempt, the Jesters had to show that the property was predominantly owned, occupied, and used for an exempt charitable, educational, or religious purpose (or some combination thereof). *See* Ind. Code § 6-1.1-10-16. The building was predominantly used for meetings and administrative tasks. Approximately one-third of the property was leased to a related group, the National Court, Royal Order of Jesters. The museum area was open five days a week and displayed historical artifacts, photographs, various Jester statuettes, and other items related to Masonry. However, it was not on the national museum registry, and there was no exterior signage or community advertisement for the museum. The Jesters organization had made no charitable contributions. And its educational activities "probably" came through its membership newsletter; further, the group had no "strictly religious activities." (Page 9, ¶ 26.)

The exemption claim was no laughing matter to the assessor, who argued that the Jesters organization was a "recreational group" that was predominantly a social club.

The Indiana Board ruled that the Jesters organization failed to meet its burden. (Pages 15-16, ¶ 44.) The property was not used for charitable purposes. The Board reasoned: "The Jesters' main function . . . is to promote the members' fraternalism, spreading mirth and cheerfulness and promoting good fellowship. To the extent charity exists in that mission, the Board holds that it is insufficient to support a finding that the property owned by the Jesters is exempt." (Page 16, ¶ 45.)

The property was not used for educational purposes. The Jesters' museum, which addressed the history of the Jesters, was intended primarily for members' own use and did not educate the public – a fact underscored by the lack of signage and community publicity for the museum. (Page 19, ¶ 49.)

And the property was not used for religious purposes. The Indiana Board concluded, "The record contains no such probative evidence that the property under appeal was used for any religious purposes." (Page 20, ¶ 50.) Thus, from the Jesters' perspective, what may have started out as an exemption comedy resulted in a property tax tragedy.

2. **100% exemption applied for property owned, occupied and used for dance and gymnastics education** (originally posted at *taxhatchet.com* on June 10, 2012).

Tangle over the Tango: Dance & Gymnastics School owned by S Corporation and leased to non-profit found 100% exempt from property tax

Property tax appeals often feel like a dance between the taxpayer and assessor, and in a January 2012 decision the parties went toe-to-toe over whether a dance and gymnastics studio qualified for a 100% exemption. In *Herrick Investments, Inc. v. Marion County Assessor*, Petition No. 49-500-08-2-8-00001 (Ind. Bd. Tax Rw., Jan. 4, 2012), *see* http://1.usa.gov/yqvtPE, the parties stipulated that the dance and gymnastics school under appeal was occupied and used for an exempt charitable and educational purpose. The issue was whether the school was "owned" for an exempt purpose. William and Lynn Herrick formed and were the sole shareholders of Herrick Investments, Inc. (HII), an S-Corporation. HII was formed for the sole purposes of owning the real property and

improvements associated with school. Effective January 1, 2008, HII leased the property to Artists in Motion, Inc. (AIM), an Indiana non-profit corporation. The lease required AIM to use and occupy the property exclusively as a non-profit school for dance and gymnastics education. HII had no intent to generate a profit from the lease. The payments were designed to get sufficient rent to pay the debt associated with the property. The Herricks received no compensation and took no cash distributions from HII during 2008 and 2009. But they did make significant contributions to AIM in 2008 and 2009 to assist with expenses, including payment of the rent for the school. A USPAP appraisal showed that the rent charged to AIM was a below market rate. Moreover, HII allowed other non-profits to use the property at no charge.

The Indiana Board of Tax Review applied a 100% exemption for the March 1, 2008 assessment date. The Board noted, "The leasing of property to a for-profit dance school previously was determined to qualify for an educational purposes property tax exemption." (Page 14, ¶ 53.) The Board further observed:

> [HII] is owned and operated by the Herricks as the sole shareholders, officers, and directors. It was formed to purchase, construct and own a facility for dance and gymnastics education. It purchased and constructed the Property solely to provide such a facility where Ms. Herrick is Executive Director. Furthermore, the Herricks personally made substantial charitable contributions to AIM to cover its expenses, including the rent. The Herricks also personally guaranteed the debt associated with the Property.

(Page 14, ¶ 54.) The Board also found the following facts to be important:

1. HII owned no other real estate.
2. There were no other tenants associated with the school.
3. The Herricks had no intent to profit from owning and leasing the property.
4. AIM is not permitted to assign, sublet or grant any concession or license to use the school without the prior written consent of HII.
5. HII has allowed several other non-profit organizations to use the school at no charge.
6. HII paid the property taxes that AIM is required to pay under the lease.
7. The rent was below market.

The 100% exemption applied because the totality of the evidence showed that HII "was created and exists as a vehicle to support the educational operations of AIM," and it "constructed and leased the Property for the sole and exclusive purpose to provide a facility for dance and gymnastics education." (Page 15, ¶ 57.)

3. **Below-market rents, charitable benefits and services supported 100% exemption for housing complex.** *FARH-West Affordable Housing, Inc. v. Marion County Assessor*, Pet. Nos. 49-601-08-2-8-00001 *et al.* (February 10, 2012) (March 1, 2008 assessment). FARH-West, a 501(c)(3) organization, was founded to provide affordable housing to low income tenants. FARH-West purchased a housing complex and spent $973,000 on capital projects, including repaving a city street. The property was managed by a for-profit company, but that company was paid below-market management fees. FARH-West provided language-learning programs and credit counseling for residents and hosted community events.

   FARH-West presented three rent studies and a USPAP appraisal showing that its rent levels fell below the rates charged by other complexes in the area. The Assessor denied FARH-West's exemption application, contending that the rents were close to or slightly above market rents. The Assessor argued that the rent studies included the area outside of I-465, whereas the subject property was in the separate submarket inside of I-465. The Assessor provided a rent analysis, though the analysis used data from 2011 while the exemption under appeal was for 2008.

   The Indiana Board found in favor of FARH-West. The Board found that FARH-West's rent studies and appraisal raised a prima facie case that the apartments were leased for less than fair market rent. (Page 15, ¶ 25.) Because the complex provided charitable benefits and services to its residents, FARH-West met the requirement that it do more than merely provide affordable housing. (Page 16, ¶ 26.) Further, by repaving the city street, FARH-West relieved the government of the burden to maintain that street. (Page 16, ¶ 27.) Thus, FARH-West established a prima facie case that its property qualified for a charitable exemption, and the Assessor failed to rebut that evidence. (Page 16, ¶ 28.) Accordingly, the Board found the property 100% exempt. (Page 17, ¶ 30.)

4. **Art Foundation which failed to timely file real property tax exemption applications could not use Form 133 petition to correct its error.** *D'Andrea LaRosa Art Foundation v. Dearborn County Assessor*, Pet. No. 15-013-08-3-5-00001 (August. 30, 2012) (March 1, 2008 and 2009 assessment dates). The Art Foundation, an exempt 501(c)(3) organization for federal income tax purposes, owned the old Lawrenceburg post office. The Foundation purchased the property in 2007. The Foundation failed to file a Form 136 exemption application in 2008 or 2009. May 15th is the standard exemption filing deadline each year. But non-Code legislation allowed taxpayers to file for exemptions regarding the 2001 to 2009 tax years before September 1, 2009. The Foundation did not file for an exemption until April 15, 2010, claiming a charitable purpose. The property was deemed exempt starting with the March 1, 2010 assessment date.

   The Assessor claimed no taxes were due for the March 1, 2008 assessment date, because the property had previously been "government owned." (Page 6, ¶ 17.) The Foundation sought the 2008 exemption anyway, believing that the 2008 exemption would carry forward to 2009. To avoid losing the property at a tax sale, the Foundation paid the outstanding taxes. The Foundation filed a Form 133 Petition to Correct Error, which it

filed on March 11, 2011. The Assessor argued that the Foundation could not correct its failure to timely file exemption applications using a Form 133 petition.

That the property showed no assessment and no tax liability for the March 1, 2008 assessment date was a mistake, the Board ruled. (Page 10, ¶ 33.) But that "situation does not prove an exemption was granted for 2008 and it does not create a basis for any exemption to carry over to 2009." *Id.* The Foundation, the Board explained, "demonstrated a fundamental misunderstanding about statutory exemption procedures." (Page 11, ¶ 34.) The Board observed, "Ultimately the [Foundation] was responsible for making sure that whatever needed to be done to claim an exemption for the property it recently bought actually was done." *Id.* The "decisive point" or "controlling point" was the Foundation's failure to file its Form 136 exemption applications by May 15th in 2008 and 2009, and its failure to meet the extended filing deadline of September 1, 2009, allowed by the non-Code provision. (Pages 11-12, ¶¶ 35-37.) That failure "waived whatever exemption might have been available." (Page 11, ¶ 35.) "The Board cannot extend the filing deadline any further than the Legislature did." (Page 12, ¶ 37.) Finally, the Board ruled, "A Form 133 cannot be used to get around the fact that the [Foundation] missed both the original filing date and the extended filing date for the exemption it sought." (Page 12, ¶ 39) (citing two Tax Court decisions explaining the "proper use" of a Form 133 is "to correct objective errors").

5. **Homeowners' Association did not prove that it was established for the purpose of retaining and preserving land and water for their natural characteristics; ten parcels comprising common areas of subdivision were not exempt from property tax.** *Marineland Gardens Community Association v. Kosciusko County Assessor*, Pet. Nos. 43-025-09-2-8-00001 etc. (Sept. 7, 2012) (March 1, 2009 and 2010 assessment dates). The Indiana Board rejected the exemption requests by the Homeowners' Association for ten parcels comprising the common area for the Marineland Gardens subdivision. (Page 8, ¶ 25.) A tract of land is exempt from property tax if the tract is owned by a non-profit entity "established for the purpose of retaining and preserving land and water for their natural characteristics." Ind. Code § 6-1.1-10-16(c)(3) (the tract also must not exceed 500 acres and may not be used by the entity to make a profit). The Association was organized as a non-profit corporation, but it offered only "scant evidence" to show the specific purpose for which it was organized. (Page 7, ¶ 20.) The Association's president pointed to "minimal steps . . . taken to maintain land and water," e.g. fencing the parcels. (Page 8, ¶ 22.) And some aspects of the Association's land use, e.g. laying down gravel for parking, were *inconsistent* with retaining and preserving land. (Page 7, ¶ 21.) The Association provided no articles of incorporation or other organizational documents "laying out the purpose or purposes for which [the Association] was organized." (Page 8, ¶ 23.) Accordingly, the Association failed to make a prima facie case that it was entitled to an exemption. (Page 8, ¶ 24.)

   Additional procedural note: The Association filed only two Form 132 petitions with the Indiana Board. The petitions listed only one parcel, one appeal for both assessment dates. But the petitions referred to "these tracts" and listed the other nine parcels as "related parcels." The petitions also attached the County Board's determination and the

Form 136 exemption applications listing all ten parcels. The Indiana Board's administrative law judge (ALJ) issued an order stating that the petitions did not comply with 52 IAC 2-5-1(b), which generally requires taxpayers to file a separate petition for each parcel under appeal. (Page 3, ¶ 6.) The error was correctable, the Board found. *Id.* The Association had "objectively manifested its intent to appeal" all ten parcels. *Id.* The Board rejected the Assessor's argument that appeals for the nine parcels not listed on the front page of the Form 132 petitions were untimely. *Id.* The ALJ made his finding contingent on the Association's timely responding to defect notices issued in conjunction with the ALJ's order. *Id.* The Association did timely respond, filing separate petitions for each parcel. *Id.*

LEGISLATIVE CHANGES AFFECTING PROPERTY TAXES[3]

P.L. 137-2012 – Tax Administration

- Ind. Code § 6-1.1-3-24, effective March 1, 2011, specifies the assessed value for outdoor advertising signs for 2011 through 2014 assessment dates.
- Ind. Code § 6-1.1-37-11, effective July 1, 2012, provides guidance on calculating interest when a provisional tax statement is issued in advance of a final or reconciling statement.
    - If a taxpayer is sent a provisional statement with a later final or reconciling statement, interest shall be computed after either the date on which taxes were paid under the provisional statement or the date on which taxes were first due, whichever is later.
- Ind. Code § 6-1.1-12-26.1, effective January 1, 2012, provides a 100% property tax deduction for solar power devices used to generate electricity and installed after December 31, 2011.
- P.L. 137-2012 § 129, effective upon passage, provides that during the 2012 legislative interim, the commission on state tax and financing policy shall study whether the value of Federal Income Tax credits under I.R.C. § 42 should be considered in determining the assessed value of low income housing tax credit property.

P.L. 146-2012 – Property Taxes

- Ind. Code § 6-1.1-4-39, effective July 1, 2012, provides that if a taxpayer wishes to have the income capitalization method or the gross rent multiplier method used in the initial assessment of the taxpayer's property, the taxpayer must submit the necessary information to the assessor by the March 1 assessment date.
    - Specifies that the taxpayer is not prejudiced or restricted in filing an appeal if the data is not submitted by March 1.
- Ind. Code § 6-1.1-13-1, effective July 1, 2012, provides that taxpayer must receive notice at least thirty (30) days before the taxpayer is scheduled to appear before the board.
- Ind. Code § 6-1.1-15-1, effective July 1, 2012, provides a taxpayer the right to a continuance of a PTABOA hearing for just cause.
    - Permits a taxpayer to request that the board make a decision based upon submitted evidence without the presence of the taxpayer.
    - Sets a deadline for filing a notice of withdrawal of a petition.
    - Imposes a $50 penalty if a taxpayer or representative fails to appear at the hearing and also fails to request a continuance, fails to request the board take action without the taxpayer being present, or fails to file a withdrawal. Permits an appeal of the penalty to the Indiana Board or directly to the Tax Court.
- Ind. Code § 6-1.1-15-18, effective July 1, 2012, specifies that a taxpayer or an assessing official may introduce evidence of the assessment of comparable properties to determine a property's market-value-in-use.

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[3] See also the presentation by DLGF Commissioner Brian Bailey, "New Legislation in 2012" (May 16, 2012), which can be viewed at *http://www.in.gov/dlgf/files/120516_-_Bailey_Presentation_-_Auditor_Conference.pdf* (last visited November 3, 2012).

- If the proceeding concerns residential property, the taxpayer or official may introduce evidence of assessments of comparable properties in same taxing district or within two (2) miles of such district's boundaries.
- If the proceeding concerns non-residential property, the taxpayer or official may introduce evidence of assessments of any relevant, comparable properties, with preference given to comparable properties in the same taxing district or within two (2) miles of such district's boundaries.

- Ind. Code § 6-1.1-37-11, effective July 1, 2012, provides that if an assessment is decreased by the Indiana Board or the Indiana Tax Court, the taxpayer is not entitled to the greater of $500 or 20% of the interest to which the taxpayer would otherwise be entitled on excess taxes paid if substantive evidence supporting the taxpayer's position was not presented by the taxpayer to the assessor before or at the hearing of the county PTABOA.
  - Provides that an appraisal may not be required by the county board or the assessor in a proceeding before the county board or in the preliminary informal conference.
- P.L. 146-2012 §§ 8-12, effective upon passage, permit various entities to file a late property tax exemption application for previous assessment years, and provides refunds regarding these exempt properties.

P.L. 112-2012 – Property Taxes

- Ind. Code § 6-1.1-4-4.2, effective July 1, 2012, requires the county assessor of each county before July 1, 2013, and before July 1 of every fourth year thereafter to prepare and submit to the DLGF a reassessment plan for the county.
  - Provides that the reassessment plan must divide all parcels of real property in the county into different groups of parcels.
    - Requires that each group of parcels must contain at least 25% of the parcels within each class of real property in the county.
  - Requires the reassessment of the first group of parcels under a county's reassessment plan to begin July 1, 2014, and be completed on or before March 1, 2015.
- Ind. Code § 6-1.1-4-5.5, effective January 1, 2013, specifies procedures for taxpayers to petition the DLGF for reassessment of parcels in a group and a schedule for completion of reassessment of parcels in a group.
- Ind. Code § 6-1.1-22.6-1 *et seq.*, effective March 19, 2012, specifies procedures for resolving multiyear delays in the issuance of tax bills for counties that are at least three years behind in issuing tax bills.

P.L. 120-2012 – Local Government Matters

- Ind. Code § 6-1.1-26-5, effective July 1, 2012, provides that the interest rate owed on property tax refunds is equal to the rate established by the commissioner of the Department of Revenue for refunds on excess state tax payments (current law sets the rate at 4%).
- Ind. Code § 6-1.1-37-9, effective July 1, 2012, provides that the interest rate owed on taxes the taxpayer is required to pay is equal to the rate established by the commissioner of the Department of Revenue for refunds on excess state tax payments (current law sets the rate at 10%).

P.L. 158-2012 – Information Technology Equipment Exemption

- Ind. Code § 6-1.1-10-44, effective July 1, 2012, provides that the property tax exemption for qualified enterprise information technology equipment applies only to property located in a high technology district area designated by the fiscal body of the county or municipality.
- Ind. Code § 6-1.1-10-44, effective July 1, 2012, also provides that an entity that leases qualified property for use in a facility or data center dedicated to computing, networking, or data storage activities is also eligible for the exemption. (Current law provides that only a business that operates such a facility is eligible for the exemption.)
- Ind. Code § 6-1.1-10-44, effective July 1, 2012, also requires that at least $10,000,000 must be invested in the facility or data center after June 30, 2012, by the entity entering into the agreement for the exemption and by the lessor of the qualified property (if the business is a lessee) and all lessees of qualified property.

DEPARTMENT OF LOCAL GOVERNMENT FINANCE
MEMOS AND PRESENTATIONS[4]

Subject	Date
Understanding Tax Abatement Process - John Toumey and Joe Lukomski	Jan. 18-20, 2012
Assessing Mobile Homes - John Toumey	Jan. 18-20, 2012
2012 Cost Table Corrections - David Schwab and Terry Knee	Jan. 18-20, 2012
Personal Property - Joe Lukomski	Jan. 18-20, 2012
Reassessment / PTABOA - Barry Wood	Jan. 18-20, 2012
Location Cost Multipliers	1/27/12
Manufactured Housing Circuit Breaker Clarification	1/27/12
Soil Productivity Factor Update	2/2/12
Future of Sales Disclosure Reporting	2/9/12
Nursing Home Exemption Decision	2/24/12
Supplement to 50 IAC 4.2-15-14 Present Value of Personal Property Leases	3/2/12
Addendum to: 50 IAC 1-3-1 (STB Directive 78-101 – Real Property) – Assessments of Oil and Gas	3/2/12
Golf Course Guidance	3/15/12
Soil Productivity Factor Changes	3/16/12
Land Type Codes – Farmland	3/23/12
Future of Sales Disclosure Reporting	4/2/12
Adjustments to Transportation Fund Maximum Levy	4/4/12
Mandatory Adoption of Anti-Nepotism Policy	5/11/12
Review and Adoption of Budgets and Levies of Certain Public Libraries	5/11/12
New Legislation in 2012 – Commissioner Brian Bailey	5/16/12
Handling Public Buildings – Cathy Wolter, General Counsel	5/16/12
Changes to the Processes of Advertising, Reviewing, and Adopting Budgets, Tax Levies, and Tax Rates Pursuant to IC 6-1.1-17-3, IC 6-1.1-17-3.5, and IC 6-1.1-17-20	5/21/12
Assessment and Appeal Changes	5/22/12
Homestead/Tax Cap Guidance	5/22/12
Assessor Certification and Qualifications for County Assessor Candidates	5/23/12
The Establishment of Fire Protection Territories	5/24/12
Additional Appropriations, HEA 1072, IC 6-1.1-18-5	5/24/12

[4] The DLGF's memos and presentations can be viewed at *http://www.in.gov/dlgf/2444.htm* (last visited November 3, 2012).

2012 - 2013 Budget Calendar	5/25/12
50 IAC 26 Amendment (Computer Standards for a Common Property Tax Management System)	6/15/12
Assessment Appeals 101	6/22/12
Assessment Appeals Flow Chart	6/29/12
Tax Sales & Payment of Delinquent Property Tax, HEA 1090	6/29/12
Allocation of Tax Revenue Subject to "Circuit Breaker" Credits	7/3/12
TIF and Redevelopment Commission Responsibilities	7/3/12
Cyclical Reassessment Follow-Up	7/7/12
HEA 1072 Homestead Deduction Proof	7/7/12
Circuit Breaker – Common Area Clarification	7/16/12
2012 Pay 2013 Certification of Net Assessed Values	7/27/12
Tax Sale Agreements – Cathy Wolter	8/2/12
Circuit breakers and common areas: difference in how the Indiana Code treats an apartment complex versus a mobile home park	8/10/12
Special Use Properties – Barry Wood	Aug. 21-24, 2012
Exemptions / Deductions / Abatements – Barry Wood	Aug. 21-24, 2012
Mobile Homes – John Toumey	Aug. 21-24, 2012
Future of Sales Disclosure Reporting	9/4/2012
State Board of Accounts Memo: Assessment – Penalties	9/4/2012
Updated Location Cost Modifiers for 2013 Annual Adjustment	10/31/12
Location Cost Multiplier Chart	10/31/12
Release of Updated Cost Information for 2013 Annual Adjustment	10/31/12
Cyclical Reassessment Guidance	11/16/12

INDIANA BOARD OF TAX REVIEW – 2012 RULE CHANGES

The following was originally posted at *www.taxhatchet.com* on August 26, 2012.

Ten Rule Changes on Deck: Indiana Board of Tax Review's new procedural rules for property tax appeals will become effective August 31, 2012

The Indiana Board of Tax Review states on its website, "The IBTR's proposed amendments to 52 IAC 1, 52 IAC 2, and 52 IAC 3 will become effective Friday, August 31, 2012." *See* http://www.in.gov/ibtr/ (last visited August 26, 2012). Here are ten of the changes that will become effective at the end of this month:

1. **Voluntary Resolution:**

   The IBTR is adding 52 IAC 2-11-1.5 to govern this process. Under the new rule, a "voluntary resolution" or "facilitation" is defined as "an informal process in which an administrative law judge acts to encourage and assist in the resolution of a property tax appeal." 52 IAC 2-11-1.5(a). The "program requires an agreement to participate by both the county and the taxpayer." 52 IAC 2-11-1.5(b). A facilitation must be conducted before the county property tax assessment board of appeals issues a decision. 52 IAC 2-11-1.5(d). "Voluntary resolution proceedings shall be considered settlement negotiations as governed by Ind. Evidence Rule 408" and they are not open to the public unless all parties agree. 52 IAC 2-11-1.5(f) & (g).

2. **Amendments to Petitions:**

   Current Rule - Amendments filed later than thirty days following the filing of the petition must be approved by the IBTR for good cause shown. *See* 52 IAC 2-5-2(c). Amendments filed solely for the purpose of adding new issues will be approved if filed no later than fifteen days prior to the hearing. *Id.*

   New Rule - "A motion to amend a petition may be filed later than thirty (30) days following the date a petition is filed and such motion may be approved by the board upon good cause shown."

3. **Issues raided before the IBTR:**

   Current Rule - Only issues raised in the appeal petition or any approved amendments to the petition may be raised at the hearing. *See* 52 IAC 2-5-2(g).

   New Rule - This provision is being eliminated.

4. **Prehearing Disclosures:**

Current Rule - Copies of documentary evidence or summaries of statements of testimonial evidence at least five *business days* before the hearing.

New Rule - The IBTR is eliminating the requirement to file summaries of statements of testimonial evidence.

5. **Subpoenas:**

Current Rule - A party may request that the IBTR issue a subpoena or subpoena *duces tecum* by filing a request with the IBTR at least ten business days before the date on which the hearing commences or the deposition is scheduled. *See* 52 IAC 2-8-4(a).

New Rule - The IBTR is adding 52 IAC 2-8-4(c): "A party may not request that the board issue a subpoena *duces tecum* to be served upon a nonparty until at least fifteen (15) days after the date on which the party intending to serve such request or subpoena serves a copy of the proposed request or subpoena on all other parties."

6. **Delays:**

IBTR is clarifying that motions (including motions for summary judgment or partial summary judgment) may be considered a delay reasonably caused by the party filing the motion and extend the time during which the hearing must be held.

7. **Continuances:**

IBTR is adding a new 52 IAC 2-8-1(b) to provide: "A continuance or extension requested less than two (2) business days prior to the hearing may be granted only upon a showing of extraordinary circumstances."

8. **Briefs:**

Current Rule - A party must file an original and two copies of a brief. The party must file the brief at the IBTR's central office. *See* 52 IAC 2-8-6(c)

New Rule - The IBTR is eliminating the requirement that an "original and two copies" of the brief be filed.

9. **Joint Stipulations:**

Current Rule - The IBTR must approve all stipulations submitted by the parties concerning the value or status of property.

New Rule - "If the parties resolve a matter after an appeal has been filed with the board, the parties shall notify the board that an agreement has been reached."

10. Small Claims 52 IAC 3-1-5(d):

IBTR is modifying this rule to provide that the request for documents and witness names and addresses must be made not later than ten business days before the hearing.

All of the Board's changes can be viewed at http://1.usa.gov/xYAjMU.

Indiana Board of Tax Review modifies Form 131 property tax appeal petition

The following originally was posted on *www.taxhatchet.com* on August 16, 2012.

The Indiana Board of Tax Review this month has modified its Form 131 appeal petition - the petition used to appeal a property tax assessment determination by the local County Board (the Property Tax Assessment Board of Appeals or PTABOA). *See* http://www.in.gov/ibtr/2331.htm. According to the Indiana Board:
The significant revisions to page 1 of the Form 131 petition include:

- Making it clear that the petitioner must file a separate petition for each appeal year.
- Adding a reference to the burden language in Ind. Code § 6-1.1-15-17.2.
- Adding space for e-mail addresses.
- In addition, the Form 131 Checklist on page 3 has been updated.

Regarding the new 5% burden-shifting rule, the amended petition provides on the first page:

> ***BURDEN:*** *If the assessed value that is the subject of this appeal increased by more than 5% over the assessed value determined by the assessor (county or township) for the immediately preceding assessment date for the same property, then the assessor has the burden of proving that the assessment is correct in any appeal before the Indiana Board of Tax Review. See Ind. Code § 6-1.1-15-17.2. Do you believe the assessed value increased by more than 5% over the assessed value determined by the assessor for the immediately preceding year?*

INDIANA PROPERTY TAX APPEALS: AN OUTLINE FOR APPEALS FROM THE COUNTY TO THE SUPREME COURT

December 6, 2012

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TABLE OF CONTENTS

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I. TRIGGERS FOR A PROPERTY TAX APPEAL.

A. Assessing officials must issue a notice regarding the assessment or reassessment of real property.[1]

B. The Department of Local Government Finance ("DLGF") requires assessing officials to "[p]rovide notice to taxpayers of an assessment change that results from the application of annual [trending] adjustments." 50 IAC 27-1-3(4).[2]

C. Notice of Assessment. A taxpayer can appeal from a notice of assessment. *See* Ind. Code § 6-1.1-15-1(c).

1. A notice of assessment is typically issued using a Form 11 Notice of Assessment of Land and Structures.

2. A notice of assessment may also be issued using a Form 113 Notice of Assessment by Assessing Officer.

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[1] *See* Ind. Code § 6-1.1-4-22 (stating that an assessing official or county property tax assessment board of appeals "shall give notice to the taxpayer and the county assessor, by mail, of the amount of the assessment or reassessment" and that the notice "must include notice to the person of the opportunity to appeal the assessed valuation under IC 6-1.1-15-1"); Ind. Code § 6-1.1-9-1 (requiring assessing official or county board to give written notice of the assessment or increase in assessment of omitted or undervalued property; "The notice shall contain a general description of the property and a statement describing the taxpayer's right to a review with the county property tax assessment board of appeals under IC 6-1.1-15-1").

[2] *See also* 50 IAC 27-7-1(b) ("If any annual adjustment factor is applied, a notice of assessment, for example, Form 11, shall be sent to each affected taxpayer pursuant to IC 6-1.1-4-22".).

D. If an assessing official or county board fails to give proper notice as required by statute, the taxpayer's receipt of the tax bill serves as notice of the taxpayer's right to appeal. *See* Ind. Code § 6-1.1-15-13.

E. To appeal the assessment for an assessment date for which a notice of assessment is not given (e.g. where there is no change of assessment, so no notice of assessment is required), a taxpayer may file a notice of review with the assessor:

1. For real property taxes, on or before May 10 of the year for which the change of assessment is sought; or

2. Within 45 days after the date of the tax bill. *See* Ind. Code § 6-1.1-15-1(d).

a. A taxpayer may appeal from the tax bill "regardless of whether the assessing official changes the taxpayer's assessment." *See* Ind. Code § 6-1.1-15-1(d)(2).

b. If an assessment notice has been issued, *appeal from the notice* and don't wait to appeal from the tax bill.

II. Initiating the Local Appeal – Review by the County or Township Assessor and Hearing Before the Property Tax Assessment Board of Appeals ("PTABOA").[3]

A. Initiating the Appeal. A taxpayer initiates an appeal by filing a notice for review with the assessing official who issued the assessment notice (the county assessor for most jurisdictions). The notice for review must include the following information:

1. The name of the taxpayer.

2. The address and parcel or key number of the property.

3. The address and telephone number of the taxpayer.

See Exhibit 1 (Sample Notice for Review).

B. The Notice for Review. A few things to note:

1. No official form is required. You may use the form Form 130 (standard or short form). To accommodate assessing officials, consider including a Form 130 with your notice for review. The taxpayer does not have to provide additional information requested on the Form 130 (e.g. sales

[3] This outline uses the term "PTABOA" to refer to the county board. *See* Ind. Code § 6-1.1-15-0.5 (noting that in Ind. Code § 6-1.1-15, "county board" means the "property tax assessment board of appeals").

information, data regarding comparable properties). *See Exhibit 2 (standard petition).*

2. Effective July 1, 2008, assessing duties in most jurisdictions were transferred to the county assessors. In those jurisdictions, notices of assessment will be issued by county assessors and notices for review must be filed with the county assessors.

3. In jurisdictions with township assessors, the taxpayer must file the notice for review with the township assessor. Consider filing a copy of the notice for review with the county assessor.

4. Request a meeting with the assessor.

5. File a separate notice for review for each parcel.

6. Identify the correct assessment date at issue in the notice for review.

7. Attach the executed and notarized power of attorney.

8. Filing the Notice for Review.

   a. Preferably, file the notice for review *by hand* with the township and county assessors. *Always obtain a file-stamped copy of the notice for your records.*

   b. If you must file by mail, submit the notice for review by certified mail, return receipt requested. Include a self-addressed stamped envelope and send a cover letter requesting that the assessor return a file-stamped copy to you. *See* Ind. Code § 6-1.1-36-1.5 (providing rules regarding the filing of documents under Ind. Code §§ 6-1.1 and 6-1.5, including by United States mail and by express carrier).

C. Indiana Board of Tax Review ("IBTR") resolution facilitation. Effective July 1, 2010, the Indiana General Assembly has added Ind. Code § 6-1.5-3-4, which permits employees of the IBTR to assist local assessing officials and taxpayers to facilitate resolution of disputes.

1. Request by County Assessor for Facilitation. Upon request by a county assessor, an employee of the IBTR may assist taxpayers and local officials in their attempts to voluntarily resolve disputes in which:

   a. A taxpayer has filed a notice for review; and

   b. The PTABOA has not given written notice of its decision on the issues under review. *See* Ind. Code § 6-1.5-3-4(b).

2. No Involvement by IBTR employee on Appeal to the IBTR. If an IBTR employee attempts to facilitate resolution of a dispute, the employee may not act as an administrative law judge or participate in a decision relating to a petition to the IBTR to review the PTABOA's action regarding the dispute. *See* Ind. Code § 6-1.5-3-4(c).

3. Confidentiality. A facilitation conference attended by an IBTR employee is not required to be open to the public. Such a conference may be open to the public only if both the taxpayer and the township or county official from whose action the taxpayer sought review agree to open the conference to the public. *See* Ind. Code § 6-1.5-3-4(d).

4. Not an IBTR proceeding. A facilitation conference attended by an IBTR employee is not a proceeding of the IBTR, and the IBTR is not required to keep a record of the conference. *See* Ind. Code § 6-1.5-3-4(e).

5. Regulation. The IBTR has promulgated 52 IAC 2-11-1.5, governing the Voluntary Resolution process. The rule provides in part:

   a. The program requires an agreement to participate by both the county and the taxpayer. 52 IAC 2-11-1.5(b).

   b. The parties may request a facilitation session after the PTABOA's hearing, but the facilitation must be conducted before the PTABOA issues a decision. 52 IAC 2-11-1.5(d).

   c. Proceedings shall be considered settlement negotiations as governed by Ind. Evidence Rule 408. 52 IAC 2-11-1.5(f).

   d. The rule shall not be construed as requiring participation in a voluntary resolution program in order to settle a property tax matter. 52 IAC 2-11-1.5(j).

D. Meeting with the assessor. The preliminary informal meeting with the assessor provides an opportunity to work out disputed assessment issues. Ind. Code § 6-1.1-15-1(g) provides that a notice for review "initiates a review" and "constitutes a request by the taxpayer for a preliminary informal meeting with the [assessing] official."

1. Pursuant to Ind. Code § 6-1.1-15-1(h), the assessing official is required to immediately forward the notice for review to the PTABOA and to attempt to hold a preliminary informal meeting with the taxpayer to resolve as many issues as possible by:

   a. Discussing the specifics of the taxpayer's assessment or deduction;

   b. Reviewing the taxpayer's property record card;

c. Explaining to the taxpayer how the assessment or deduction was determined;

d. Providing to the taxpayer information about the statutes, rules, and guidelines that govern the determination of the assessment or deduction;

e. Noting and considering objections of the taxpayer;

f. Considering all errors alleged by the taxpayer; and

g. Otherwise educating the taxpayer about:

i. The taxpayer's assessment or deduction;

ii. The assessment or deduction process; and

iii. The assessment or deduction appeal process.

2. The assessor may not require the taxpayer to provide documentary evidence at the informal preliminary meeting. *See* Ind. Code § 6-1.1-15-1(m).

3. Not later than ten days after the informal preliminary meeting, the assessing official shall forward to the county auditor and the PTABOA the results of the conference on a Form 134, which must be completed and signed by the taxpayer and the official. The Form 134 indicates:

a. If the taxpayer and the official agree on the resolution of all assessment or deduction issues in the review, a statement of:

i. Those issues; and

ii. The assessed value of the tangible property or the amount of the deduction that results from the resolution of those issues in the manner agreed to by the taxpayer and the official. *See* Ind. Code § 6-1.1-15-1(i)(1).

b. If the taxpayer and the official do not agree on the resolution of all assessment or deduction issues in the review:

i. A statement of those issues; and

ii. The identification of:

(A) The issues on which the taxpayer and the official agree; and

(B) The issues on which the taxpayer and the official disagree. *See* Ind. Code § 6-1.1-15-1(i)(2).

c. Note that the statute does not require the parties to explain on the Form 134 *why* they may disagree on an issue. They need only identify *what* the issues are.

E. The PTABOA hearing.

1. If the PTABOA receives a Form 134 before its scheduled hearing stating that all assessment or deduction issues have been resolved:

a. The PTABOA shall cancel the hearing;

b. Notice of the agreed to value shall be given to the taxpayer, PTABOA, county assessor and county auditor; and

c. If the matter at issue is the assessment of tangible property, the PTABOA may reserve the right to change the assessment under Ind. Code § 6-1.1-13. *See* Ind. Code § 6-1.1-15-1(j).

2. If the taxpayer and the official do not resolve all outstanding issues or the PTABOA does not receive the Form 134 explaining the results of the preliminary informal meeting within 120 days after the notice for review is filed, the PTABOA shall conduct a hearing within 180 days of the filing of the notice for review. *See* Ind. Code § 6-1.1-15-1(k).

3. Parties to appeal. The taxpayer and the county or township assessor who made the disputed assessment (and with whom the notice for review was filed) are the parties to the proceeding before the PTABOA. *See* Ind. Code § 6-1.1-15-1(k).

4. Burden.

a. Where the assessment under appeal represents an increase of the property's assessed value by more than five percent (5%) over the value determined by the assessor for the immediately preceding assessment date, the assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal to the PTABOA, the Indiana Board of Tax Review or to the Indiana Tax Court. *See* Ind. Code § 6-1.1-15-17.[4]

[4] The IBTR has issued several rulings on the application of the 5% burden-shifting rule. Please refer to my overview of these rulings in "Indiana Real Property Tax Appeals: 2012 Update on Procedural, Jurisdictional, Burden-Shifting, & Exemption Issues."

b. If the assessor changes the underlying parcel characteristics, including age, grade, or condition, of a property from the previous year's assessment date, the assessor is required to document each change and the reason that each change was made. Ind. Code § 6-1.1-4-4.4. In any appeal of the assessment, the assessor has the burden of proving that each change was valid. *See id.*

5. Notice of the PTABOA hearing.

a. The PTABOA shall, by mail, give notice of the date, time and place fixed for the hearing to the taxpayer and the county or township official with whom the taxpayer filed the notice for review. *See* Ind. Code § 6-1.1-15-1(k).

b. The PTABOA shall give at least thirty days notice. *See id.*

6. Pre-hearing disclosures.

a. The PTABOA *may not* require a taxpayer to file documentary evidence or summaries of statements of testimonial evidence before the hearing. *See* Ind. Code § 6-1.1-15-1(m).

b. Taxpayers are not required to have an appraisal of the property in order to initiate or prosecute an appeal. *See* Ind. Code § 6-1.1-15-1(m). *See also* Ind. Code § 6-1.1-37-11 ("An appraisal may not be required by the [PTABOA] or the assessor in a proceeding before the [PTABOA] or in a preliminary informal meeting under IC 6-1.1-15-1(h)(2).")

7. Continuance. A taxpayer may request a continuance of the hearing by filing, at least twenty days before the hearing date, a request for continuance with the PTABOA and the county or township assessor. *See* Ind. Code § 6-1.1-15-1(k).

a. The request must be supported with evidence showing a just cause for the continuance.

b. The PTABOA shall, not later than ten days after the date the request for a continuance is filed, either:

i. Find that the taxpayer has demonstrated a just cause for a continuance and grant the taxpayer the continuance; or

ii. Deny the continuance.

8. PTABOA action without Taxpayer's presence. At least eight days before the hearing, a taxpayer may file a request with the PTABOA and county or township assessor that the PTABOA:

   a. Take action without the taxpayer being present; and

   b. Make a decision based on the evidence already submitted by filing. *See* Ind. Code § 6-1.1-15-1(k).

9. Withdrawal of appeal. At least eight days before the hearing date, a taxpayer may withdraw a petition by filing a notice of withdrawal with the PTABOA and the county or township assessor. *See* Ind. Code § 6-1.1-15-1(k).

10. Penalty for failing to appear at hearing. A $50 penalty shall be assessed against the taxpayer for failing to appear at the PTABOA hearing and:

   a. Taxpayer's request for continuance is denied; or

   b. Taxpayer's request for continuance, request for PTABOA to take action without the taxpayer being present, or a withdrawal is not timely filed.

   A taxpayer may appeal the assessment of the penalty to the IBTR or directly to the Tax Court. *See* Ind. Code § 6-1.1-15-1(l).

11. Presentation at the hearing. During the PTABOA hearing:

   a. The taxpayer may present the taxpayer's reasons for disagreement with the assessment; and

   b. The county or township official with whom the taxpayer filed the notice for review must present:

      i. The basis for the assessment decision; and

      ii. The reasons that the taxpayer's contentions should be denied. *See* Ind. Code § 6-1.1-15-1(l).

   c. Use of assessment records as evidence of comparable properties. A party may introduce evidence of assessment records in an appeal. *See* Ind. Code § 6-1.1-15-18(c).

      i. In an appeal of residential property, the party may introduce evidence of the assessments of comparable properties located in the same taxing district or within two (2) miles of

a boundary of the taxing district, *see* Ind. Code § 6-1.1-15-18(c)(1); and

ii. In an appeal of non-residential property, a party may introduce evidence of the assessments of any relevant, comparable property. But a preference "shall be given to comparable properties that are located in the same taxing district or within two (2) miles of a boundary of the taxing district." Ind. Code § 6-1.1-15-18(c)(2).

iii. "The determination of whether properties are comparable shall be made using generally accepted appraisal and assessment practices." Ind. Code § 6-1.1-15-18(c).

F. Notice of determination. The PTABOA shall issue a written determination. The PTABOA will issue its decision using a Form 115.

1. The PTABOA shall prepare a written decision resolving all of the issues under review. *See* Ind. Code § 6-1.1-15-1(n).

2. Notice of the PTABOA's decision must be issued no later than 120 days after the hearing to the taxpayer, the assessing official responsible for the disputed assessment, the county assessor and the county auditor. *See* Ind. Code § 6-1.1-15-1(n).

3. The PTABOA is required to notify the taxpayer in writing of:

a. The taxpayer's opportunity for review to the IBTR; and

b. The procedures that the taxpayer must follow in order to obtain review by the IBTR. *See* Ind. Code § 6-1.1-15-3(b).

G. Change in assessment.

1. From a *timely* filed appeal, a change in assessment carries over from year to year until the next assessment date for which the assessment is changed. *See* Ind. Code § 6-1.1-15-1(e).

2. An assessment change will be effective for the next assessment date when the taxpayer's appeal pursuant to Ind. Code § 6-1.1-15-1(d) (i.e. the May 10th appeal and the appeal from the tax bill) is *untimely* filed. *See* Ind. Code § 6-1.1-15-1(e).

H. Refusal to hold hearing. If the maximum time elapses for the PTABOA to hold a hearing or to issue notice of the PTABOA's determination, the taxpayer may initiate a proceeding for review before the Indiana Board of Tax Review under Ind. Code § 6-1.1-15-3 "at any time after the maximum time elapses." Ind. Code §

6-1.1-15-1(o). *See Weber v. St. Joseph County Assessor*, Pet. No. 71-001-06-1-5-02183, ¶ 2 n.1 (Ind. Bd. Tax Rw., Jan. 28, 2010) (explaining that once taxpayer filed his Form 131 appeal to the IBTR, the PTABOA lost jurisdiction to unilaterally change assessment for tax year under appeal), *Smith v. Allen County Assessor*, Pet. No. 02-075-11-1-5-00027, ¶ 9 n.3 (Ind. Bd. Tax Rw., Aug. 30, 2012) ("Assessor lacks the authority to unilaterally change a determination of the PTABOA.").

III. THE STATE ADMINISTRATIVE APPEAL – REVIEW BY THE INDIANA BOARD OF TAX REVIEW.

A. Party initiating the Appeal.

1. Appeal by Taxpayer. A taxpayer may appeal the PTABOA's assessment of the taxpayer's property if the PTABOA's action requires the giving of notice to the taxpayer. *See* Ind. Code § 6-1.1-15-3(a).

2. Appeal by County Assessor. A county assessor "who dissents from the determination of an assessment . . . by the county board may obtain a review of the assessment" by the IBTR. Ind. Code § 6-1.1-15-3(c).

3. The taxpayer and the county assessor will be the parties to an appeal. The county assessor is the party to the IBTR appeal to defend the PTABOA's determination. *See* Ind. Code § 6-1.1-15-3(b).

B. Time and place for filing an appeal to the IBTR. The Indiana Board of Tax Review has promulgated rules governing the filing and prosecution of appeals. *See* 52 IAC 1, 2 and 3.

1. A petition for review to the IBTR is filed using a Form 131 Petition.[5] The party's petition for review must be filed:

   a. With the IBTR, *see* Ind. Code § 6-1.1-15-3(d)(1);

   b. Not later than forty-five days "after the date of the notice given to the party or parties of the determination of the county board," *see* Ind. Code § 6-1.1-15-3(d). *See also* 52 IAC 2-4-2(e) ("There is a rebuttable presumption that the notice of determination is mailed on the date of the notice.").

[5] Appeals from final determinations of the Department of Local Government Finance are made using the Form 139 petition. The petition is filed at the IBTR's central office in Indianapolis. One copy of the petition is filed with the county assessor, one copy with the township assessor, and one copy with the DLGF. The DLGF will be a party to these appeals.

c. The party must "mail a copy of the petition to the other party," *see* Ind. Code § 6-1.1-15-3(d)(2).

2. Failure to timely file a petition for review with the IBTR will result in a dismissal of the appeal.[6] *See 115 Land Trust v. St. Joseph County Assessor* ¶¶ 18, 35 (Ind. Bd. Tax. Rw., March 15, 2011) (The IBTR dismissed 20 Form 131 petitions filed at least three days passed the statutory deadline, noting "If a taxpayer chooses to exercise his appeal rights, he must follow those procedures by filing an appropriate petition in a timely manner.").

C. Filing Fee. There is no fee for filing a petition to the IBTR.

D. The Form 131 Petition. **Note: This form was changed in August, 2012.**

1. Review the form carefully. The form's cover page (page 1) states:

a. The petition must be filed with the IBTR at its central office, 100 North Senate Avenue, Room N-1026, Indianapolis, Indiana 46204.

b. The form states in bold lettering: "**A copy of this petition must be served on the county assessor of the county where the property is located. If this petition is filed by the county assessor, a copy must be served on the taxpayer.**"

c. Petitioners must file a separate petition for each appeal year.

---

[6] 52 IAC 2-3-1 provides in part:

> (c) The postmark date on an appeal petition or petition for rehearing, correctly addressed and sent by United States (1) first class mail, (2) registered mail, or (3) certified mail, will constitute prima facie proof of the date of filing.
>
> (d) The date on which the document is deposited with a private carrier, as shown by a receipt issued by the carrier, will constitute prima facie proof of the date of filing if the document is sent to the board by the carrier.
>
> (e) The date-received stamp affixed by the board to an appeal petition or a petition for rehearing filed by personal delivery will constitute prima facie proof of the date of filing.

The filing of appeal petitions and petitions for rehearing must be made by: (a) personal delivery; (b) deposit in U.S. mail; (c) private courier; or (d) registered or certified mail, return receipt requested. *See* 52 IAC 2-4-1(a)(1)-(4). Appeal petitions and petitions for rehearing may not be filed by facsimile or electronic mail. *See* 52 IAC 2-4-1(b). *See also King v. Lake County Assessor*, Pet. No. 007-16-27-0454-0003, ¶ 2 n.1 (Ind. Bd. Tax Rw., Jan. 7, 2010) (where Form 115 notice was dated May 7 but envelope from assessor was dated June 4, concluding that taxpayers received notice of PTABOA's final determination on June 4).

d. Petitioners wishing to appeal more than one parcel must file a separate petition form for each parcel, unless the IBTR determines otherwise, and should attach a list of related parcels under appeal.[7]

e. Petitioners should attach:

i. A copy of the notice for review;

ii. A copy of the PTABOA's determination (Form 115); and

iii. A notarized power of attorney (this is not required if the taxpayer's representative is an attorney licensed to practice law in Indiana or is a duly authorized employee or corporate officer of the taxpayer; nevertheless, consider attaching the power of attorney). *See* 52 IAC 2-3-2.

f. Regarding the new 5% burden-shifting rule, the amended petition provides on the first page:

> ***BURDEN:*** *If the assessed value that is the subject of this appeal increased by more than 5% over the assessed value determined by the assessor (county or township) for the immediately preceding assessment date for the same property, then the assessor has the burden of proving that the assessment is correct in any appeal before the Indiana Board of Tax Review. See Ind. Code § 6-1.1-15-17.2. Do you believe the assessed value increased by more than 5% over the assessed value determined by the assessor for the immediately preceding year?*

g. In bold lettering, the IBTR notes: "**As a result of filing this petition, the assessment may increase, may decrease, or may remain the same.**"

h. Check the type of property under appeal (real or personal).

[7] The IBTR, on its own motion or upon motion of a party, may consolidate two or more petitions if: (a) the subject properties are located in the same township and are of the same classification; and (b) the common factual and legal issues in dispute predominate over the individual issues. *See* 52 IAC 2-6-7.

i. Identify whether the subject property is currently under appeal for another tax year (if yes, indicate the years and types of appeals for the subject property).

2. On Section II, page 2, check whether the taxpayer accepts or opts out of the small claims procedures.

   a. The small claims procedures will apply if elected by the taxpayer and the subject property is assessed at less than one million dollars ($1,000,000).

   b. The small claims rules are found at 52 IAC 3.

3. On Section III, page 2, the form requests the party to identify the current and proposed values for the subject property.

   a. If you are not sure what value you will request (e.g. you need to have an appraisal made), do not include a value and note that you do not have sufficient data yet to determine the requested value.

   b. Note on the petition that the value listed is not necessarily the final value claimed by the taxpayer.

4. Also in Section III, page 2, state the general grounds for your appeal. If more space is required, attach a separate page. The form specifically states in bold lettering, "**You are not required to submit any evidence with your petition. However, specific evidence, fully supporting the assessment that you believe to be correct, must be presented at the hearing.**"

5. On Section IV, page 3, sign the petition. The person signing on behalf of the taxpayer states that the statements in sections I and III of the Form 131 Petition are "accurate to the best of my knowledge and belief."

6. On Section V, page 3, affirm that a service copy has been provided (also consider attaching a separate certificate of service).

7. Page 3 includes a check list to assist in filling out the petition.

8. *See also*: http://www.in.gov/ibtr/2410.htm (last visited November 3, 2012) (IBTR web site, "Taxpayer's Guide to Filing a Petition to the IBTR").

E. Compliant Appeal Petitions. The IBTR's rules provide, "Appeal petitions must be submitted on the form prescribed by the board and in conformance with the instructions provided on the petition." 52 IAC 2-5-1(a).

1. If the appeal petition is not properly completed, the IBTR will issue a notice of defect, specifying the nature of the defect and will return the appeal petition to the petitioner. The petitioner must correct or cure the appeal petition within thirty days from the date the notice of defect is served. *See* 52 IAC 2-5-1(d).

2. Failure to bring the appeal petition into substantial compliance with the instructions in the defect notice may result in denial of the petition without hearing. *See* 52 IAC 2-5-1(e).

F. Notice of Appearance. File a notice of appearance at the time the Form 131 Petition is filed. 52 IAC 2-3-2 (providing that attorneys must file a notice of appearance "stating the party has authorized the [attorney] to appear on the party's behalf.").

1. Failure to file a notice of appearance could result in the IBTR's denial of the taxpayer's evidence and arguments at the administrative hearing. *See Watson v. Van Buren Twp. (Brown County)*, Pet. Nos. 07-003-02-1-5-00098 *et al.*, ¶ 6 n.3 (Ind. Bd. Tax Rev. Aug. 9, 2007) (where petitioners failed to appear at hearing or submit a notarized power of attorney authorizing "property manager" to represent them, concluding that that any arguments presented by "property manager" were "in essence, nullities" and noting that petitioners' failure to appear at the hearing subjected their appeals to dismissal).

2. Tax representatives, local government representatives and certified public accountants must file a power of attorney with the IBTR. *See* 52 IAC 2-3-2(a).

3. Counsel do not need powers of attorney but must "file a notice of appearance with the board, stating that the party has authorized the attorney to appear on the party's behalf." *See* 52 IAC 2-3-2(c).

G. *De novo* proceeding. The hearing before the IBTR is a *de novo* proceeding. *See Interactive Academy, Inc. v. Boone County Assessor*, Pet. Nos. 06-019-08-2-8-00001 to -4, ¶ 4 n.1 (Ind. Bd. Tax Rw., Oct. 5, 2009) ("Once a taxpayer has properly invoked the Board's jurisdiction, . . . its proceedings are *de novo*.") (citing Ind. Code § 6-1.1-15-4(m)).

H. Issues raised.

1. Limitation of issues. The IBTR may not limit the scope of the issues raised to those presented to the PTABOA unless all parties agree to the limitation of the issues. *See* 52 IAC 2-5-3. *See also* Ind. Code § 6-1.1-15-4(k), *Childcraft Indus. v. Jackson Twp. Assessor*, Pet. Nos. 31-011-05-1-4-00001-4, ¶ 25 (Ind. Bd. Tax Rw., Oct. 17, 2006) ("The Petitioner is not limited to evidence or issues raised before the PTABOA.").

2. Amendment of appeal issues.

a. The petition may be amended once as a matter of course within thirty days of the filing of the original appeal petition. *See* 52 IAC 2-5-2(b).

b. "A motion to amend a petition may be filed later than thirty (30) days following the date a petition is filed and such motion may be approved by the board upon good cause shown." *See* 52 IAC 2-5-2(c).

c. The IBTR will not approve an amendment filed within fifteen business days before the hearing without the consent of the other parties to the hearing. *See* 52 IAC 2-5-2(d).

I. Site Inspection. The IBTR may conduct a site inspection (but rarely does). The IBTR is required to give the parties notice of the date and time for the site inspection. *See* Ind. Code § 6-1.1-15-4(b).

J. Trial Rules. "The Indiana Rules of Trial Procedure may be applied to the extent that the trial rules do not conflict with the statutes governing property tax appeals or [52 IAC]." *See* 52 IAC 2-1-2.1.

K. Discovery. The IBTR's rules permit the use of discovery. *See* 52 IAC 2-8-3(a)(2) (providing that parties may "use the applicable discovery methods contained in the Indiana Rules of Trial Procedure.")

1. The parties are required to make "all reasonable efforts" to resolve discovery disputes before seeking a discovery order from the IBTR. *See* 52 IAC 2-8-3(b).

2. A party may not be precluded from supplementing the evidence and witness summaries required by 52 IAC 2-7-1(b)(1) or adding to the witness and exhibit lists required by 52 IAC 2-7-1(b)(2) because such items were not identified in discovery. *See* 52 IAC 2-8-3(e).

3. The IBTR's rules provide that no party shall serve on any other party more than twenty-five interrogatories or more than twenty-five requests for admission, including subparagraphs and subparts, without leave of the IBTR. *See* 52 IAC 2-8-3(f).

4. Upon motion of a party and for good cause shown, the IBTR may issue a protective order restricting discovery of a trade secret or other confidential information. *See* 52 IAC 2-8-3(g).

L. Pre-hearing Disclosures. The IBTR's rule 52 IAC 2-7-1(b) (as authorized by Ind. Code § 6-1.1-15-4) requires that a party to an appeal must provide to the other parties:

1. Copies of documentary 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.

3. If a new issue has been added by another party under 52 IAC 2-5-2(c), a party may supplement its list of witnesses and exhibits ten *business days* before the hearing in order to address the new issue. *See* 52 IAC 2-7-1(b)(2).

4. To determine compliance with these filing deadlines, the IBTR under 52 IAC 2-7-1(c) requires parties to:

   a. Provide personal or hand delivery of the submissions;

   b. Deposit the materials in the United States mail or with a private carrier *three days prior to the deadline* in accordance with the provisions of 52 IAC 2-3-1;

   c. If a party uses a private carrier that guarantees next day delivery, the materials must be sent *one day before* the specified deadline.

   d. 52 IAC 2-7-1(f) provides that failure to comply with the filing deadlines "may serve as grounds to exclude the evidence or testimony at issue." *See Meijer Stores LTD v. Wayne Twp. Assessor (Wayne County)*, Pet. No. 89-030-02-1-4-00417 , ¶ 18(A) *et seq.* (Ind. Bd. Tax Rw., Aug. 16, 2006) (excluding exhibits that were deposited in the U.S. mail one day after filing deadline). *But see Tate v. Delaware County Assessor*, Pet. No. 18-017-08-1-5-00002 (Feb. 10, 2012) (allowing documents that had not been timely exchanged into evidence that had been submitted at PTABOA or that were public records, where no prejudice to assessor shown).

5. Copies of all pre-hearing disclosure materials provided to other parties will become part of the administrative record only if admitted into evidence by the IBTR or administrative law judge ("ALJ"). *See* 52 IAC 2-7-1(e).

M. Notice of Hearing. The IBTR shall give notice of the date fixed for the hearing, by mail, to the taxpayer and to the county assessor. The notice shall be given at

least thirty days before the date fixed for the hearing, unless the parties agree to a shorter period. *See* Ind. Code § 6-1.1-15-4(b).

N. Subpoenas. A party may request that the IBTR issue a subpoena or subpoena duces tecum by filing a request with the IBTR at least ten business days before the date on which the hearing commences or the deposition is scheduled. *See* 52 IAC 2-8-4(a). But a "party may not request that the board issue a subpoena duces tecum to be served upon a nonparty until at least fifteen (15) days after the date on which the party intending to serve such request or subpoena serves a copy of the proposed request or subpoena on all other parties." 52 IAC 2-8-4(c).

O. Summary Judgment. A party may, before the hearing, move for summary judgment or partial summary judgment pursuant to the Indiana Rules of Trial Procedure. *See* 52 IAC 2-6-8.

P. Motions. A party may file motions with the IBTR or the designated ALJ. *See* 52 IAC 2-8-5.

1. Except for motions made during a hearing, all motions must be in writing, state the basis for the motion, set forth the relief or order sought, be properly captioned, be signed by the party or authorized representative, and include verification or proof of service to all parties. *See* 52 IAC 2-8-5(a)(1)-(6).

2. Failure to serve all parties may result in a denial of the motion. *See* 52 IAC 2-8-5(b).

3. Any response to a motion must be filed within thirty days after the date of service unless otherwise specified by the IBTR or ALJ. *See* 52 IAC 2-8-5(c).

Q. Pre-hearing Conference: The IBTR may order a pre-hearing conference. *See* 52 IAC 2-8-2.

1. A pre-hearing conference order may include a requirement for the parties to confer and submit an appeal management plan. *See* 52 IAC 2-8-2(a).

2. The IBTR may, through the pre-hearing conference or appeal management plan, *see* 52 IAC 2-8-2(b), require the parties to submit:

a. A list of two or more desired dates for the hearing;

b. A preliminary statement of all contentions and defenses;

c. A discovery and motion schedule;

d. A preliminary witness and exhibit list;

e. Possible stipulations;

f. Amendments to the appeal petition;

g. An outline or summary of the matter under appeal; or

h. Any other information that the board deems beneficial to the orderly review of an appeal petition.

R. The Hearing.

1. All hearings will be conducted by an ALJ, any member of the IBTR acting as an ALJ, or the IBTR sitting in its entirety. *See* 52 IAC 2-6-5(a).

2. Hearings before an ALJ shall be conducted in the IBTR's central office, the county in which the property subject to appeal is located, or in an adjacent county, unless the parties and designated ALJ agree to a different location. *See* 52 IAC 2-6-2(a).

3. All hearings conducted by a member of the IBTR or by the IBTR sitting in its entirety will be held in the IBTR's central office, unless otherwise agreed to by the IBTR. *See* 52 IAC 2-6-2(b).

4. All testimony at the hearing shall be under oath or affirmation. *See* 52 IAC 2-6-5(b).

5. Hearings will be recorded by the ALJ. *See* 52 IAC 2-6-5(c). The recording will serve as the basis of the official record of the proceeding unless the hearing is transcribed by a court reporter. *Id.* A party may hire a court reporter to transcribe the hearing but must provide an official copy of the transcript to the IBTR at no cost to the IBTR. *Id.*

S. Timing of the Hearing.

1. With respect to an appeal of a real property assessment that takes effect on the assessment date on which a general assessment of real property takes effect, the IBTR shall conduct a hearing not later than one year after a petition in proper form is filed with the IBTR (excluding any time due to a delay reasonably caused by the appealing party). *See* Ind. Code § 6-1.1-15-4(f).

2. For all other appeals, the IBTR shall conduct a hearing not later than nine months after a petition in proper form is filed with the IBTR (excluding any time due to a delay reasonably caused by the appealing party). *See* Ind. Code § 6-1.1-15-4(e).

3. Motions (including motions for summary judgment or partial summary judgment) may be considered a delay reasonably caused by the party filing the motion and extend the time during which the hearing must be held. *See* 52 IAC 2-6-8 and 2-8-5.

T. Continuance. Continuances under 52 IAC 2-8-1(a) may be granted only if:

1. The request is made before the hearing or other deadline;

2. Good cause is shown; and

3. The request is served on all parties.

4. "A continuance or extension requested less than two (2) business days prior to the hearing may be granted only upon a showing of extraordinary circumstances." 52 IAC 2-8-1(b). A continuance granted before a hearing automatically extends the time in which the hearing must be held. 52 IAC 2-8-1(c).

U. Failure to Appear. The Board will likely deny an appeal petition where an appealing party or the party's representative fails to appear at the administrative hearing. *See* 52 IAC 2-10-1(a) (providing that failure to appear at a hearing, after proper notice has been given, may constitute the basis for a default or dismissal of the appeal petition). *See also* 52 IAC 2-10-1(b) (providing that, within ten days after the order of default or dismissal is issued, the party against whom the order is entered may file a written objection requesting that the order be vacated and set aside), *Westerman, Trustee of Revocable Trust v. Steuben County Assessor*, Pet. No. 76-002-06-1-5-00035 & -36, ¶ 1 (Ind. Bd. Tax Rw., Aug. 28, 2009) (where trustee did not appear and person not authorized to practice before the Board appeared instead, the Board excluded all evidence offered on behalf of the trustee).

V. Evidence.

1. Taxpayers are not required to have an appraisal of the property in order to initiate or prosecute an appeal. *See* Ind. Code § 6-1.1-15-3(f). *But see Kooshtard Prop. VI, L.L.C. v. White River Twp. Assessor*, 836 N.E.2d 501, 506 n.6 (Ind. Tax Ct. 2005) (stating belief of Tax Court that "the most effective method to rebut the presumption that an assessment is correct is through the presentation of a market value-in-use appraisal, completed in conformance with the Uniform Standards of Professional Appraisal Practice (USPAP)").

2. A party may introduce evidence that is otherwise proper and admissible without regard to whether that evidence has previously been introduced at a hearing before the PTABOA. *See* 52 IAC 2-7-1(a). *See also* Ind. Code § 6-1.1-15-4(k).

3. Materials submitted to or made a part of the record at a PTABOA hearing, department hearing, or other proceeding from which the appeal arises will not be made part of the record of the IBTR proceeding unless submitted to the IBTR. *See* 52 IAC 2-7-1(g). Evidentiary materials proffered but not admitted into evidence will be so identified in the record. *See id.*

4. *See* http://www.in.gov/ibtr/2406.htm (last visited November 3, 2012) (IBTR web site, "Identification of Exhibits": "The parties are directed to have all exhibits labeled for identification prior to the hearing so that the proceedings will not be delayed or interrupted.")

5. The IBTR shall consider only the evidence, exhibits, and briefs submitted to it, other documents made part of the record, and matters of which the IBTR expressly takes official notice under 52 IAC 2-7-4. *See* 52 IAC 2-7-1(i).

6. Admissibility of Evidence.

   a. The ALJ shall regulate the course of the proceedings in conformity with any pre-hearing order and without recourse to the rules of evidence. *See* 52 IAC 2-7-2(a).

   b. A party may object to the admissibility of evidence during the hearing. *See* 52 IAC 2-7-2(b). The ALJ may defer a ruling on the admissibility of the evidence for the IBTR's decision. *See id.* If the ALJ defers a ruling, all proffered evidence will be entered for the record and its admissibility will be considered by the IBTR and addressed in the findings. *See id.*

   c. The IBTR will determine the relevance and weight to be assigned to the evidence. *See* 52 IAC 2-7-2(c).

   d. Evidence may be admitted over the objection of a party. *See* 52 IAC 2-7-2(c). If the evidence is *immaterial, irrelevant, or should be excluded or disregarded on other grounds*, it will not be assigned any weight in the IBTR's final determination. *See id.*

7. Hearsay Evidence.

   a. Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. *See* 52 IAC 2-7-3.

   b. If not objected to, the hearsay evidence may form the basis for a determination. *See id.*

   c. 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. *See id. See also Leffler v. Brown Twp. Assessor (Hendricks County)*, Pet. No. 32-001-04-1-5-00009, ¶ 24 (Ind. Bd. Tax Rw., Sept. 1, 2006) (assigning no weight to taxpayer's e-mail response regarding construction cost, because the response was "rank hearsay," "completely lacks any indicia of reliability," and was not corroborated by any independent evidence in the record), *Thiry v. Dearborn County Assessor*, Pet. No. 15-020-10-1-5-0001, ¶ 16, 20(c) (Ind. Bd. Tax Rw., May 17, 2012) (concluding that an appraisal was hearsay and standing alone could not support a reduction of property's value).

8. Official Notice. Pursuant to 52 IAC 2-7-5(a)(1)-(4), the IBTR may take official notice of:

   a. Any fact that could be judicially noticed in the courts.

   b. The record of other proceedings before the IBTR.

   c. Codes or standards that have been adopted by an agency of the United States or the State of Indiana.

   d. Publications, treatises, or other documents commonly considered to be reliable authorities on subjects addressed at the hearing.

   However, parties must be notified that an order is based in whole or in part on material noticed by the IBTR, of the specific facts or material noticed, and afforded an opportunity to contest and rebut the facts or material noticed. *See* 52 IAC 2-7-5(b).

9. Confidential Information. A party must, at the time it is submitted, clearly identify all confidential information provided to the IBTR. *See* 52 IAC 2-7-5(a).

   a. The party must specify the statutory basis under which the information is claimed to be confidential. *See id.*

   b. A redacted version (that will be available to the public) of a document containing both confidential and non-confidential evidence shall be provided to the IBTR by the party requesting confidential treatment. *See* 52 IAC 2-7-5(d). The redacted version of the document will be available to the public. *See id.*

W. Briefs. Parties may file, or the IBTR may request, briefs in support of a party's position on any issue relevant to the appeal. *See* 52 IAC 2-8-6.

1. Briefs shall be filed within the time limits set by the ALJ or IBTR. If a brief is not timely filed, the IBTR may exclude it from consideration. *See* 52 IAC 2-8-6(b).

2. A party must file the brief at the IBTR's central office. A copy of the brief shall be served on each party. *See* 52 IAC 2-8-6(c).

3. A brief shall not exceed thirty pages (excluding exhibits) without prior written permission of the ALJ or IBTR. *See* 52 IAC 2-8-6(d).

4. Briefs *amicus curiae* may be filed with leave of the IBTR, but must be filed in accordance with the briefing schedule established for the parties by the IBTR. *See* 52 IAC 2-8-6(f). The PTABOA that made the determination under review may file an *amicus curiae* brief. *See* Ind. Code § 6-1.1-15-4(b). Also, the executive of a taxing unit may file an *amicus curiae* brief if the property whose assessment is under appeal is subject to assessment by that taxing unit. *See id.*

X. Proposed Findings and Conclusions. A party may file proposed findings of fact and conclusions of law within the time period established by the ALJ or IBTR. *See* 52 IAC 2-8-7. A copy must be served on each party. *See id.*

Y. Post-hearing Evidence. The IBTR will not accept post-hearing evidence unless it is requested by the ALJ or the IBTR. *See* 52 IAC 2-8-8.

1. If the post-hearing evidence is not filed timely, the IBTR will make its final determination without considering the untimely submitted post-hearing evidence. *See* 52 IAC 2-8-8(b).

2. Post-hearing evidence must be served on all parties. *See* 52 IAC 2-8-8(c). If a party fails to serve the post-hearing evidence on all parties, the ALJ or IBTR will not consider the post-hearing evidence. *See Jenner v. Hanover Twp. Assessor (Jefferson County)*, Pet. No. 39-009-02-1-5-00093, ¶ 6 n.1 (Ind. Bd. Tax Rw., Feb. 10, 2005) (rejecting Respondent's post-hearing evidence that was not served on the Petitioner).

Z. Default or Dismissal. Under its rule, *see* 52 IAC 2-10-2, the IBTR may issue an order of default or dismissal as the result of:

1. Failure of the petitioner to state a claim on which relief can be granted;

2. Failure of a party to comply with a rule or order of the IBTR or ALJ;

3. Disruptive, vulgar, abusive, or obscene conduct or language by a party or authorized representative; or

4. Failure of a party to provide or exchange evidence in accordance with 52 IAC 2.

AA. Final Determination.[8]

1. The IBTR is not required to assess the subject property. *See* Ind. Code § 6-1.1-15-4(b). However, the IBTR may "correct any errors" that may have been made and adjust the assessment or exemption in accordance with the correction. *See* Ind. Code § 6-1.1-15-4(a).

2. Timing.

a. With respect to an appeal of a real property assessment that takes effect on the assessment date on which a general reassessment of real property takes effect, the IBTR shall make a determination not later than the later of one hundred 180 days after the hearing or the date set in an extension order issued by the IBTR. *See* Ind. Code § 6-1.1-15-4(h).

b. With respect to all other appeals, the IBTR shall make a determination not later than the later of ninety days after the hearing or the date set in an extension order issued by the IBTR. *See* Ind. Code § 6-1.1-15-4(g).

c. The IBTR may not extend the final determination date by more than one hundred 180 days. *See* Ind. Code § 6-1.1-15-4(i).

d. If the IBTR fails to make a final determination within the time allowed following the hearing, the entity that initiated the petition may:

i. Take no action and wait for the IBTR to make a final determination; or

ii. Petition for judicial review to the Indiana Tax Court pursuant to Ind. Code § 6-1.1-15-5. *See* Ind. Code § 6-1.1-15-4(i) (review before the Tax Court would be *de novo*, *see* Ind. Code § 6-1.1-15-5(g)).

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[8] A "final order" or "final determination" under 52 IAC 2-2-9 is any action of the IBTR that is:

(1) designated as final by the IBTR;

(2) the final step in the administrative process before resort may be made to the judiciary; or

(3) deemed final under IC 6-1.1-15-4 and IC 6-1.1-15-5.

3. Notice. After the hearing, *see* Ind. Code § 6-1.1-15-4(d), the IBTR shall give notice, by mail, of its final determination, as well as (for parties entitled to appeal the final determination) notice of the procedures that must be followed to appeal to the Tax Court, to:

    i. The taxpayer;

    ii. The county assessor; and

    iii. Any entity that filed an *amicus curiae* brief.

4. Regarding the IBTR's final determination, pursuant to Ind. Code § 6-1.5-5-4(j):[9]

    a. The final determination must include separately stated findings of fact for all aspects of the determination.

    b. Findings of ultimate fact must be accompanied by a concise statement of the underlying basic facts of record to support the findings.

    c. Findings must:

        i. Be exclusively based on the evidence on the record in the proceeding and matters officially noticed in the proceeding;

        ii. Based on a preponderance of the evidence. *See also* Ind. Code § 6-1.5-5-4(c).

BB. Settlements/Stipulations of Value. Under 52 IAC 2-9-4, the IBTR states:

1. "If the parties resolve a matter after an appeal has been filed with the board, the parties shall notify the board that an agreement has been reached." 52 IAC 2-9-4(a).

2. "This section is not intended to prevent a petitioner from withdrawing its appeal once an agreement is reached between the parties." 52 IAC 2-9-4(b).

3. This rule "shall not apply to the stipulation or settlement of matters remanded" from the Indiana Tax Court. 52 IAC 2-9-4(c).

[9] The IBTR's final determinations can be viewed at: http://www.in.gov/ibtr/2332.htm (last visited Oct. 5, 2012). Also, the IBTR has a site called "Guide to Appeals" at: http://www.in.gov/ibtr/2330.htm (last visited Oct. 5, 2012).

CC. Mediation and Alternative Dispute Resolution. Any appeal to the IBTR may, with the consent of the parties, be resolved by mediation or other alternative dispute resolution procedures. *See* 52 IAC 2-11-1.

DD. Arbitration. An appeal may, with the consent of the parties, be resolved by arbitration. *See* 52 IAC 2-11-2(a).

EE. Small Claims Appeals.

1. The small claims procedures apply to real and personal property with assessed values not in excess of one million dollars. *See* 52 IAC 3-1-2(a).

    a. Unless a party elects to transfer out, the small claims procedures will apply to these properties. *See* 52 IAC 3-1-2(a).

    b. A party not meeting the one million limit may elect to use the small claims procedures, *see* 52 IAC 3-1-2(d), by:

        i. Requesting the IBTR to apply the small claims procedures within thirty days of filing the party's petition; and

        ii. Obtaining consent to the election from the other parties.

        iii. A "party's failure to object to the election of the board's small claims procedures for property that does not meet the criteria of subsection (a) may be deemed by the board to be the party's consent to such an election." 52 IAC 3-1-2(d)(2).

2. By accepting the small claims procedure, the parties agree that the issues contained in the appeal petition are substantially the same as those presented to the PTABOA and that no new issues will be raised before the IBTR. *See* 52 IAC 3-1-2(b). *See Richard G. Robinson Irrevocable Family Trust v. Carroll County Assessor*, Pet. No. 08-011-10-1-5-00007, ¶ 14(g) (Ind. Bd. Tax Rw., August 6, 2012) (finding in a small claims case that, when raised neither at the PTABOA hearing nor in the Form 131 petition, "the issue of whether the home is incorrectly assessed as having a basement is not before the Board").

3. Small claims procedures shall be structured with the "sole objective of hearing the petition in an expeditious and just manner according to the rules of substantive law." 52 IAC 3-1-5(a)(1).

4. Small claims procedures are not bound by the rules of trial practice, procedure, or evidence except provisions relating to privileged communications and offers of settlement. 52 IAC 3-1-5(a)(2).

5. The relaxation of evidentiary rules is not a relaxation of the burden of proof. *See* 52 IAC 3-1-5.

6. Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. *See* 52 IAC 3-1-5(b).

    a. If not objected to, the hearsay evidence may form the basis for a determination. *See id.*

    b. 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. *See id.*

7. There is no pre-hearing discovery under the small claims procedures. 52 IAC 3-1-5(c).

    a. However, 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 *business days* before the day of a small claims hearing. 52 IAC 3-1-5(d). The request for documents and witness names and addresses must be made not later than ten *business days* before the hearing. *See id.*

    b. Failure to make the pre-hearing disclosures may serve as grounds to exclude evidence or testimony that was not timely provided. *See* 52 IAC 3-1-5(f).

8. Small Claims Hearing.

    a. The parties in small claims may elect to waive a hearing and have the board issue a final determination based solely on the written and documentary evidence submitted by the parties. *See* 52 IAC 3-1-6.

    b. A small claims proceeding shall be continued only upon a showing of extraordinary circumstances. *See* 52 IAC 3-1-7.

    c. Each party will be restricted in the amount of time the party will be allowed to present its case in a small claims proceeding to no more than twenty minutes. *See* 52 IAC 3-1-8(a).

        i. If a party cannot adequately present its case within the time restrictions, it is the party's duty to request in writing that the matter be removed from the small claims docket and

scheduled to be heard under 52 IAC 2. *See* 52 IAC 3-1-8(c).

ii. Petitions cannot be withdrawn from small claims once the hearing has commenced except under extraordinary circumstances. *See id.*

d. Small claims hearings shall be recorded. *See* 52 IAC 3-1-9.

e. *See* http://www.in.gov/ibtr/2408.htm (The IBTR's "Small Claims Hearing Instructions," last visited November 3, 2012)

FF. Request for Rehearing. Not later than fifteen days after the IBTR gives notice of its final determination or the maximum allowable time for the issuance of a final determination by the IBTR expires, a party may request a rehearing before the IBTR. *See* Ind. Code § 6-1.1-15-5(a).

1. The IBTR may conduct a rehearing and affirm or modify its final determination, giving the same notices after the rehearing as are required by Ind. Code § 6-1.1-15-4.

2. The IBTR has fifteen days after receiving a petition for a rehearing to determine whether to grant a rehearing.

3. Failure to grant a rehearing not later than fifteen days after receiving the petition shall be treated as a final determination to deny the petition.

4. A petition for a rehearing does not toll the time in which to file a petition for judicial review unless the petition for rehearing is granted.

5. If the IBTR determines to rehear a final determination, the IBTR:

a. May conduct the additional hearings that the IBTR determines necessary or review the written record without additional hearings; and

b. Shall issue a final determination not later than ninety days after notifying the parties that the IBTR will rehear the final determination.

GG. Appeal to Tax Court without IBTR Final Determination. Pursuant to Ind. Code § 6-1.1-15-5(a), if the IBTR fails to make a final determination within the time allowed, the entity that initiated the petition for rehearing may:

1. Take no action and wait for the IBTR to make a final determination; or

2. Petition for judicial review under Ind. Code § 6-1.1-15-5(g).

IV. JUDICIAL REVIEW BY THE INDIANA TAX COURT.

A. Exclusive Jurisdiction. The Indiana Tax Court, *see* Ind. Code § 33-26-3-1, has exclusive jurisdiction over any case[10] that arises under the tax laws of Indiana and that is an initial appeal of a final determination made by:

1. The Department of State Revenue with respect to a listed tax (as defined in Ind. Code § 6-8.1-1-1); or

2. The IBTR.

See State v. Sproles, 672 N.E.2d 1353, 1356 (Ind. 1996) (explaining that the Tax Court was created to "channel tax disputes to a specialized tribunal"). *Accord Marion County Auditor v. Revival Temple Apostolic Church*, 898 N.E.2d 437, 445 (Ind. Ct. App. 2008) (same); *Wayne Twp. v. Ind. Dept. of Local Gov't Fin.*, 865 N.E.2d 625, 628 (Ind. Ct. App. 2007) (same).

B. AOPA does not apply. Appeals to the Indiana Tax Court are not governed by the Administrative Orders and Procedures Act ("AOPA") under Ind. Code §§ 4-21.5-5 *et seq.*

C. Filing an Original Tax Appeal Petition. To petition for judicial review by the Tax Court of the final determination of the IBTR, a party must, *see* Ind. Code § 6-1.1-15-5(b):[11]

1. File a petition with the Indiana Tax Court;

2. Serve a copy of the petition on:

   a. The county assessor;

   b. The attorney general; and

   c. Any entity that filed an *amicus curiae* brief with the IBTR; and

3. File a written notice of appeal with the IBTR informing the IBTR of the party's intent to obtain judicial review.[12]

D. The Petition. The Tax Court rules govern what should be in the petition. An original tax appeal from a final determination of the IBTR is commenced by filing

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[10] The cases over which the Tax Court has exclusive original jurisdiction are referred to as "original tax appeals." *See* Ind. Code § 33-26-3-3. *See also* Tax Court Rule 2.

[11] If a taxpayer fails to comply with any statutory requirement for the initiation of an original tax appeal, the Tax Court does not have jurisdiction to hear the appeal. Ind. Code § 33-26-6-2(a). *See also Goldstein v. Ind. Dep't of Local Gov't Fin.*, 876 N.E.2d 391, 393 n.4 (Ind. Tax Ct. 2007) (same).

[12] *Compare* Ind. App. Rule 9(F) and Form. App. 9-1.

a petition in the Tax Court and filing a written notice of appeal with the IBTR. *See* Tax Court Rule 3(B). *See also Holsapple v. Monroe County Assessor*, 918 N.E.2d 783 (Ind. Tax Ct. 2010) (holding that Court lacked jurisdiction over the appeal where taxpayers failed to serve copies of their petition on the assessor and Attorney General and did not file a notice of intent to appeal with the IBTR until after filing period had elapsed). A sample verified petition is included with the Appendix of the Tax Court Rules.

E. Parties to the Appeal.

1. By statute, the county assessor is a party to the appeal before the Indiana Tax Court. *See* Ind. Code § 6-1.1-15-5(b).[13] Tax Court Rule 4(B)(1) provides that the Court "acquires jurisdiction over a party or person who under these rules commences or joins in the original tax appeal, is served with summons or enters an appearance, or who is subjected to the power of the Tax Court under any other law."

2. The "named respondent" in an original tax appeal "shall be the person or persons designated by statute as parties to the judicial review of final determinations of the Indiana Board of Tax Review." *See* Tax Court Rule 4(B)(2).

F. Service of Summons. For appeals from the IBTR, Tax Court Rule 4(B)(4) provides, "Service of summons shall be required only with respect to the named respondent and any other person whom the petitioner seeks to join as a party."

G. Request for and Transmission of the Record. Pursuant to Tax Rule 3(E), "In original tax appeals [from a final determination of the IBTR], the petitioner shall request the [IBTR] to prepare a certified copy of the agency record within thirty (30) days after filing the petition."

1. The request can be included as part of the original tax appeal petition or can be a separate document.

2. Because petitioners must now file a notice of appeal with the IBTR, the request can be made as part of the notice of appeal.

3. Tax Court Rule 3(E) requires that the petitioner "shall transmit a certified copy of the record to the Tax Court within thirty (30) days after having received notification from the [IBTR] that the record has been prepared."[14]

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[13] The county assessor may petition for review to the Tax Court in the same manner as the taxpayer. *See* Ind. Code § 6-1.1-15-5(e). However, if the county assessor initiates the appeal, the Attorney General may not represent the county assessor. *See* Ind. Code § 6-1.1-15-5(f).

[14] In *Bosamia v. Marion County Assessor*, 969 N.E.2d 635, 638-39 (Ind. Tax Ct., 2012), the Indiana Tax Court dismissed the taxpayers' petition due to their failure to timely file a copy of the administrative record with the

a. File a notice of filing the certified record of administrative proceeding. This is not required, but is recommended.

b. A copy of the certified record does not need to be served on the Attorney General (who represents the county assessor).

4. The IBTR has issued a non-rule policy document (#2007-01) regarding preparation of the agency record.

a. The IBTR shall charge the petitioner the reasonable cost of preparing the agency record.

b. An instrument (check, money order, etc.), made payable to the IBTR, in the amount of $50 will accompany any request for an agency record filed with the IBTR. This $50 is a non-refundable administrative fee and will be deducted from the final payment made when the agency record is delivered to the petitioner.

c. Upon completion of the agency record, the Petitioner will be notified as to when the agency record may be picked up and the total balance due for its preparation. The balance due must be paid to the IBTR before the agency record is released to the petitioner.

H. Timing. A party must petition for judicial review (and serve the appropriate copies and file the written notice of appeal) not later than:

1. Forty-five days after the IBTR gives the person notice of its final determination, unless a rehearing is conducted; or

2. Forty-five days after the IBTR gives the person notice of its final determination, if a rehearing is conducted under Ind. Code § 6-1.1-15-5(a) or the maximum time elapses for the IBTR to make a determination after rehearing is granted.

See Ind. Code § 6-1.1-15-5(c). The taxpayer may appeal to the Tax Court once the maximum time elapses for the IBTR to make a determination under Ind. Code §§ 6-1.1-15-4 or -5. *See* Ind. Code § 6-1.1-15-5(g).

I. Failure to hold Timely Hearing is not Notice. The failure of the IBTR to conduct a hearing within the period prescribed in Ind. Code § 6-1.1-15-4 does not constitute notice to the party of an IBTR final determination. *See* Ind. Code § 6-1.1-15-5(d).

Court. The IBTR's notice stating that the agency record had been prepared was sufficient to trigger the thirty-day filing period. *Id.* at 637. Where the failure to file was due to the taxpayers' "own inaction," the Court refused to employ its discretion to extend the filing deadline. *Id.* at 638.

J. Notice of Appearance. A party should file a notice of appearance at the time it files an original tax appeal. A sample Notice of Appearance is included in the Appendix of the Tax Court Rules.

K. Filing Fee. There is a $120 filing fee for initiating an appeal to the Tax Court. *See* Ind. Code § 33-26-9-1.

L. Written Election of County for Evidentiary Hearings.

1. At the time a taxpayer initiates an original tax appeal, the taxpayer must elect to have all evidentiary hearings held in one of the following counties, *see* Ind. Code § 33-26-3-4, Tax Court Rule 8(A):

   a. Allen County.

   b. Jefferson County.

   c. Lake County.

   d. Marion County.

   e. St. Joseph County.

   f. Vanderburgh County.

   g. Vigo County.

2. A taxpayer that is an appellee in an appeal to the Tax Court shall, within thirty days after it receives notice of the appeal, elect to have all evidentiary hearings in the appeal conducted in one of the above listed counties. *See* Ind. Code § 33-26-3-5 and Tax Court Rule 8(A).

M. Consolidation of Petitions. Petitions for judicial review may be consolidated at the request of the appellants if it can be done in the interest of justice. *See* Ind. Code § 6-1.1-15-5(b).

N. DLGF Intervention. The DLGF may intervene in an original tax appeal action if the interpretation of a rule of the DLGF is at issue in the action. *See* Ind. Code § 6-1.1-15-5(b).

O. No Jury. The Tax Court shall try each original tax appeal without the intervention of a jury. *See* Ind. Code § 33-26-6-1 and Tax Court Rule 8(B).

P. Decision based on the administrative record. Regarding appeals from the IBTR, *see* Ind. Code § 33-26-6-3(b), judicial review of disputed issues of fact must be confined to:

1. The record of the proceeding before the IBTR; and

2. Any additional evidence taken under Ind. Code § 33-26-6-5(b), which provides that the Tax Court may receive evidence in addition to that contained in the IBTR record only if the evidence relates to the validity of the determination at the time it was taken and is needed to decide disputed issues regarding:

   a. Improper constitution as a decision making body;

   b. Grounds for disqualification of those taking the agency action; or

   c. Unlawfulness of procedure or decision making process.

   Ind. Code § 33-26-6-5(b) applies only if the additional evidence could not, by due diligence, have been discovered and raised in the administrative proceeding giving rise to a proceeding for judicial review.

Q. No *de novo* review. The Tax Court may not try the case *de novo* or substitute its judgment for that of the IBTR. *See* Ind. Code § 33-26-6-3(b). However, the Tax Court will conduct a *de novo* review if the IBTR has failed to issue a timely final determination and the party elects to initiate a judicial proceeding. *See* Ind. Code §§ 6-1.1-15-4(i) and 15-5(g).

R. Limitation of Issues.

1. Judicial review is limited to only those issues raised before the IBTR, or otherwise described by the IBTR, in its final determination. *See* Ind. Code § 33-26-6-3(b).

2. A person may obtain judicial review of an issue that was not raised before the IBTR, *see* Ind. Code § 33-26-6-3(c), only to the extent that the:

   a. Issue concerns whether a person who was required to be notified of the commencement of a proceeding under this chapter was notified in substantial compliance with the applicable law; or

   b. Interests of justice would be served by judicial resolution of an issue arising from a change in controlling law occurring after the IBTR's action.

S. Injunction of Taxes. A taxpayer is permitted to request that the Court enjoin the collection of a tax pending an original tax appeal. *See* Tax Court Rule 3(F), Ind. Code § 33-26-6-2. For property tax appeals, this is not typically necessary because under Ind. Code § 6-1.1-15-10(a):

1. "If a petition for review to any board or a proceeding for judicial review in the tax court regarding an assessment or increase in assessment is pending, the taxes resulting from the assessment or increase in assessment are . . .

not due until after the petition for review, or the proceeding for judicial review, is finally adjudicated and the assessment or increase in assessment is finally determined."

2. However, the taxpayer shall pay taxes on the property when the property tax installments come due (unless there is an injunction) in an amount based on the immediately preceding year's assessment of real property.[15]

T. Burden before the Tax Court. The burden of demonstrating the invalidity of an action taken by the IBTR is on the party to the judicial review proceeding asserting the invalidity. *See* Ind. Code § 36-26-6-6(b).

U. Relief. The Tax Court shall grant relief under Ind. Code § 36-26-6-7 if the Tax Court determines that a person seeking judicial relief has been prejudiced by an action of the IBTR, *see* Ind. Code § 36-26-6-6(e), that is:

a. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

b. Contrary to constitutional right, power, privilege, or immunity;

c. In excess of statutory jurisdiction, authority, or limitations, or short of statutory jurisdiction, authority, or limitations;

d. Without observance of procedure required by law; or

e. Unsupported by substantial or reliable evidence.

V. Small Claims. The Tax Court has a small claims docket for processing appeals of final determinations of assessed value made by the IBTR that do not exceed $45,000. *See* Ind. Code § 33-26-5-1. Tax Court Rule 16 provides:

1. Except as otherwise provided in the Small Tax Case Rules, the Indiana Rules for Small Claims are also applicable to small tax claims. To the extent not inconsistent therewith, the Indiana Tax Court Rules will apply. *See* Tax Court Rule 16(A).

2. Pursuant to Tax Court Rule 16(B), the notice of claim to be used under Small Claims Rule 2 shall contain:

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[15] Under Ind. Code 6-1.1-15-10(b) (emphasis added):

> If the petition for review or the proceeding for judicial review is not finally determined by the last installment date for the taxes, the taxpayer, upon showing of cause by a taxing official or at the tax court's discretion, *may be required to post a bond or provide other security* in an amount not to exceed the taxes resulting from the contested assessment or increase in assessment.

a. The name of the Tax Court;

b. The name, address and telephone number of claimant;

c. A designation of the type of tax the claim involves;

d. A statement of the taxable period involved;

e. A brief statement of the nature of the claim;

f. A statement of the amount of tax at issue; and

g. Any additional information which may facilitate proper service or processing of the claim.

3. For the purpose of service, the notice of claim shall also be considered to be the summons. A copy of the notice of claim shall be served upon the Attorney General by registered or certified mail, return receipt requested. Tax Court Rule 16(C).

4. The Attorney General shall be deemed to have entered an appearance for and on behalf of the governmental defendant or defendants. *See* Tax Court Rule 16(D).

5. If a taxpayer prevails in a small claims action, the taxpayer is entitled to a refund of the filing fee. *See* Ind. Code § 33-26-9-5.

W. Remand of Issues to IBTR. The Tax Court is required to render its decisions in writing. *See* Ind. Code § 33-26-6-7(a). *See also* Ind. Code § 33-26-6-6(d) ("The tax court shall make findings of fact on each material issue on which the court's decision is based.") If a final determination by the IBTR regarding the assessment of property is vacated, set aside, or adjudged null and void under the decision of the Tax Court, the matter of the assessment or exemption of the property shall be remanded to the IBTR with instructions to the IBTR to refer the matter to the:

1. DLGF with respect to an appeal of a determination made by the DLGF; or

2. PTABOA with respect to an appeal of a determination made by the county board

to make another assessment determination. *See* Ind. Code § 6-1.1-15-8(a). The Tax Court's order shall specify the issues on remand on which the IBTR is to act. *See* Ind. Code § 33-26-6-7(c). Upon remand, the IBTR may take action only on those issues specified in the decision of the tax court. *See* Ind. Code § 6-1.1-15-8(a).

X. The Tax Court's procedures.

1. Once a response to the petition for review is filed, the Tax Court generally will schedule a case management conference with the parties.

2. At the case management conference, the parties provide the Court with an overview of the disputed issues and discuss a briefing schedule.

3. Because appeals of IBTR issues almost always are considered based on the evidence presented and the record established before the IBTR, it is not necessary to set discovery completion deadlines or a trial date. (If a *de novo* appeal is filed after the time for the IBTR to issue a final determination as elapsed, then such dates will be discussed.) The Court will set a briefing schedule allowing a petitioner's brief, a response brief and a reply brief.

4. There are no page limits regarding briefs filed in Tax Court. However, as the Court has stated (after receiving briefs of 40, 42 and 74 pages), "litigants are reminded to be as concise and succinct as possible." *Caterpillar Fin. Servs. Corp. v. Ind. Dep't of State Rev.*, 849 N.E.2d 1235, 1239 n.8 (Ind. Tax Ct. 2005).

Y. Rehearing.

1. Any party adversely affected by a final judgment may file a petition for rehearing with the Tax Court (not a motion to correct error). *See* App. Rule 63(B). A Rehearing is governed by App. Rule 54. *See id.*

2. A petition for rehearing need not be filed in order to seek review of a final judgment of the Tax Court. *See id.*

3. When rehearing is requested, a ruling or order by the Tax Court granting or denying the petition shall be deemed a final decision from which review by the Supreme Court can be sought. *See id.*

V. DISCRETIONARY REVIEW BY THE INDIANA SUPREME COURT.

A. Any party adversely affected by a final judgment (as defined by App. Rule 2(H)[16]) of the Tax Court shall have the right to petition the Supreme Court for review of the final judgment.

B. A two-step process. Review by the Supreme Court is discretionary. Seeking review involves (1) filing a notice of intent to petition for review (before the preparation of the Tax Court record) and (2) the actual petition for review.

C. Notice of Intent to Petition for Review. Pursuant to App. Rule 63(C), a party initiates a petition for review by filing a notice of intent to petition for review with the Clerk of the Supreme Court, Court of Appeals and Tax Court in accordance with the requirements of App. Rule 9 (except with respect to the filing fee) no later than:

1. Thirty days after the final judgment if a petition for rehearing was not sought, *see below*; or

2. Thirty days after final disposition of the petition for rehearing if rehearing was sought and such petition was timely filed by any party.

3. App. Rule 25(C), which provides a three-day extension for service by mail or third-party commercial carrier, *does not extend the due date* for filing a notice of intent to petition for review. No extension of time shall be granted to file the notice of intent.

D. Clerk's Record. The Clerk shall give notice of filing of the notice of intent to petition for review to the court reporter and shall assemble the Clerk's record in accordance with App. Rule 10. *See* App. Rule 63(D). The court reporter shall

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[16] Appellate Rule 2(H) provides:

> A judgment is a final judgment if:
>
> (1) it disposes of all claims as to all parties;
>
> (2) the trial court in writing expressly determines under Trial Rule 54(B) or Trial Rule 56(C) that there is no just reason for delay and in writing expressly directs the entry of judgment (i) under Trial Rule 54(B) as to fewer than all the claims or parties, or (ii) under Trial Rule 56(C) as to fewer than all the issues, claims or parties;
>
> (3) it is deemed final under Trial Rule 60(C);
>
> (4) it is a ruling on either a mandatory or permissive Motion to Correct Error which was timely filed under Trial Rule 59 or Criminal Rule 16; or
>
> (5) it is otherwise deemed final by law.

prepare and file the transcript in accordance with Ind. App. Rule 11. *See id.* Reference to the "trial court clerk" in App. Rules 10, 11, and 12 shall mean the Clerk of the Supreme Court, Court of Appeals and Tax Court. *See id.*

E. Petition for Review. The petitioning party shall file its petition for review no later than thirty days after:

1. The date the Clerk issues its notice of completion of the Clerk's record if the notice reports that the transcript is complete or that no transcript has been requested; or

2. In all other cases, the date the Clerk issues its notice of completion of the transcript. *See* App. Rule 63(E):

F. Response brief. A response brief may be filed no later than thirty days after the petition for review is served. *See* App. Rule 63(F).

G. Reply brief. The petitioning party may file a reply brief no later than fifteen days after a brief in response is served. *See* App. Rule 63(G).

H. Format. App. Rules 43, 44 and 46 govern the format and contents of petitions and briefs before the Supreme Court. *See* App. Rule 63(I).

I. Interlocutory appeal. Any party adversely affected by an interlocutory order of the Tax Court may petition the Supreme Court for review of the order pursuant to App. Rule 14(B). *See* App. Rule 63(H). No appellant's case summary or notice of intent to petition for review shall be filed after the Supreme Court accepts a petition for interlocutory appeal. *See id.*

J. Effect of Court's denial of review. The denial of a petition for review shall have no legal effect other than to terminate the litigation between the parties in the Supreme Court. *See* App. Rule 63(N). No petition for rehearing may be filed from an order denying a petition for review. *See id.*

K. Filing fee. Upon the filing of a petition for review, the petitioner shall pay a fee of $125.00. *See* App. Rule 63(P).

VI. THE FORM 133 PETITION.

A. *For objective errors*,[17] a taxpayer may file with the county auditor a Form 133 Petition for Correction of an Error to correct the following types of errors:

1. The taxes, as a matter of law, were illegal.[18]

2. There was a mathematical error in computing an assessment.

3. Through an error of omission by any state or county officer, the taxpayer was not given:

a. The proper credit under Ind. Code § 6-1.1-20.6-7.5 for property taxes imposed for an assessment date after January 15, 2011;

b. Any other credit permitted by law;

c. An exemption permitted by law; or

d. A deduction permitted by law.

See Ind. Code § 6-1.1-15-12.[19]

B. No notice of assessment or tax bill is required to trigger a taxpayer's right to file a Form 133 Petition.

C. The DLGF's Petition for Correction of an Error Fact Sheet states, "Claims may be made for up to three years of assessments with the submission of the Form 133. Taxpayers requesting refunds must also file a Claim for Refund form (Form 17T)."[20]

D. A correction of error requires signatures of approval from two of the following three officials:

1. County assessor.

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[17] *See Walker Mfg. Co. v. DLGF*, 772 N.E.2d 1, 5 (Ind. Tax Ct. 2002) ("A taxpayer may file a 133 Petition when it discovers an error that can be corrected without resort to subjective judgment and according to objective standards.") (internal quotations and punctuation omitted).

[18] *See Throgmartin Henke Development, LLP v. Hamilton County Assessor*, Pet. Nos. 29-015-08-3-5-00010 and -11, Page 15, ¶ 42 (Jan. 24, 2012) ("To determine something 'as a matter of law' simply means to apply the law to undisputed, material facts.").

[19] A Form 133 cannot be used to correct an error made by a taxpayer on the taxpayer's personal property tax return. *See* Ind. Code § 6-1.1-15-12(g).

[20] *See* Ind. Code § 6-1.1-26-1 (providing that a refund claim must be filed within three years after the taxes were first due).

2. County auditor.

3. Township assessor, if any.[21]

E. If two officials do not approve, the county auditor shall refer the matter to the PTABOA. *See* Ind. Code § 6-1.1-15-12(d).

F. The PTABOA is not required to permit the taxpayer to present its case at an administrative hearing. *See id.* (providing that PTABOA shall provide a copy of its determination to the taxpayer). *See* Form 133, Sec. V (explanation of determination).

G. A taxpayer may appeal a determination of the PTABOA to the IBTR. *See* Ind. Code § 6-1.1-15-12(e).

1. The appeal shall be conducted "in the same manner as appeals under" Ind. Code §§ 6-1.1-15-4 through -8. *See id.*

2. The appeal, according to Section VI of the Form 133, must be filed with the county auditor within forty-five days of the mailing of the notice denying the petition.

3. Consider filing a copy directly with the IBTR as well.

VII. MANDATORY CORRECTIONS BY TOWNSHIP ASSESSOR.

A. Ind. Code § 6-1.1-15-12.5(a) provides that if a township assessor determines that the assessor has made an error concerning (1) the assessed valuation of property, (2) the name of the taxpayer, or (3) the description of property, the assessor "shall on the township assessor's own initiative correct the error."

B. The township assessor "may not increase an assessment" under Ind. Code § 6-1.1-15-12.5(a).

C. The township assessor shall correct the error "without requiring the taxpayer to file a notice with the [PTABOA] requesting a review of the township assessor's original assessment."

D. If the township corrects an error under Ind. Code § 6-1.1-15-12.5, the assessor shall give notice of the correction to the taxpayer, the county auditor and the PTABOA. Ind. Code § 6-1.1-15-12.5(b).

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[21] In jurisdictions where the county assessor assumes the assessment duties of township assessors, taxpayers must obtain signatures from the county assessor and county auditor.

E. If the assessment results in a reduction of the assessment, the taxpayer is entitled to a credit on the taxpayer's next installment equal to the amount of any overpayment of tax that resulted from the incorrect assessment. Ind. Code § 6-1.1-15-12.5(c).

F. If the overpayment exceeds the taxpayer's next installment, the taxpayer is entitled to (1) a credit in the full amount of the next installment and (2) credits on succeeding tax installments until the taxpayer has received total credits equal to the amount of the overpayment. Ind. Code § 6-1.1-15-12.5(d).

VIII. PROPERTY TAX EXEMPTIONS – APPLICATIONS AND APPEALS.

A. Form 136. Taxpayers request property tax exemptions using the Form 136 application.

B. Filing Deadline. Form 136 must be filed on or by May 15 of year for which exemption is sought.[22]

C. Frequency of Filing.

1. Exemptions must be filed annually. *See* Ind. Code § 6-1.1-11-3(a).

2. Not-for-profit corporations file in even numbered years, unless:

a. The corporation did not file for an exemption in a prior year.

b. There has been a material change in the physical status or use of the property as of March 1 of the odd numbered year;

c. An application for a prior year is pending or remains under appeal as of May 15 of the odd numbered year. *See* Ind. Code § 6-1.1-11-3.5(a), (c).

d. If you have acquired personal property since March 1st of the prior year, consider filing a new application, even if it's an odd numbered year. Counties treat exemptions for personal property inconsistently.

3. Applications are not required per Ind. Code § 6-1.1-11-4(d) if:

a. The exempt property is:

[22] Note that the application says the Form 136 must be filed "before May 15." However, the governing statute provides that the application is to be filed "on or before May 15." *See* Ind. Code § 6-1.1-11-3(a).

i. Tangible property used for religious purposes described in Ind. Code § 6-1.1-10-21 (property used for religious worship, parsonage);

ii. Tangible property owned by a church or religious society used for educational purposes described in Ind. Code § 6-1.1-10-16;

iii. Other tangible property owned, occupied, and used by a person for educational, literary, scientific, religious, or charitable purposes described in Ind. Code § 6-1.1-10-16; or

iv. Other tangible property owned by a fraternity or sorority, as defined in Ind. Code § 6-1.1-10-24.

b. The exemption application was filed properly at least once for a religious use under Ind. Code § 6-1.1-10-21, for an educational, literary, scientific, religious, or charitable use under Ind. Code § 6-1.1-10-16, or for use by a fraternity or sorority under Ind. Code § 6-1.1-10-24; and

c. The property continues to meet the requirements for an exemption under Ind. Code § 6-1.1-10-16, Ind. Code § 6-1.1-10-21, or Ind. Code § 6-1.1-10-24.

D. Change of Ownership. Change in ownership of an exempt property does not terminate an exemption under Ind. Code § 6-1.1-11-4, if after the change the property continues to meet the requirements for an exemption under:

1. Ind. Code § 6-1.1-10-16 (property used for charitable, educational, religious, scientific, and literary purposes);

2. Ind. Code § 6-1.1-10-21 (property used for religious worship, parsonage); or

3. Ind. Code § 6-1.1-10-24 (property used by fraternities or sororities).

The buyer or owner of exempt property must file a Form 136-CO/U (Notice of Change of Ownership or Use of Exempt Property).

E. PTABOA Determination.

1. The PTABOA shall approve or disapprove the exemption application. *See* Ind. Code § 6-1.1-11-7.

2. The PTABOA notifies a taxpayer of its action with a Form 120 Notice. (Some counties do not issue a notice when a 100% exemption is approved.)

F. Appeal to IBTR. Taxpayer may appeal the PTABOA's determination to the IBTR using Form 132. There appears to be an ambiguity as to the filing deadline – thirty (30) days v. forty-five (45) days.

1. Thirty-day filing deadline. Ind. Code § 6-1.1-11-7(c) provides that an appeal should be filed within thirty days of the PTABOA's notice.

2. Forty-five day filing deadline.

a. Ind. Code § 6-1.1-11-7(c) also provides that a taxpayer may petition the IBTR in the manner provided by Ind. Code § 6-1.1-15-3, which provides that an appeal must be filed within forty-five days of the PTABOA's notice.

b. The IBTR's Form 132 (last revised in 2009), citing Ind. Code § 6-1.1-15-3(d), states that the petition "must be filed not later than 45 days after" the PTABOA's notice.

3. To be safe, file with the IBTR *within thirty days* of the PTABOA's notice.

4. IBTR exemption appeals are conducted in the same manner as assessment appeals.

G. Appeals to the Tax Court or Indiana Supreme Court are the same as for valuation appeals.

IX. Where to Find the Forms, Statutes, and Rules.

A. DLGF forms. The DLGF's website at http://www.in.gov/dlgf/8516.htm (last visited November 3, 2012) includes the following:

1. Form 11 (assessment notice).

2. Form 113 (assessment notice).

3. Form 115 (notice of PTABOA final determination).

4. Form 120 (notice of PTABOA action on property tax exemption application).

5. Form 130 (standard and short, initiates local appeal).

6. Form 133 (petition for correction of an error).

7. Form 134 (joint assessor/taxpayer report to PTABOA).

8. Form 136 (property tax exemption application).

9. Form 136-CO/U (Notice of Change of Ownership or Use of Exempt Property)

10. Power of Attorney.

B. IBTR forms. The IBTR's website at http://www.in.gov/ibtr/2331.htm (last visited November 3, 2012) includes the following:

1. Form 131 (initiates IBTR assessment appeal).

2. Form 132 (initiates IBTR exemption appeal).

3. Form 139 (initials IBTR appeal of DLGF final determination).

4. Sample Exhibit Coversheet.

5. Sample Notice of Appearance for Attorneys.

C. Statutes. Property tax assessment and appeal statutes (Ind. Code § 6-1.1) may be viewed at: http://www.in.gov/legislative/ic/code/title6/ar1.1/ (last visited November 3, 2012).

D. Regulations. The IBTR's regulations may be view at: http://www.in.gov/legislative/iac/iac_title?iact=52 (last visited November 3, 2012).

E. Court Rules. The Indiana Tax Court Rules and Rules of Appellate Practice may be viewed at: http://www.in.gov/judiciary/rules/ (last visited November 3, 2012).

EXHIBIT NO. 1

SAMPLE NOTICE FOR REVIEW

[Date]

VIA HAND DELIVERY

[Name of County Assessor]
_____ County Assessor
[Address of Assessor]

Re: Request for Preliminary Conference/Notice for Review – March 1, [Assessment Year at Issue]
Tax Parcel: [Parcel No. of Subject Property]

Dear [Name of County Assessor]:

This letter serves as a notice for review for the taxpayer and property identified below. Enclosed herein in duplicate is a Form 130 Appeal Petition for the above-captioned property. Pursuant to Indiana law, Ind. Code § 6-1.1-15-1, we request a meeting to discuss the March 1, [Assessment Year at Issue] assessment for the following property:

Taxpayer: [Taxpayer Name]
Parcel No.: [Parcel No. of Subject Property]
Address: [Address of Subject Property]
Telephone No.: [Taxpayer's Telephone Number]

Please contact:

Brent A. Auberry
BAKER & DANIELS LLP
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204
(317) 237.1076
(317) 237.1000 (fax)
brent.auberry@bakerd.com

to schedule the meeting on behalf of the taxpayer and the subject property. Please note that this appeal is being filed within 45 days of issuance of [identify the assessment notice or tax bill].

Sincerely yours,

Brent A. Auberry

BAA:jal

Enclosures

PETITION FOR REVIEW OF ASSESSMENT BY LOCAL ASSESSING OFFICIAL - PROPERTY TAX ASSESSMENT BOARD OF APPEALS

State Form 21513 (R10 / 7-12)
Prescribed by the Department of Local Government Finance

FORM 130
Assessment year under appeal
MARCH 1, 20____

GENERAL INSTRUCTIONS:

1. *Please print or type. See page four for a chart illustrating the procedure for appeal of assessment.*
2. *The petitioner should complete Section I, Section II, and Section III of this form.*
3. *The petition must be signed by the petitioner or an authorized representative. A representative must attach a notarized power of attorney unless the representative is a duly authorized employee of corporate officer of the taxpayer.*
   Is a power of attorney attached? ☐ *Yes* ☐ *No*
4. *Certified tax representatives must attach a Tax Representative Disclosure statement. 50 IAC 15-5-5*

As a result of filing this petition, the assessment may increase, may decrease, or may stay the same.

Check type of property under appeal *(check only one)*: ☐ Real ☐ Personal

SECTION I: PROPERTY & PETITIONER INFORMATION		
County	Township	Parcel or key number *(for real property only)*
Address of property being appealed *(number and street, city state, and ZIP code)*		
Legal description on Form 11 or Property Record card *(for real property)*, or business name *(for personal property)*		
Name of property owner		Telephone number of property owner ( )
Mailing address of property owner *(number and street, city state, and ZIP code)*		
Name of authorized representative *(if different from owner)*		Telephone number of authorized representative ( )
Mailing address of authorized representative *(number and street, city state, and ZIP code)*		

SECTION II: REASON FOR APPEAL			
	Land	**Improvements**	**Personal Property**
The property described in Section I is currently assessed at:			
The petitioner contends that the property should be assessed at:			
Present use for the property			
Use for which property was designed			
Classification of property *(commercial, residential, etc.)*			
Was property sold in the last three years? ☐ Yes ☐ No	If yes, date of sale *(month, day, year)*	Sale price	
If the property was sold in the last three years, attach the purchase agreement, escrow statement, closing statement, or other evidence, if available. If buyer and seller were or are related or had any common business interests, attach an explanation of the relationship.			
If the property was not sold but was listed for sale in the past three years, attach a copy of the listing agreement or other available evidence.			
Do you intend to present the testimony or report of a professional assessor / appraiser? ☐ Yes ☐ No	Is the property valued higher than comparable properties? ☐ Yes ☐ No		
If yes, attach the owner's name and address of each comparable property and explain how the property is comparable to the property being appealed.			
The requested change in assessed value is justified for the following reasons: *(Give specific reasons. Do not give conclusions such as the assessment is too high.)*			

EXHIBIT
tabbies
2

SECTION III: SIGNATURES

Petitioner, taxpayer, or duly authorized employee or corporate officer of the taxpayer

I certify that my entries in Section I and Section II are accurate to the best of my knowledge and belief. I also understand that by appealing my assessment, my assessment may increase, may decrease, or may remain the same.

Signature of petitioner, taxpayer, or duly authorized officer	Date of signature (*month, day, year*)

Printed or typed name of petitioner, taxpayer, or duly authorized officer

Tax representative

I certify that the entries in Section I and Section II are accurate to the best of my knowledge and belief. I certify that I have viewed this property, the property record card, and Form 11 or Form 113, and that I have the authority to file this appeal on behalf of the taxpayer. I certify that I have made all necessary disclosures to my client, pursuant to 50 IAC 15-5.5.

Signature of tax representative	Date of signature (*month, day, year*)

Printed or typed name of tax representative

Attorney representative

I certify that my entries in Section I and Section II are accurate to the best of my knowledge and belief.

Signature of attorney representative	Date of signature (*month, day, year*)

Printed or typed name of attorney representative

CHECKLIST

- ☐ I have reviewed Form 11 RA, Form 11 CI, or Form 113.
- ☐ I have reviewed the property record card.
- ☐ If I am appealing both real and personal property assessments, I have filed separate petitions for each property.
- ☐ I have checked the type of property under appeal (real or personal) at the top of page one.
- ☐ I have completed Section I, Section II, and Section III of this petition.
- ☐ I have given specific reasons for the requested change in value in Section II of this petition.
- ☐ If this petition is being filed by an authorized tax representative, a duly executed power of attorney and a Tax Representative Disclosure statement is attached.
- ☐ I have signed this petition.
- ☐ I understand that I must submit the original and one copy of this form to the assessing official.
- ☐ If there are other related parcels currently under appeal, a listing of these parcels is attached.

FOR ASSESSING OFFICIAL USE ONLY		
1. Date notice was sent to taxpayer (*month, day, year*)	2. Date petition for review was filed by petitioner (*month, day, year*)	3. Petition for review timely filed? ☐ Yes ☐ No
Signature of assessor		Date of signature (*month, day, year*)
If the answer to number 3 above is "No", the assessor shall notify the petitioner that the petition was not timely filed.		

THE FOLLOWING SECTION IS FOR THE ASSESSOR / PETITIONER CONFERENCE

SECTION IV: RESULTS OF ASSESSOR / PETITIONER CONFERENCE

Before the county board holds the hearing required under IC 6-1.1-15.1 subsection (g), the taxpayer may request a meeting by filing a written request with the country or township official with whom the taxpayer filed the notice of review to:

(1) attempt to resolve as many issues under review as possible; and

(2) seek a joint recommendation for settlement of some or all of the issues under review.

A county or township official who receives a meeting request under this subsection before the county board hearing shall meet with the taxpayer. The taxpayer and the county or township official shall present a joint recommendation reached under this subsection to the county board at the hearing required under IC 6-1.1-15-1 subsection (g). The county board may adopt or reject the recommendation in whole or in part.

	Land	Improvements	Personal Property
The petitioner contends that the property should be assessed at:			
The assessing official contends that the property should be assessed at:			

If no agreement can be reached, explain the reasons for disagreement. If a change in assessed value is being made, explain the reason for the change.

SIGNATURES

The values listed above and the explanation given accurately reflect my opinion regarding this property.

Signature of assessing official	Date of signature (*month, day, year*)
Printed or typed name of assessing official	
Signature of taxpayer or authorized representative	Date of conference (*month, day, year*)
Printed or typed name of taxpayer or authorized representative	

PROCEDURE FOR APPEAL OF ASSESSMENT

Part of State Form 21513 (R10 / 7-12)

Taxpayer has right to appeal assessment.
a) Form 11 Notice (must file appeal within 45 days)
b) Form 113 Notice (must file appeal within 45 days)
c) Tax Bill (notice required but not issued, must file appeal within 45 days)
d) May 10 Filing (notice not required)

IC 6-1.1-15-1(a)-(d)

Taxpayer files a property tax appeal with assessing official.
With the assessing official, the taxpayer files an appeal containing the taxpayer's name, address and parcel/key number of the property, and taxpayer's address and telephone number.
(Form 130 may be used but is not required.)

IC 6-1.1-15-1(f)

Filing of the appeal:
1) initiates a review; and
2) constitutes a request by the taxpayer for a preliminary informal meeting with the assessing official.

IC 6-1.1-15-1(g)

Assessing official must forward appeal to PTABOA and attempt to hold the preliminary informal meeting with the taxpayer to resolve as many issues as possible. Not later than 10 days after the meeting, the assessing official must forward results of the preliminary meeting to Auditor and PTABOA[1] using Form 134.

IC 6-1.1-15-1(h)-(i)

If PTABOA receives Form 134 that indicates an agreement was reached before the PTABOA hearing:
- PTABOA cancels hearing,
- assessing official gives notice of the agreed to assessment to PTABOA, Auditor and Assessor *(if not same as assessing official)*; and
- PTABOA may change assessment.

IC 6-1.1-15-1(j)

If no agreement is reached or PTABOA does not receive Form 134 within 120 days of appeal, PTABOA must hold hearing within 180 days of filing of appeal. PTABOA must give taxpayer and official at least 30 days notice of the hearing date.*

IC 6-1.1-15-1(k)

During the PTABOA hearing, taxpayer may present his/her evidence for disagreement. The assessing official must present the basis for the assessment decision and refute the taxpayer's evidence. No appraisal is required by taxpayer.[3]

IC 6-1.1-15-1(l)-(m)

If the PTABOA refuses to hold a timely hearing within 180 days of filing of appeal or give notice of decision within 120 days after hearing, taxpayer may appeal to IBTR[2].

IC 6-1.1-15-1(o)

Taxpayer initiates an appeal with IBTR
Taxpayer may appeal PTABOA's action to IBTR with respect to (1) assessment of taxpayer's real or personal property, (2) exemption of taxpayer's real or personal property or (3) property tax deductions. The taxpayer must file the Form 131 with the IBTR within 45 days when PTABOA's order is given to parties and must mail a copy of the petition to the other party, i.e. the assessing official. No appraisal is required by taxpayer.[3]

IC 6-1.1-15-3(a), (d), (f)
IC 6-1.5-4-1

IBTR holds hearing within 9 months after appeal petition is filed (unless general reassessment year). IBTR must issue decision within 90 days after hearing (unless extension ordered or general reassessment year). Party may request a rehearing within 15 days of IBTR final determination. May appeal to Tax Court.

IC 6-1.1-15-4(e)-(h)
IC 6-1.1-15-5(a)

Taxpayer initiates appeal with Tax Court
A taxpayer must file a petition with the Indiana Tax Court within 45 days of IBTR final determination or at any time after the maximum time elapses for the IBTR to make a final determination. May appeal Tax Court determination to Supreme Court.

IC 6-1.1-15-5(b), (c), (g)

Taxpayer initiates appeal with Indiana Supreme Court
Review by the Supreme Court is discretionary.

IC 33-26-6-7(d)

1. PTABOA =
County Property Tax Assessment Board of Appeals

- Each county must have PTABOA comprised of individuals "knowledgeable in the valuation of property."

- The County Commissioners may determine whether to have a 3 or 5 member PTABOA. The County Assessor is a non-voting member of the PTABOA regardless of the number of members.

- Three-Member PTABOA:
  - The fiscal body appoints 1 individual who must be a certified Level II or III assessor-appraiser.
  - The Board of Commissioners appoints 2 freehold members so that not more than 2 of the members may be of the same political party and so that at least 2 are residents of the county. At least 1 of the Board's appointees must be a certified Level II or III assessor-appraiser. The Board, however, may waive that requirement.

- Five-Member PTABOA:
  - The Board of Commissioners appoints 3 freehold members and the county fiscal body appoints 2 members.
  - At least 1 of the members appointed by the county fiscal body must be a certified Level II or III assessor-appraiser.
  - The Board of the county shall appoint 3 freehold members so that not more than 3 of the 5 members may be of the same political party and so that at least 3 of the 5 members are residents of the county. At least 1 of the members appointed by the Board must be a certified Level II or III assessor-appraiser. The Board, however, may waive the requirements that one of their appointments be a Level II or III assessor-appraiser.

IC 6-1.1-28-1

- Taxpayer may request continuance at least 20 days before hearing. PTABOA must rule on continuance within 10 days of the request. Taxpayer may request action without his presence or withdraw a petition at least 8 days before the hearing. A penalty of $50 will be assessed against the taxpayer or representative for an unexcused failure to appear at the hearing.

2. IBTR = Indiana Board of Tax Review
- IBTR is a state agency with 3 commissioners appointed by the Governor.
- 2 members of IBTR must be members of one major political party, and 1 member must be a member of the other major political party.
- IBTR may appoint administrative law judges to conduct appeal hearing.

IC 6-1.5-2-1, IC 6-1.5-3-3

3. For a proceeding pending or commenced after June 30, 2012, to accurately determine market-value-in-use, a taxpayer or official may (in a proceeding concerning residential property) introduce evidence of the assessment of comparable properties in the same taxing district or within 2 miles of the taxing district, but (in a proceeding regarding non-residential property) taxpayer may indtroduce evidence of any comparable property but preference is given to comparable property in taxing district or within 2 miles of taxing district.

Assessor Burden of Proof: If the assessment for which a notice of review is filed increased the assessed value of the property by more than five percent (5%) over the assessed value finally determined 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.

IC 6-1.1-15-1(p)

Department of Local Government Finance
June 1, 2012

A Guide to Property Tax Appeals in Indiana

December 6, 2012

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I. TRIGGERS FOR A PROPERTY TAX APPEAL.

A. Form 11 Notice (must file appeal within 45 days).
B. Form 113 Notice (must file appeal within 45 days).
C. Tax bill (may file appeal within 45 days of date of tax bill, regardless of whether the assessment is changed). If an assessment notice is issued, *appeal from the notice*. Don't wait to appeal from the tax bill.
D. May 10th filing (notice not required).

II. INITIATING THE PROPERTY TAX APPEAL.

A. Initiating the Appeal.
   1. File a notice for review with the assessor.
   2. The notice *must contain*:
      a. Taxpayer's name.
      b. Address and parcel/key number of the property.
      c. Taxpayer's address and telephone number.
B. Filing the notice for review:
   1. Consider attaching a Form 130 (standard or short). Taxpayer does not have to provide the additional information requested on the Form 130 (e.g. sales information, comparable properties data).
   2. Some counties (e.g. Marion) have their own forms. You may use these, but the only required information is that listed in A(2) (taxpayer's name, parcel number, and address / telephone number).
   3. In most jurisdictions, file the original with the county assessor. Where township assessors have been retained, file the original with the township assessor and a copy with the county assessor.
   4. Request a meeting with the assessor.
   5. File a separate notice for each parcel.
   6. Attach a power of attorney.
   7. Identify the correct assessment date.
   8. File the notice:
      a. Preferably, by hand. Get a file-stamped copy.
      b. If by mail, use certified mail, return receipt requested. Include a self-addressed stamped envelope and send a cover letter requesting that the assessor return a file-stamped copy to you. *See* Ind. Code § 6-1.1-36-1.5.

III. THE LOCAL APPEAL – REVIEW BY THE COUNTY OR TOWNSHIP ASSESSOR AND PTABOA HEARING.

A. The assessing official must attempt to hold a preliminary informal meeting with the taxpayer. The official must forward the results of the meeting to the PTABOA using the Form 134.
B. IBTR resolution facilitation, *see* Ind. Code § 6-1.5-3-4.
   1. A county assessor can request that an employee of the IBTR facilitate resolution of a dispute where:
      a. A taxpayer has filed a notice for review; and
      b. The PTABOA has not given written notice of its decision on the issues under review.
   2. The IBTR employee may not participate in appeals of the PTABOA's decision regarding the dispute.
   3. The facilitation conference is confidential and is open to the public only with the parties' consent.
   4. The conference is not an IBTR proceeding, and the IBTR is not required to keep a record of the conference.
C. Evidence.
   1. Taxpayer is not required to have an appraisal of the subject property to initiate or prosecute an appeal.
   2. The assessing official may not require the taxpayer to provide documentary evidence at the preliminary informal meeting.
   3. The PTABOA may not require the taxpayer to file documentary evidence or summaries of testimony before the hearing.
D. The PTABOA hearing.
   1. If the taxpayer and assessing official agree to all disputed issues, no hearing is conducted. The PTABOA reserves the right to change the assessment under Ind. Code § 6-1.1-13.
   2. PTABOA shall, by mail, give at least 30 days notice of the date, time, and place fixed for the hearing.
      a. Continuance. Taxpayer may request a continuance by filing, at least 20 days before the hearing date, a request with the PTABOA and the county or township assessor with evidence supporting a "just cause for the continuance." The PTABOA has 10 days to grant or deny the request.
      b. Decision without Taxpayer's presence. Taxpayer may request that the PTABOA take action without taxpayer's presence at the hearing and based on the evidence already submitted. Taxpayer must file the request with the PTABOA and county or township assessor at least 8 days before the hearing.
      c. Withdrawal. Taxpayer may withdraw a petition by filing, at least 8 days before the hearing date, a notice of withdrawal with the PTABOA and the county or township assessor.

d. $50 penalty. A $50 penalty is assessed against the taxpayer if the Taxpayer or its representative fails to appear at the hearing and the Taxpayer's request for continuance is denied or the Taxpayer's request for continuance, request for the board to take action without the Taxpayer being present, or withdrawal is not timely filed. (A Taxpayer may appeal the assessment of the penalty to the IBTR or directly to the Tax Court.)

3. If issues remain unresolved or the PTABOA is not given the results of the preliminary informal meeting within 120 days of filing of the notice for review, the PTABOA shall conduct a hearing within 180 days of filing of the notice for review.
4. During the PTABOA hearing:
   a. Taxpayer may present the taxpayer's reasons for disagreement; and
   b. Assessor must present:
      i. The basis for the assessment decision; and
      ii. The reasons that the Taxpayer's contentions should be denied.

E. Burden.
1. Where the assessment under appeal represents an increase of the property's assessed value by more than five percent (5%) over the value determined by the assessor for the immediately preceding assessment date, the assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal to the PTABOA, the Indiana Board of Tax Review or to the Indiana Tax Court. *See* Ind. Code § 6-1.1-15-17.2.
2. If the assessor changes a property's underlying parcel characteristics (e.g. property's age, grade, or condition), the assessor has the burden of proving that each change is valid. *See* Ind. Code § 6-1.1-4-4.4.

F. Determination.
1. PTABOA must issue a decision within 120 days of the hearing.
2. PTABOA shall issue a written determination and notify Taxpayer of its appeal rights and procedures.

G. If the PTABOA refuses to hold a timely hearing or to issue a timely determination, Taxpayer may initiate an appeal with the IBTR.

IV. The State Appeal – Review by the Indiana Board of Tax Review.

A. The county assessor is the party to an appeal.
B. Filing the Form 131 Petition.
1. File with IBTR within 45 days of PTABOA's notice.
2. Taxpayer must mail a copy of the petition to the county assessor.
3. File a notice of appearance.

C. File pre-hearing disclosures, *see* 52 IAC 2-7-1(b).
D. Taxpayers are not required to have an appraisal of the property in order to initiate or prosecute an appeal.
E. Hearing notice. The IBTR shall give notice of its hearing date, by mail, at least 30 days before the hearing, unless the parties agree to a shorter period.
F. Timing of hearing.
1. Appeals regarding a general reassessment date, within 1 year after the petition is filed, with a decision issued 180 days after hearing (IBTR may extend up to 180 additional days).
2. For all other appeals, within 9 months after a petition is filed, with a decision issued 90 days after hearing (IBTR may extend up to 180 additional days).
3. If the IBTR fails to make a final determination within the time allowed, taxpayer may:
   a. Take no action and wait for the IBTR to make a final determination; or
   b. Petition for judicial review to the Indiana Tax Court.

G. Party may request a rehearing within 15 days of final determination.
1. Petition for rehearing does not toll the time to file in Tax Court, unless rehearing is granted.
2. Final determination to be issued not later than 90 days after granting rehearing.

V. Judicial Review by the Indiana Tax Court.

A. Taxpayer must:
1. File a petition with the Indiana Tax Court within 45 days of IBTR final determination or at any time after the maximum time elapses for the IBTR to make a final determination.
2. Serve a copy of the petition on:
   a. The county assessor;
   b. The attorney general; and
   c. Any entity that filed an *amicus curiae* brief with the IBTR.
3. File a written notice of appeal with the IBTR.

B. Service of summons required for "named respondent" and "any other person whom the petitioner seeks to join as a party." *See* Tax Court Rule 4(B)(4).
C. Taxpayer must request a copy of the administrative record within 30 days of filing petition. File copy of the record with the Tax Court within 30 days after having received notice that the record has been prepared.
D. File a notice of appearance.
E. File a written election regarding the county where hearings will be held. *See* Tax Court rule 8(A).
F. Pay $120 Filing Fee.
G. All original tax appeals are tried to the Court without a jury.

VI. Discretionary Review by the Indiana Supreme Court.

A. Review by the Supreme Court is discretionary. A party requests review by (1) filing a notice of intent to petition for review within 30 days of the Tax Court's final judgment or final disposition of a petition for rehearing and (2) filing a petition for review within 30 days of notice of completion of the Clerk's record or transcript. *See* Ind. App. Rule 63.
B. Pay $125 filing fee.
C. Any party adversely affected by an interlocutory order may petition the Supreme Court for review of the order.