Fiscal Policy Matters: The 2012 Indy Bar State & Local Tax Update

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1 Please visit Brent's state and local tax blog: www.taxhatchet.com (not a firm site). And follow him on Twitter: @TaxHatchet (not a firm account).

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EXHIBITS

1. Department of Local Government Finance: Assessment Appeals Flow Chart
2. Indiana Board of Tax Review: 2012 Proposed Rule Changes
3. Indiana Fiscal Policy Institute: To Collect Sales Tax or Not: Indiana’s Ecommerce Conundrum—Determining the State’s Lost Sales Tax Revenue and Weighing the Amazon Tax Policy (November 2011)
Administrative burdens justified disparate treatment of taxpayers arising from forgiveness of Barrett Law assessments for some homeowners without refunding payments to similarly situated homeowners.

This summary was prepared by our colleagues Jon Laramore and Christina Clark and posted on the Faegre Baker Daniels' website on June 4, 2012 at http://www.faegrebd.com/18488.

On June 4, 2012, the United States Supreme Court decided Armour v. City of Indianapolis, No. 11-161, affirming the Indiana Supreme Court's decision and holding that when a municipality switches from one method of infrastructure financing to another, the municipality's decision to forgive certain financial obligations arising under the prior financing method may be justified for equal protection purposes by administrative concerns even when the forgiveness creates disparate consequences.

Since 1889, Indianapolis financed sewer improvements using Indiana's "Barrett Law," which equally divided costs among all affected homeowners and allowed the homeowners to pay either in lump sum or in installments over a period of years, with the installments collected as taxes. In 2005, Indianapolis implemented a new method for sewer financing in which each homeowner was charged a flat fee and the remainder of costs was financed by bonds paid by all taxpayers. In connection with this change, the city chose to forgive all outstanding Barrett Law installment payments. Certain homeowners who had paid their Barrett Law assessments in a lump sum sought refunds of a portion of their lump sum payments, contending that the city's decision to keep their full payments while forgiving outstanding installment payments violated the Equal Protection Clause.

The Indiana trial court granted summary judgment in favor of the plaintiff homeowners, finding an equal protection violation, and the state intermediate appellate court affirmed. The Indiana Supreme Court reversed, ruling in the city's favor and holding that the disparate treatment did not violate the Constitution because it was rationally related to legitimate governmental purposes.

The U.S. Supreme Court affirmed, finding a rational basis for the city's decision and stating "[o]rdinarily, administrative considerations can justify a tax-related distinction." The Court noted that the city's decision had to be supported only by a rational basis because it involved no fundamental right or suspect classification. It then concluded that the administrative burdens that would have been placed on the city justified the disparate treatment that arose from forgiving outstanding Barrett Law assessments. Those administrative burdens included the need to maintain parallel administrative systems (including expensive computer systems) to monitor both the new and old financing systems, billing and collecting outstanding Barrett Law payments, and calculating and administering refunds to lump-sum payers (which would require appropriating funds for the payments). The Court declined to address other reasons the Indiana Supreme Court found in support of the City's decision, ruling that administrative convenience was a sufficient rational basis. It also did not entertain the lump-sum payers' arguments about alternative forgiveness systems, ruling that the City's system needed only to be rational, not ideal. The Court's opinion also addressed Allegheny Pittsburgh Coal Co. v. Commission of Webster County,
488 U.S. 336 (1989), which rejected a property tax assessment system that produced grossly disparate assessments of similar properties, ruling that Allegheny Pittsburgh was distinguishable in light of the clearly stated statutory goal of assessment equality and lack of any other rational basis for the assessment disparities in that case.

Faegre Baker Daniels LLP filed an amicus brief supporting affirmance on behalf of the International City/County Management Association, National Association of Counties, National Conference of State Legislatures, National League of Cities, and United States Conference of Mayors.

Justice Breyer delivered the opinion of the Court, in which Justices Kennedy, Thomas, Ginsburg, Sotomayor, and Kagan joined. Chief Justice Roberts filed a dissent, which was joined by Justices Scalia and Alito.

INDIANA COURT DECISIONS RELATING TO TAXES

Gross Premium Privilege Tax

1. Taxpayers not "doing business" in Indiana for purposes of premiums tax

   Indiana Supreme Court holds that captive reinsurers failed to prove that they were "doing business" in Indiana and thus "subject to" premiums tax

Ordinarily, when a court rules in a tax appeal that the taxpayer was not doing business in the state, the taxpayer celebrates a hard-fought victory. But "ordinary" was not on the docket today with the Indiana Supreme Court's ruling in Indiana Department of Revenue v. United Parcel Service, Inc., Cause No. 49S10-1107-TA-417 (June 21, 2012). See http://1.usa.gov/PDvC8k.

In Indiana and many other states, insurance companies are required to pay tax on earned premiums in lieu of state corporate income tax. Slip op. at 2. In Indiana, "there shall be no tax on the adjusted gross income of… [i]nsurance companies subject to tax under Ind. Code § 27-1-18-2 [the "gross premium privilege tax" or "premiums tax"][.]" Ind. Code § 6-3-2-2.8(4). The premiums tax applies to all foreign insurance companies doing business in Indiana, and is calculated by taking all premiums received on policies covering risks within the state, less (among other items) income received for reinsurance of risks within the state. Ind. Code § 27-1-18-2(a).

UPS established insurance subsidiaries to insure its risks, but such corporate structures have federal tax disadvantages. Slip op. at 4. To avoid those disadvantages, UPS contracted with unrelated primary insurers, which in turn entered into reinsurance agreements with UPS’s affiliates. Id. This had the effect of avoiding the federal tax disadvantages while still allowing UPS to essentially self-insure. Id.

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2 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 July 3, 2012).
consolidated corporate income tax return, UPS excluded the income of the affiliates, reasoning that the affiliates were "subject to" the premiums tax. *Id.* Because the premiums that the affiliates received were entirely for reinsurance, UPS argued that the premiums tax resulted in no taxable premiums. Slip op. at 6. UPS argued that its subsidiaries were "subject to" the premiums tax, but were never required to pay it. *Id.* The Indiana Tax Court, ruling on UPS's motion for summary judgment in an unpublished decision (see [http://1.usa.gov/L9tbpL](http://1.usa.gov/L9tbpL)) determined that UPS had properly excluded the affiliates' income, because the affiliates were "subject to" the premiums tax. Slip op. at 7. The Tax Court held that "to be 'subject to' the premiums tax … does not mean that one must 'pay' the premiums tax; rather, it simply means that one is 'placed under the authority, dominion, control, or influence' of the premiums tax." *Id.* (citing *United Parcel Service v. Indiana Dept. of Revenue*, Cause No. 49T10-0704-TA-24 (December 29, 2010)).

The Supreme Court, rather than focusing on the phrase "subject to" as the Tax Court and the parties had done, focused on language that requires insurance companies to be "doing business within Indiana" to be "subject to" the premiums tax. The mere fact that the affiliates collected premiums for reinsurance of risks in Indiana does not *ipso facto* establish they were "doing business within" Indiana.

Citing an Indiana Court of Appeals case from 1917, the Court found that reinsurance transactions occurring outside of Indiana, even if they involved primary risks located in Indiana, do not amount to business done in the state. Slip op. at 8-10 (citing *State ex rel. Crittenberger v. Continental Insurance Co. of New York*, 116 N.E. 929 (Ind. Ct. App. 1917)). Because the affiliated reinsurers were located in Bermuda and the Virgin Islands, and the primary insurers were located in Boston and New York, the transactions occurred entirely outside of Indiana. *Id.* at 10-11. Nothing before the Court established that the affiliates were "doing business within" Indiana; therefore, because that was a necessary condition to being "subject to" the premiums tax, the Court reversed the Tax Court. *Id.* at 11.

"Big Brown" may be feeling down. But the case is not over. It was simply remanded for "further proceedings" (which presumably are not scheduled for "next day" delivery). This decision was issued in the context of UPS's refund claim for and protest of adjusted gross income tax for 2000 and 2001. Whether the final decision also goes beyond the "ordinary" is a question that will be answered another day.

**Adjusted Gross Income Tax**

1. **Decision on combined returns remanded to Tax Court.** *Indiana Department of State Revenue v. Rent-A-Center East, Inc.*, Cause No. 49S10-1112-TA-683, Indiana Supreme Court, March 9, 2012. Rent-A-Center had prevailed before the Tax Court on its argument that the Department could not require a combined return because it had not shown that it had considered using alternative methods (other than a combined return) to fairly reflect Rent-A-Center's Indiana income. The Tax Court granted summary
judgment to Rent-A-Center on the basis that the Department had not designated any facts to show its compliance with I.C. § 6-3-2-2(p), which states as follows:

   Notwithstanding subsections (l) and (m), the department may not require that income, deductions, and credits attributable to a taxpayer and another entity not described in subsections (o)(1) or (o)(2) be reported in a combined income tax return for a taxable year, unless the department is unable to fairly reflect the taxpayer's adjusted gross income for the taxable year through use of other powers granted to the department by subsections (l) and (m).

The Indiana Supreme Court reversed and remanded the Tax Court's decision, finding that the notice of proposed assessment issued by the Department was prima facie evidence the Department had complied with (p). The Indiana Supreme Court did not address the merits of either party's motion, but remanded the case back to the Tax Court to consider the motions for summary judgment on their merits in light of all the designated evidence the parties may tender.

2. Here we go again: Indiana Supreme Court considering apportionment of "sales factor". Miller Brewing Company v. Indiana Department of State Revenue, Cause No. 49S10-1203-TA-00136, Indiana Supreme Court. The Indiana Supreme Court has granted review of this saga, which has continued for more than a decade, about whether Ohio sales should be included in the Indiana sales factor numerator. The Tax Court's decision in Miller Brewing Company is the Court's second ruling under 45 I.A.C. 3.1-1-53(7) that the sales of goods picked up at an out-of-state dock by a purchaser's common carrier are not includable in the numerator of the Indiana sales factor.

Gross Retail (Sales) & Use Tax

1. Supreme Court reverses Tax Court's decision on taxation of promotional materials. In AOL, LLC v. Indiana Department of State Revenue, Cause No. 49T10-0903-TA-7, December 29, 2010, the Tax Court held that AOL did not owe use tax on its promotional materials, e.g., CDs and printed materials, which were processed by third-party vendors for distribution to potential Indiana customers. The Tax Court found that the services performed by vendors ultimately consumed the original materials, and did not constitute taxable retail transactions. (Only tangible personal property acquired in a retail transaction is subject to tax.) The Indiana Supreme Court granted transfer and reversed the Tax Court.

   Indiana Department of State Revenue v. AOL, LLC, Cause No. 49S10-1108-TA-514, Indiana Supreme Court, March 16, 2012. The Indiana Supreme Court held that the transactions between AOL and its third-party vendors were retail transactions, resulting in Indiana use tax once AOL used the property in Indiana. The Indiana Supreme Court relied on I.C. § 6-2.5-4-1(c), which provides that "[f]or the purposes of determining what constitutes selling at retail, it does not matter whether…the property is transferred in the same form as when it was acquired." The Court said that the purpose of this provision (I.C. § 6-2.5-4-1(c)) was to prevent a person from arguing that a merchant was not selling
at retail merely because the merchant changed the form of the property between acquiring it and transferring it. The Supreme Court also noted that I.C. § 6-2.5-4-1(c) "should have prevented" the decisions of *Ameritech Publ'g, Inc. v. Indiana Department of State Revenue*, 855 N.E.2d 1096 (Ind. Tax Ct. 2006) and *Ameritech Publ'g, Inc. v. Indiana Department of State Revenue*, 916 N.E.2d 752 (Ind. Tax Ct. 2009).

**Property Tax**

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.

2. **Allocated sales price/contract rent in sale/leaseback transactions did not reflect property's value.** In *Grant County Assessor v. Kerasotes Showplace Theatres, LLC*, Cause No. 49T10-0908-TA-47, Indiana Tax Court, October 20, 2011, the taxpayer sold a multi-screen movie theatre in a sale/leaseback transaction. The taxpayer argued that sale/leaseback transactions are financial tools and often represent value beyond simply the real property involved. The Indiana Board of Tax Review agreed and said it could "not conclude that the subject property's allocated sales price/contract rent reflected the value of the subject real property alone" and reduced the assessed value to the amount requested by the taxpayer. The Indiana Tax Court affirmed the Board's final determination, declining to reweigh the evidence and appraisals already considered by the Board.

**Tax Procedure and Jurisdiction**

1. **Tax Court lacked jurisdiction to hear appeal, where there was no final determination from the Indiana Board of Tax Review to appeal.** *Brenda Truedell-Bell v. Marion County Treasurer*, 955 N.E.2d 872 (Ind. Tax Ct. 2011). Trudell-Bell filed a "Petition for Temporary Order/Injunction Removing Property from the Property Tax Sale Pending the Outcome of the Assessment Appeal/Property Reassessment."

Trudell-Bell had filed four petitions challenging the 2007 assessment of property she owned in Marion County, alleging that each of the properties was a brownfield and therefore overvalued. The Marion County PTABOA did not schedule a hearing on the petitions. Trudell-Bell did not pay the placeholder tax liability to keep the property out of a tax sale while her assessment appeals were pending. Therefore, the Marion County Treasurer and Auditor included Trudell-Bell's property in the 2009 tax sale for delinquent taxes, which was scheduled to occur on March 18, 2010. She filed for an injunction with the local circuit court, seeking to remove her property from the tax sale pending the resolution of her assessment appeals. The circuit court denied the injunction,
claiming it lacked subject matter jurisdiction. The Indiana Court of Appeals affirmed the denial. Truedell-Bell then filed a petition in Tax Court. Her property had been sold in the tax sale on Oct. 7, 2010.

The Court noted, "The current statutory framework limits access to the Tax Court through specified procedural channels." 955 N.E.2d at 876 (quoting State Bd. of Tax Comm'rs v. Montgomery, 730 N.E.2d 680, 686 (Ind. 2000)). The Court then explained: "That statutory framework not only required Truedell–Bell to obtain a final determination from the Indiana Board before appealing to the Tax Court, but provided her with an avenue—when the local assessment appeal process failed her—by which she could obtain that final determination." Id. Without a final determination from the Indiana Board, the Tax Court was deprived of subject matter jurisdiction and was required to dismiss the appeal. Id.

2. Where Clerk of the Tax Court had served Attorney General with copy of the petition, the Court refused to dismiss the Taxpayers' appeal due to their failure to serve the petition. Idris v. Marion County Assessor, 956 N.E.2d 783 (Ind. Tax Ct. 2011). The pro se taxpayers filed their "Notice of Claim—Small Tax Case" and notice of appearance with the Clerk of the Tax Court, but the certificates of service referenced only the Marion County Assessor and not the Attorney General. However, the Clerk on the date of filing sent a Transmittal Letter to both the Indiana Board of Tax Review and the Attorney General consistent with Tax Court Rule 4. A copy of the petition was attached. On the next day, the Clerk issued a summons to the Assessor by certified mail, return receipt requested. The return receipt was later filed with the Court.

Ind. Code § 33-26-6-2 provides that a party seeking to set aside an Indiana Board final determination must file a petition with the Tax Court and states that 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 § 6-1.1-15-5(b) requires a petitioner to serve a copy of the petition on the attorney general. Tax Court Rule 16(C) requires the petition to be served on the Attorney General by registered mail, return receipt requested. Accordingly, the Assessor argued that the petition should be dismissed due to the taxpayers' failure to serve a copy of the petition on the Attorney General.

The Court first observed that Ind. Code § 6-1.1-15-5(b) is silent as to method of service; thus, its concern is that service actually be made – not the method by which it is made. 956 N.E.2d at 786. The taxpayer "went into the Clerk's office, filed a copy of her Petition, and indisputably triggered the Clerk's process of transmitting a copy of the Petition to the Attorney General." Id. Therefore, the Court held that the taxpayers satisfied the service requirements of Ind. Code § 6-1.1-15-5. Id.

The Court also explained that the purpose of Tax Court Rule 16(C) is to ensure that there is evidence of both service and receipt. 956 N.E.2d at 787. That evidence was present in the Transmittal Letter and the Assessor's acknowledgment that a copy of the petition was mailed to and received by the Attorney General within the statutorily prescribed period. Dismissal under Tax Court Rule 16 was not warranted. Id.
3. **Indiana follows the "American Rule" (not the "English Rule") regarding payment of attorney fees.** *Fuller v. Cass County Assessor*, Cause No. 49T10-1011-TA-68 (Ind. Tax Ct., Nov. 9, 2011) (Not for Publication). Taxpayer who failed to establish that he was entitled to the homestead credit, homestead standard deduction, or the mortgage deduction claimed he was entitled to fees and costs for representing himself. Noting that Indiana follows the "American Rule" (or "every man for himself") and not the "English Rule" ("loser pays") for attorney fee schemes, the Court noted that "in the absence of a statute, rule, agreement, or stipulation providing otherwise, litigants must pay their own fees and costs." Slip op. at 6-7. No such evidence was presented, so the Court denied taxpayer's claim for fees and costs. Slip op. at 7.

4. **Tax Court lacked jurisdiction over a tax collection and enforcement issue.** *Etzler v. Indiana Dep't of State Revenue*, 957 N.E.2d 706 (Ind. Tax Ct. 2011). Taxpayer filed an appeal asking the Court to declare that his security interest in certain property has priority over the Department's judgment liens. But the Court had no jurisdiction over the matter under Ind. Code § 33-26-3-1, which states that a case in an original tax appeal if it (a) arises under the tax laws of Indiana and (b) is the initial appeal of a final determination of the Department, Indiana Board of Tax Review, or the Department of Local Government Finance. Because the case involved the collection and enforcement of a judgment (not the collection of a tax) and because no statute specifically gave the Court jurisdiction to review the judgment, the appeal did not "arise under" the tax laws of Indiana. 957 N.E.2d at 709. The Court also lacked jurisdiction because the taxpayer lacked a final determination from the Department. *Id.*

5. **Affidavit must be based on personal knowledge and show that affiant is competent to testify.** *Estate of Neterer v. Ind. Dep't of State Revenue*, 956 N.E.2d 1214 (Ind. Tax Ct. 2011). The Estate claimed a 30% adjustment in the fair market value of real property based on a lack of marketability and a lack of control over the property (the decedent owned an undivided one-half interest in the property). The Department denied the Estate's refund claim of the additional inheritance tax due based on the Department's rejection of the adjustment. The Estate asserted that its verified returns established the propriety of the discount because they were the equivalent of affidavits providing testimony as to the fair market value of the property. But the verification clause represented only that the return was correct "to the best of my knowledge and belief." The Court explained that an affidavit offered in support of a party's motion for summary judgment "must be based on the affiant's personal knowledge and affirmatively show that the affiant is competent to testify to the matters stated therein." 956 N.E.2d at 1221 (citations omitted). The Estate's personal representative, however, did not show that her information was based on personal knowledge. *Id.* And the Estate did not show that the representative was competent to render an opinion concerning the application and quantification of the 30% discount. *Id.* "Given the totality of the evidence, therefore, the Court cannot say that the probate court erred in disallowing the 30% discount." *Id.*

6. **Tax Court did not improperly grant "retroactive relief".** *Metropolitan School District of Pike Twp. v. DLGF*, 962 N.E.2d 705 (Ind. Tax Ct., Dec. 27, 2011). The Court
found that it was not improperly granting "retroactive relief" in compelling the DLGF to apply the correct calculations of the District's capital projects fund (CPF) for the prior, un-contested 2007 to 2010 tax years to ensure the accuracy of its contested 2011 CPF levy property tax rate calculation.

7. **Tax Court ordered payment of Department's attorney fees in "frivolous" suit.** *Lacy v. Ind. Dep't of State Revenue*, 959 N.E.2d 936 (Ind. Tax Ct. 2011). As an exception to the "American Rule" regarding the awarding of attorney fees, Ind. Code § 34-52-1-1 provides that fees may be awarded in civil actions if the court finds that a party "brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless." The Court observed that this statute "must be applied in a manner that gives effect to its purpose: fairly balancing a litigant's access to court, deterring unnecessary and unwarranted litigation, and allowing an attorney to be a zealous advocate." 959 N.E.2d at 939 (citations omitted). Based on the totality of the facts, the Court concluded that the taxpayer "continued to pursue his claim when any reasonable attorney would have understood that the claim was frivolous." *Id.* at 941. The Court held that an award of attorney fees was proper because the taxpayer "failed to make a good faith or rational argument for the extension, modification, or reversal of existing law with respect to this 2008 [adjusted gross income tax] claim." *Id.*

The Court has broad discretion in determining what constitutes a reasonable attorney fee. *Id.* (citation omitted). The judge is considered an expert in that regard and need not completely rely upon the evidence presented to support the requested fee. *Id.* (citation omitted). The Court rejected the Department's calculation, which reflected time spent defending the case before the Court denied taxpayer's petition for rehearing. *Id.* at 492. The case "clearly became frivolous" after that denial, so the fee request was reduced to reflect only the Department's post-denial expenses based on the Court's own calculation. *Id.*

**Note:** The Court decided the case by applying Ind. Code § 34-52-1-1. It did not address the Department's request under the "obdurate behavior" exception to the "American Rule." 959 N.E.2d at 938 n.1.

8. **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](http://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. 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 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.

9. **Indiana Supreme Court issues order saying that it "improvidently granted" review in Tax Court's jeopardy assessment decision** (originally posted at www.taxhatchet.com on May 20, 2012).

*Department of Revenue barks up the wrong tree: Indiana Supreme Court lets stand Tax Court's order voiding Department of Revenue's jeopardy assessments for income and sales tax in "puppy mill" case*

On May 15, 2012, the Indiana Supreme Court took the unusual step of vacating its order granting review of the Tax Court's decisions in *Garwood v. Indiana Department of State Revenue*. After conducting an oral argument (see http://bit.ly/K0vJID), the Supreme Court issued its order (see http://1.usa.gov/L8OtXF) stating, "the Court has determined that review was improvidently granted. Accordingly, the order granting review is VACATED."

The Department sought appeal of two Tax Court rulings. In the first (*Garwood I*, see http://1.usa.gov/L9mVPf), the Court held that it had jurisdiction over the appeal. In the second (*Garwood II*, see http://1.usa.gov/LjB2ke), the Court held that the Department's sixteen jeopardy assessments issued to the Garwoods were void as a matter of law.

**Background (or case pedigree).** Beginning in 2007, the Garwoods began breeding and selling puppies. Following a report by local animal control officials, the hunt was on. The Office of Indiana Attorney General (OAG) and the Department of Revenue conducted a joint investigation, sniffing out the unreported transactions. The Garwoods dug themselves a hole. They were not registered retail merchants and had never remitted sales tax or filed sales tax returns.

The Department and OAG left no bone buried. In April 2009, two of the OAG's special investigators purchased two puppies from the Garwoods for a total of $550.00 in cash.
The Garwoods did not issue receipts in either transaction. The Department issued jeopardy assessments for sales and income taxes, totaling more than $284,000. On June 2, the Department served its jeopardy assessment documents. When the Garwoods could not pay, OAG and the Department seized 240 dogs. That afternoon, the Attorney General – as leader of the pack – held a television press conference and newspaper interview, publicizing the seizure of the Garwoods' dogs. And the next day, OAG (on behalf of the Department) sold all of the 240 dogs seized to the Humane Society of the United States for a total of $300.00.

The Garwoods howled, protesting the assessments. But the Department, in a letter dated June 22, refused to hold a hearing and told the Garwoods to seek relief from the county court. Instead, the Garwoods appealed directly to the Tax Court.

Garwood I ruling. The Department moved to dismiss for lack of jurisdiction. The Department argued that its jeopardy tax warrants were the final judgments of the county court, "the day for disputing the tax [was] over," and the matter had progressed to the "collection stage." In the alternative, the Department argued that the Garwoods did not exhaust their administrative remedies, which they could do by paying the taxes and then filing a claim for refund.

The Tax Court rejected the Department's reasoning. As to the first argument, the Court found that the Garwoods attempted to contest the validity of the jeopardy tax assessments with both the Department and the Tax Court. See Garwood I, Slip op. at 7. Therefore, the jeopardy tax warrants at issue in the case had not yet attained the status of judgments. Id. at 7-8.

For the Tax Court to have jurisdiction, a case must arise under the tax laws of Indiana and must be an appeal of a final determination made by the Department. See Garwood I, Slip op. at 8 (citing Ind. Code § 33-26-3-1). The first requirement was easily met, the Court observed, as the Garwoods' claims "indisputably arise under the tax laws of this state." Id. As to the second requirement, the Department claimed that because the Garwoods did not file a claim for refund with the Department, there was no final determination. The Department argued that the State's jeopardy tax assessment process was a pure "pay to play" system. The Court disagreed, explaining:

First, Indiana Code § 6-8.1-5-3 is silent as to the manner by which a taxpayer may challenge the validity of a jeopardy assessment. See A.I.C. § 6-8.1-5-3. Second, the claim for refund statute makes no mention of jeopardy tax assessments. See IND. CODE ANN. § 6-8.1-9-1 (West 2007). Third, nearly fifteen years ago, Indiana's Supreme Court unambiguously explained that taxpayers may challenge jeopardy assessments through the administrative procedures provided under Indiana Code § 6-8.1-5-1. See Clifft, 660 N.E.2d [310.] 317-18 [(Ind. 1995)]. Fourth, the Department's own regulation, enacted in 1987, provides that taxpayers 'may protest [a jeopardy assessment] within twenty (20) days after the
assessment is made.' 45 I.A.C. 15-5-8(c). Consequently, through its argument, the Department attempts to eliminate one administrative path to the Tax Court when there are actually at least two. See A.I.C. § 6-8.1-5-1 (the protest process); A.I.C. § 6-8.1-9-1 (the claim for refund process). This Court, however, will not sanction such actions.

See Garwood I, Slip op. at 9. The Court held that, for purposes of the case, the Department's letter to the Garwoods rejecting their request for a hearing constituted a final judgment. Id. at 10. Accordingly, the Court denied the Department's motion to dismiss. Id.

Garwood II ruling. The Tax Court first explained the special nature of jeopardy assessments as follows:

[T]he Indiana Legislature has granted the Department authority to employ the powerful tool of jeopardy assessment in exceptional circumstances. Indeed, the use of a jeopardy assessment is an extraordinary measure because it allows the state to deprive a taxpayer of property without first providing constitutionally guaranteed notice or an opportunity to be heard. As a result, our Legislature very narrowly tailored the Department's jeopardy assessment power to further the essential state interest of exercising its power to tax when collection is at risk. . . . [T]he general jeopardy assessment statute, Indiana Code § 6-8.1-5-3, requires that specific exigent circumstances exist before a jeopardy assessment may be imposed: circumstances identifying the line between fair tax administration and oppression.

Garwood II, Slip op. at 7-8 (case citations omitted, emphasis added). Jeopardy assessments are allowed if the Department finds "that a person owing taxes intends to [1] quickly leave the state, [2] remove his property from the state, [3] conceal his property in the state, or [4] do any other act that would jeopardize the collection of those taxes." Id. at 8 (citing Ind. Code § 6-8.1-5-3(a)). The Department's assessments met none of these standards, the Garwoods claimed. And the Tax Court agreed, holding: "[T]he Department did not show the presence of the statutorily prescribed exigent circumstances that the Garwoods intended to quickly leave the state, remove their property from the state, conceal their property in the state, or do any other act that would jeopardize the collection of taxes." Id. at 12-13. The Court's decision was based on a number of factors:

- There was no evidence that the Garwoods were a "flight risk" (or, perhaps more appropriately, a "run" risk).
- The Department did not claim and no evidence showed that the Garwoods intended to remove the dogs from the State.
- The Garwoods' refusal to allow an animal control officer onto the property was not evidence of intent to conceal property in the State. "In fact, it is not
reasonable to infer that [the taxpayers'] intent was to conceal property to avoid paying taxes because one would not normally expect an Animal Control Officer, who typically investigates matters involving animals, to be the emissary of the tax collector." *Id.* at 10

- There was no evidence "that indicates the Garwoods would sell all their dogs or release them to avoid paying tax. . . . Specious non sequiturs are not probative evidence of an intent to conceal property." *Id.* (emphasis added).

The Court held: "[T]aken as a whole, these actions suggest that the Garwoods were not properly reporting and paying taxes allegedly due, not that they intended not to pay, or preserve the wherewithal to pay, their taxes. *The absence of facts demonstrating the Garwoods' intent to thwart collection is palpable.*" *Id.* at 12 (emphasis added).

The Tax Court was not impressed with the OAG's and the Department's dog show. The jeopardy assessments were not intended to protect the State's fiscal interest. The Court observed: "The unusual occurrence of this media hype in conjunction with the Department's sale of the Garwoods' property for a nominal sum demonstrate that the Department wielded the power of jeopardy assessments as a sword to eliminate a socially undesirable activity and close down a suspected 'puppy mill,' not to fill the State's coffers with the tax liabilities the Garwoods purportedly owed." *Id.* at 13-14.

The jeopardy assessments were deemed void as a matter of law, because the Department "overstepped its authority in this case by issuing jeopardy assessments without having shown the exigent circumstances required by Indiana Code § 6-8.1-5-3 and 45 IAC 15-5-8." *Id.* at 14.

The Indiana Supreme Court's decision to vacate its order granting review means that the Tax Court's rulings in both Garwood opinions remain in place to limit the Department of Revenue's ability to "unleash the hounds" against taxpayers by pursuing collections of alleged liabilities with jeopardy assessments.

10. **Tax Court rejects Department of Revenue's motion to dismiss on grounds that the Court lacked subject matter jurisdiction, that taxpayer lacked standing, and that the taxpayer failed to certify appeal as class action** (originally posted at www.taxhatchet.com on June 1, 2012).

*Seller of Medical Equipment had Standing to bring Sales Tax Refund Claim and was not required to pursue Appeal as a Class Action*

Today, the Indiana Tax Court issued an Order denying the Indiana Department of Revenue's motion to dismiss a Taxpayer's appeal challenging the Department's denial of a sales and use tax refund claim. The Order can be viewed here: [http://1.usa.gov/LTJefr](http://1.usa.gov/LTJefr). Taxpayer, Fresenius USA Marketing, Inc. (Fresenius), is represented by Faegre Baker Daniels LLP, and this posting conveys only the facts and ruling included in the Court's order.
During the tax period at issue (January 1, 2004, through October 31, 2007), Fresenius sold equipment used to treat patients with End Stage Renal Disease, including but not limited to dialysis machines. Fresenius collected sales tax from its customers on the equipment sales and remitted the tax to the Department. Fresenius filed a refund claim, asserting that the sales qualified for exemption under the durable medical equipment exemption. See Ind. Code § 6-2.5-5-18. Once it received the refund, Fresenius indicated that it would return the proper amounts to each of its customers. The Department issued a final determination denying the refund claim, and Fresenius filed an original tax appeal.

The Department argued that the appeal should be dismissed because: (a) the Court lacked subject matter jurisdiction over the appeal; (b) Fresenius lacked standing to bring the appeal; and (c) Fresenius failed to certify the appeal as a class action lawsuit. The Court rejected all three arguments.

The Court had subject matter jurisdiction over the appeal. In finding that it had jurisdiction, the Court explained that it has exclusive subject matter jurisdiction over "original tax appeals." Slip op. at 3 (citing Ind. Code § 33-26-3-1 and -3). To be an original tax appeal, the case must "arise under" the tax laws of Indiana and must be an initial appeal of a final determination by the Department with respect to a "listed tax." Id. (citing Ind. Code § 33-26-3-1). The Department argued that the Tax Court lacked subject matter jurisdiction because Fresenius failed to obtain a properly executed power of attorney from its customers authorizing Fresenius to represent them at the administrative level. According to the Department, the customers' "putative refund claims have never legally been before or addressed by the Department and thus their individual refund remedies have never been exhausted." Slip op at 4. (omitting internal quotations and edits). But this argument failed, the Court explained, because "it improperly focuses on Fresenius's customers rather than Fresenius itself." Id. Fresenius's case arose under Indiana's tax laws, and Fresenius appealed from the Department's final determination denying its refund claim. Fresenius thus met both statutory requirements for initiating an original tax appeal. Slip op. at 4-5.

Taxpayer had standing to bring the appeal. The Tax Court also concluded that the Department's argument that Fresenius lacked standing was "without merit." Slip op. at 7. The Department asserted that Fresenius was not entitled to seek a refund of sales tax paid by its customers until it had refunded the money to the customers. But the cited statute, Ind. Code § 6-2.5-6-14.1, provides that "a retail merchant is not entitled to a refund of [sales] or use taxes unless the retail merchant refunds those taxes to the person from whom they were collected." The words "unless" and "until" are not synonymous, the Court reasoned. Given its plain and unambiguous meaning, Ind. Code § 6-2.5-6-14.1 does not limit a retail merchant's ability to seek a refund; rather, it "come[s] into play by placing a limitation on the retail merchant's ability to receive the money." Slip op. at 7 (emphasis added). The Court could not construe the statute in a way that would either limit or extend its operation. Id.
Taxpayer was not required to pursue a class action. Because Fresenius "sought to litigate this matter on behalf of a class of taxpayers but has not sought class certification," the Department contended that the appeal should be dismissed. The Court held that this claim also failed. Slip op. at 8. Fresenius had a statutory right to appeal the Department's denial of its refund claim. *Id.* "Consequently, it does not need to pursue its appeal – nor has it – as a class action." *Id.*

11. **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." *Id.* (quotations and citations omitted). 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).
Property Tax – Valuation decisions

1. **History of property's listing refuted reduction for 2009 and supported reduction for 2010 assessments** (originally posted at taxhatchet.com on June 7, 2012).

   Indiana Board of Tax Review relies on listing prices for industrial facility to determine its property tax value

   In property tax appeals, the reviewing body frequently faces a "battle of the experts" (usually appraisers). In *1 General Street, LLC v. Cass County Assessor*, Pet. Nos. 09-010-09-1-3-00120 *et al.* (Jan. 31, 2012) (March 1, 2009 and 2010 assessment dates), the Indiana Board of Tax Review instead dealt with a "battle of the listing prices."

   See http://1.usa.gov/zZBVdc. The industrial facility under appeal consisted of three vacant parcels and a parcel with a 231,000 square foot building. For 2009 and 2010, the parcels were collectively assessed at $824,600 and $833,900, respectively; Taxpayer (General Street) requested a total value of $450,000 for all four parcels for both years. To support the reduction, General Street submitted a "LoopNet" sale and lease history, an aerial map, and listing contracts.

   The Board concluded that the property's actual listing history did not support a reduction for the March 1, 2009 assessment. The Board first explained: "[W]hen reasonable marketing efforts are made to sell a property at a given price for a long period of time and those efforts are unsuccessful, it can be inferred that the market value-in-use of a property is something less than its asking price." (Page 7, § 16(e).) The property's listing history was as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Listing Price</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006:</td>
<td>$1,250,000</td>
</tr>
<tr>
<td>3/2007:</td>
<td>$850,000</td>
</tr>
<tr>
<td>7/2007:</td>
<td>$975,000</td>
</tr>
<tr>
<td>8/2008:</td>
<td>$875,000</td>
</tr>
<tr>
<td>4/2009:</td>
<td>$750,000</td>
</tr>
<tr>
<td>10/2009:</td>
<td>$650,000</td>
</tr>
<tr>
<td>1/2010:</td>
<td>$595,000</td>
</tr>
<tr>
<td>9/2011:</td>
<td>$450,000</td>
</tr>
</tbody>
</table>

   For the March 1, 2009 assessment appeal, the Board held: "[General Street's] current listing price fails to show the properties were over-assessed for the March 1, 2009, assessment date and the properties’ listing prices in 2008 support the properties’ assessed values." (Page 7, § 16(f).)

   The March 1, 2010 assessment, however, was a different story. The Board explained:

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According to the properties' listing history, the properties were offered for $650,000 as October 13, 2009, and reduced to $595,000 on January 1, 2010. The properties did not sell for this price and, in fact, the listing price was reduced again in 2011. Thus, the Petitioner presented some evidence that, as of the [March 1, 2010] valuation date, the value of its properties was no more than $595,000. (Page 7, § 16(g).)

To further support a reduction, General Street relied upon the listing price of a "similar property," and it asserted that the property would not sell because of its location in a "residential area." But General Street failed to show how the subject property and the comparable were truly comparable. (Page 8, § 16(h).) Moreover, because it "failed to tie the location of the property to an actual loss in the value of the property, [General Street] failed to raise a prima facie case that the subject property's assessment was incorrect." (Page 8, § 16(i).)

2. **Homeowner failed to show how Federal Housing Finance Authority indexes proved property's decline in value.** Christopher S. Hughes v. Allen County Assessor, Pet. No. 02-063-10-1-5-00011 (February 6, 2012) (March 1, 2010 assessment date) [Small Claims Docket]. Hughes bought the subject property for $235,000 in the first quarter of 2008. He claimed that because "property values were dropping like a rock" and had been since he purchased the property, his property also declined in value. To quantify the property's decline in value, Hughes presented indexes from the Federal Housing Finance Agency ("FHFA"), including indexes of the Fort Wayne, Indiana, East North Central United States, and United States markets. He sought a reduction in value based on an 11% decline in the Fort Wayne market, a number Hughes calculated by summing the quarterly declines from 2008 to 2010.

The Assessor argued that a property's sale price is the best indicator of market value, and the property's assessment was lower than the $235,000 Hughes paid for it. The Assessor further argued that the FHFA's indexes refer to geographic areas that the DLGF's rules do not recognize as being relevant. The Assessor also provided ratio studies which showed that nearby rural residential properties actually increased in value.

The Indiana Board noted that Hughes focused on adjusting the price he paid in February 2008 to a value as of March 1, 2010, using the FHFA indexes. (Page 7, ¶ 15(d).) However, Hughes failed to explain how the indexes were meant to be read, and whether a person could simply add the quarterly declines to calculate a cumulative decline. *Id.* The Board declined to give weight to the evidence, though it noted that Hughes could have used the indexes to make a broader point about the market in general. (Page 7, ¶ 15(e).) The property's assessed value was already 4.3% below his purchase price, and Hughes failed to show that 11% was a more appropriate depreciation. *Id.* Both Hughes and the Assessor failed to meaningfully compare the subject property to the other rural residences, but because Hughes had the burden of proof and failed to raise a prima facie case, the Indiana Board found for the Assessor. (Page 8, ¶ 15(g)-(h).)
3. **Indiana Board declines to lower property value below that requested by Taxpayer, even though appraisal supported a lower value.** *Castleman v. Steuben County Assessor*, Pet. No. 76-006-08-1-5-00001 (Feb. 6, 2012) (March 1, 2008 assessment) [Small Claims Docket]. Taxpayer appealed the March 1, 2008 assessment of a residential property, proving that the subject property's value was too high with an appraisal. (Page 8, ¶ 15(j).) However, the value could have been reduced even further. The IBTR reasoned, see *id*.: 

If Ms. Castleman had asked the Board to lower the subject property’s assessment to match Mr. Krebs’s appraisal, the Board likely would do so. But Ms. Castleman asked for a land assessment of $473,928 [a value higher than the appraised value] on her Form 131 petition. And her sole witness reaffirmed that request at the Board’s hearing. Under those circumstances, the Board will not reduce the subject property’s assessment below the amount that Ms. Castleman requested.

4. **Indiana Board grants summary judgment motion to apply "developer's discount" and agricultural base rate to vacant land.** The Developer in *Allisonville Road Development, LLC v. Hamilton County Assessor*, Pet. Nos. 29-006-08-1-4-00066 and -00067 (March 15, 2012) (March 1, 2008 assessment), owned two unimproved lots in Fishers. On appeal, it claimed that the lots' assessments of $607,400 and $820,000 should be reduced to their values as calculated by applying the $1,200 per acre base rate for agricultural land. Developer asserted that the properties' 2002 assessments were contrary to law under the "developer's discount" statute, Ind. Code § 6-1.1-4-12. Developer acquired the parcels in 2006 and claimed that it held the property as "land in inventory." It described the ownership history dating back to 1992, observing that the property had continually been owned by developers.

In 2001, the two parcels were classified as agricultural land. In 2002, they were reclassified as commercial acreage, resulting in a substantial assessment increase. Developer argued that, under the "developer's discount" statute, the property was improperly reclassified because the use of the property had not changed, title did not transfer, improvements were not constructed and no building permits were sought or obtained between the 2001 and 2002 assessment dates. (Page 7, ¶ 17(D)).

The parties argued at length as to which version of the "developer's discount" statute applied, the pre-2006 version or the current version. In the pre-2006 version, land was reassessed based on its new classification upon the occurrence of any of these three events: "when land was subdivided into lots, when land was rezoned, or when land was put to a different use." (Page 14, ¶ 25.) However, for land assessed on an acreage basis that was sub-divided into lots, a lot could not be reassessed until the assessment date following a change in legal or equitable title to that lot. *Id.* (quoting Ind. Code § 6-1.1-4-12 (2005)). Under the 2006 statute, the triggering events granting the assessor authority to reassess a property were: "transferring title to someone who is not a land developer,
beginning construction of a structure, or obtaining a building permit." (Page 15, ¶ 26.) The Indiana Board held that, regardless of which statute applied, "none of the events that would trigger a reassessment under either version of the statute occurred here." (Page 15, ¶ 27.)

The purpose of the "developer's discount," as explained by the Tax Court, is "to encourage developers to buy farmland, divide it into lots, and resell the lots." (Page 16, ¶ 31) (quoting Aboite Corp. v. State Bd. of Tax Comm'r's, 762 N.E.2d 254, 257 (Ind. Tax Ct. 2001).) "Here, the [Developer] did not sell its vacant lots; rather, the lots remained vacant and did not change use." (Page 17, ¶ 31.) Accordingly, the Board held that the Developer's properties should have continued being assessed by applying the agricultural base rate. For 2008, that rate was $1,200 per acre, resulting in assessments of $7,272 and $8,412 for the March 1, 2008 assessment date. (Page 17, ¶ 32.)

Jurisdictional Note. Developer contended that the lots should also be assessed based on the agricultural base rates for the March 1, 2009 and 2010 assessment dates, because it did not sell the property until April 14, 2010. But the Board did not have appeals for 2009 and 2010 before it; thus, the Board did not have authority to decide the lots' values for 2009 and 2010. (Page 17, ¶ 32 n.2.)

5. Indiana Board relies on homeowner's sales and assessor's trending data to lower lake property's assessment. 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]. Miller owned a home on Lake Wawasee which was subject to setback requirements because it fronted the lake, a channel, and a public road. The property was appraised by a certified appraiser, who estimated the property's value at $720,000 as of January 9, 2009. Miller's attorney also pointed to other factors that detracted from the value of the property, and presented the assessment of a comparable property.

The Assessor argued that the subject property was purchased for $710,000 in 2003, so the 2009 assessment of $1,028,500 reflected appreciation that occurred in the intervening six years. The Assessor's appraiser presented a chart of sales on Lake Wawasee which showed a 22% increase in median sale prices between 2000 and 2001, and a more gradual increase from 2003 to 2008.

The Indiana Board determined that most of the evidence presented by Miller lacked probative value. (Page 8, ¶ 15(e)-(f).) Miller's USPAP appraisal estimated the value of the property more than a year after the relevant January 1, 2008, valuation date. (Page 8, ¶ 15(h).) The sales used in the analysis, however, were from 2008, so they showed some relationship to the proper valuation date. Id. The Assessor offered annual trending data for Lake Wawasee properties which showed a 4.3% decrease in values between January 1, 2008, and January 1, 2009. (Page 9, ¶ 15(i).) The Board held that Miller presented a prima facie case for over assessment, but it used the Assessor's trending data to determine a value of $752,400. Id. The Assessor failed to rebut the trended valuation, and the Board held that the Assessor's data actually supported Miller's claims, so the Board found for Miller. (Page 10, ¶ 15(m).)
6. **Taxpayer's right to challenge a property's market value-in-use on appeal exists independently of uniformity requirements.** *Edward Wineinger v. Dubois County Assessor*, Pet. No. 19-006-09-1-5-00019 (April 12, 2012) (March 1, 2009 assessment) [Small Claims Docket]. Wineinger owned 30 acres of unimproved land which lacked utilities or an access road and was completely wooded. The property's 2008 assessment was $9,600, but the Assessor changed a portion of the land's classification from "agricultural woodland" to "residential non-ag," resulting in a 2009 assessment of $63,000. Wineinger had no plans to develop the land, and in 2011 secured a Forest Management Plan for the property.

The Assessor asserted that Department of Local Government regulations require land to be actively farmed or wooded as a prerequisite to being classified as agricultural, and wooded land cannot be agricultural unless the owner produces a forestry plan. Wineinger did not file a farmer's personal property return and did not have a management plan in 2009. Further, the assessment was within the statistical ranges for measuring uniformity, equality, and accuracy of mass appraisals.

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 Indiana Board noted that the Assessor did not show that the use had changed, so the Board did not need to answer the question of whether a change in use affects whether the burden shifts. (Page 6, ¶ 19(c).) The Board was also not persuaded that an assessment is correct as long as it is within the requirements for uniform and equal assessments. (Page 7, ¶ 19(e).) The Board explained: "[A]n individual taxpayer has the right to appeal his property's assessment on grounds that the assessment does not accurately reflect the property's market value-in-use. And that right exists independently of any constitutional or statutory requirements for uniform and equal assessments." *Id.* Thus, because the Assessor failed to meet her burden of proof, the Board reduced the property's assessment to its 2008 level. Page 7, ¶ 19(f).

7. **Assessor's valuation of leased fee interest given "little weight" and could not support assessment increase.** *CVS Corporation #6252-02 v. Vanderburgh County Assessor*, Pet. No. 82-020-09-1-4-07415 (April 12, 2012) (March 1, 2009 assessment). CVS' property was built in 2003, and the Assessor collected data about the property according to the Real Property Assessment Guidelines at that time. The property's value was trended according to the Guidelines for subsequent years. The Assessor's appraiser used comparable sales for CVS and Walgreen stores across the Midwest to calculate the value of the property. The appraiser stated that investors in the market purchase the properties for an income stream, and although he did not perform an appraisal of the property, he calculated the value of the property to be much higher than the assessment.

The Assessor called CVS' tax representative as a witness to show that CVS' valuation was not credible. The Assessor argued that the representative's comparable properties were not truly comparable, and used the representative's calculations with more
comparable sales data to show that the assessment was correct. CVS argued, however, that the Assessor could not substantiate the assessed value, and that the income analysis and comparable sales presented by the Assessor's appraiser used properties that were leasebacks, which are not relevant under Indiana case law.

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.) The Board rejected the Assessor's argument that the assessment was correct because the Assessor had followed the Guidelines. (Page 8, ¶ 19.) Further, the Assessor's appraiser determined rent on a leased fee basis and valued the lease rather than the property itself. (Page 10, ¶ 25.) Because Indiana law rejects such methods, the Board found that valuations offered by the Assessor were of little weight.

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.)

8. **Farm property lowered to prior assessed value, but owners failed to prove that an assessment lower than the prior value was justified.** John K. and Jeanne L. Austgen v. Lake County Assessor, Pet. Nos. 45-014-07-1-1-00001 et al. (April 20, 2012) (March 1, 2007 assessment) [Small Claims Docket]. The Austgens owned agricultural land improved with a residence and various farm buildings. The Austgens presented the sales of two comparable properties nearby, and argued that the sales were more persuasive than an appraisal, which is merely an opinion of value. The subject property was subject to periodic flooding because of developments to neighboring land. Further, according to the Austgens, the agricultural buildings on the parcel had no value for modern agricultural methods, and prospective investors would see a negative utility because of the cost of demolishing them.

The Assessor asserted that the land and buildings were all assessed properly. The Assessor argued that the comparable properties were not truly comparable, because they were larger than the subject and unimproved with a residence. Further, the state has no directive for valuing flood zones, and because a large farming operation would not purchase such a small property, the agricultural buildings were properly assessed.

The Indiana Board first noted that the value of the property increased by more than 5%, so the Assessor had the burden of proving that the assessments were correct, though the Austgens had the burden of proof on any reductions below the prior year's values. (Pages 5-6, ¶ 15.) The Assessor's argument that he assessed the property correctly was insufficient to carry his burden, because he failed to present evidence that the county's land values represented the market value-in-use of the property. (Page 6, ¶¶ 16-17.) However, the Austgens did not make a case for lowering the value below the previous year's assessment. (Page 7, ¶ 18.) "Whether the Petitioners use the buildings for any
purpose or whether a future purchaser could use the buildings does not alter the fact that the buildings exist on the property and add value to the property." (Page 7, ¶ 21.)

Further, the Austgens failed to provide evidence of repeated, wide-spread flooding on the property, so the IBTR concluded that the value of the property should be reduced to the level of the prior assessment, but not lower. (Pages 8-9, ¶¶ 25, 27.)

9. **Indiana Board finds that "proximity matters" in selection of appraiser's comparable sales; Lake County Assessor appeals reduction for townhome and loses "battle of the appraisers".** Usually, the taxpayer is the part appealing a county board's denial of its assessment appeal to the Indiana Board of Tax Review. In *Lake County Assessor v. Port*, Pet. No. 45-036-07-1-5-00001 (May 18, 2012) (March 1, 2007 assessment) [Small Claims docket], the assessor challenged the county board's $28,100 reduction in the valuation of the taxpayer's townhome (from $373,100 to $345,000). The Assessor requested a value of $410,000 based upon a USPAP appraisal (with a January 1, 2006 valuation date), sales of allegedly comparable properties, and listing information for the townhome in 2009 and 2011. The taxpayers presented two appraisals. The first valued the property at $345,000 as of March 1, 2007. The second valued the property at $310,000 as of March 1, 2008. Taxpayers calculated trended values for the appraisals of $346,725 and $333,250, respectively, as of the January 1, 2006 valuation date. The adjoining townhome (the other half of the duplex) sold for $320,000 on March 31, 2008. And taxpayers stated they received a purchase offer on March 22, 2010 for $300,000 less seller concessions of $3,000. Taxpayers also asserted that sales of comparable properties supported the assessment reduction.

The Board first concluded that the assessor's appraisal made a prima facie case that the property was under-valued. (Page 8, ¶ 15(d).) But the Board observed that the assessor failed to prove an increase was warranted based on his comparable sales (because he failed to show the properties were comparable) and his listing information (the dates of which were "too far removed" from the valuation date). (Page 8, ¶ 15(d) n.3.) The Board found the taxpayers' appraisals to be probative of the townhome's assessed value as well. (Page 8, ¶ 15(d).) Although their appraisals determined values beyond the valuation date, the taxpayers trended the values to the valuation date.

In this classic "battle of the appraisers," the Board gave greater weight to the taxpayers' appraisal. The Board considered only their 2007 appraisal, because the 2008 appraisal was two years from the valuation date. (Page 9, ¶ 15(g) n. 4.) Noting that an appraisal valuing the property as of the proper valuation date "may be more reliable than an appraisal that must be trended," taxpayers' appraisal was only fourteen months after the valuation date and used a reasonable trending method (i.e. using the annual adjustments determined by the assessor pursuant to Ind. Code § 6-1.1-4-4.5). (Page 9, ¶ 15(g).) The biggest difference in the parties' appraisals was the locations of the chosen comparables. Taxpayers' comparables were closer to their townhome, and their "evidence suggests that, in the case of the subject property's neighborhood, proximity matters." (Page 9, ¶ 15(h).) In contrast, the assessor's comparables were all located in another neighborhood with higher values. And the assessor's "trending factors strongly support a finding that the [adjoining duplex] would not have been worth more than $350,000 in 2006." (Page 10, ¶
The Board found that taxpayers' townhome "would not sell for substantially more than its neighboring condo." *Id.* The Board held that the trended appraised value of $346,725 was the best evidence of the property's value. (Page 10, ¶ 16.)

**Procedural Note:** Taxpayers objected to the Assessor's appraisal because it was submitted after the county board's hearing. The Indiana Board overruled the objection, explaining that proceedings before it are *de novo* and that the parties are not limited to the evidence offered at the local level. (Page 2, ¶ 11(a) n.1 (citing Ind. Code § 6-1.1-15-4(k).) Not wanting to be outdone, the Assessor objected to the taxpayers' appraisal because it "did not value the property as of the proper valuation date and used sales outside of the January 1, 2005, to January 1, 2006, timeframe." (Page 4, ¶ 11(e) n.2.) The Board noted that the objections went to weight and relevancy of the information – not its admissibility – and overruled the objections. *Id.*

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.)

**Property Tax – Exemption decisions**

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](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](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.)

**Property Tax – Procedural & Jurisdictional Issues**

1. **Indiana Board has authority to hear claims regarding tax credits.** *Martin v. Ripley County Assessor*, Pet. No. 69-003-09-1-5-00001 (Dec. 2, 2011) (March 1, 2009 assessment) [Small Claims Docket]. Taxpayer claimed that his 2009-pay-2010 tax bill exceeded the 1% property tax cap. The Indiana Board of Tax Review explained that Indiana Code § 6-1.5-4-1(a)(4) (adding "property tax credits" to the Board's jurisdiction), as amended effective July 1, 2011, granted the Board authority to consider claims regarding tax credits. (Page 5, ¶ 16.)

2. **Form 134 was a binding agreement between taxpayer and assessor, not merely a "recommendation" to PTABOA.** *Wingfield L. Chubb, Trustee v. Porter County Assessor*, Pet. No. 64-023-07-1-4-00058 (Dec. 9, 2011) (March 1, 2007 assessment). In an appeal of its March 1, 2007 assessment, the taxpayer and PTABOA hearing officer executed a Form 134 resolving the appeal. But the PTABOA increased the property's assessment. Under Ind. Code § 6-1.1-15-1(j), which became effective July 1, 2008 and was in effect at the time that taxpayer filed its appeal with the PTABOA and at the time the Form 134 was signed by the parties, the parties' agreement was not merely a "recommendation" to the PTABOA and was binding on the parties and the PTABOA. (Page 6, ¶ 15(f).)

3. **Indiana Board could not consider late-filed petition.** *Seventh Street Group, LLC v. Porter County Assessor*, Pet. No. 84-004-08-1-3-00443 (Dec. 5, 2011) (March 1, 2008 assessment) [Small Claims Docket]. Taxpayer admitted that it did not timely file its Form 131 Petition with the IBTR regarding its March 1, 2008 assessment appeal. The Board explained:
Pursuant to Ind. Code § 6-1.1-15-3(d), the time limit for filing a petition with the Board and serving a copy of that petition on the opposing party is 45 days after the PTABOA’s determination. In this case, the PTABOA mailed its determination on August 9, 2010. The Board’s procedural rules allow an additional three days when a document is served through the mail. 52 IAC 2-3-1(f). Therefore, the Petitioner had 48 days to file its petition with the Board. That date would have been Sunday, September 26, 2010; however, the Board’s procedural rules made Monday, September 27, 2010, the actual last day for filing. 52 IAC 2-3-1(b).

(Page 4, ¶ 13(a).) The testimony indicated that the petition was submitted on September 28 or 29 – which was too late. Taxpayer "lost its opportunity" to appeal the March 1, 2008 assessment. (Page 4, ¶ 13.) The Indiana Board of Tax Review further noted: (1) the fact that the Indiana Board subsequently confirmed receipt of the Form 131 petition did not make it timely; and (2) the fact that the failure to file on time was not raised prior to the hearing was irrelevant. (Page 4, ¶ 13(c) & (d).)


The assessor objected to the taxpayer's appraisal and income and expense spreadsheet, claiming both failed to meet the Daubert standard for reliability and relevance because they treated several rental homes as one apartment complex. See Daubert v. Merrill Dow Pharmaceuticals, 113 S. Ct. 2786 (1993). The Indiana Board repeated the Tax Court's recent declaration, “[t]he valuation of property is the formulation of an opinion; it is not an exact science.” (Page 4, ¶ 11) (quoting Grant Co. Assessor v. Kerasotes Showplace Theatres, 955 N.E.2d 876, 882 (Ind. Tax Ct. 2011)). The Indiana Board overruled the objections, explaining: "Appraisals and the income capitalization approach on the spreadsheet are the kinds of evidence routinely used to establish the value of property. . . . [T]he Respondent failed to provide convincing authority or explanation to simply exclude the appraisal or spreadsheet based on Daubert." Id.

The assessor complained that getting an appraisal was cost prohibitive, arguing that the Indiana Board's deference to appraisals might create an "unlevel playing field." (Page 5, ¶ 12.) The IBTR found this contention unpersuasive, reasoning: "[Assessor] failed to show how this point diminishes the credibility of the Petitioner's case or how it enhances the credibility of the assessed values as they currently stand. Ultimately, what it would have cost the [assessor] for an appraisal is irrelevant to the determination of this case." Id.

5. 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).)

6. **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.)

7. **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:

> 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.

8. **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*
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 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.*

9. **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.)
10. **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. The 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.)

11. **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 observed that it 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.)

12. **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. Because the Board did not rely significantly on either attorney's testimony, the Board did not decide whether Rule 3.7 applied and whether the attorneys violated it.

13. **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.)

14. **Indiana Board finds that date on tax notice trumped unsworn testimony of deputy treasurer in finding that appeal was timely filed** (as 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.

15. 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. 5% burden-shifting rule applies to pending property tax appeals. Echo Lake, LLC v. Morgan County Assessor, Pet. Nos. 5-016-09-1-4-00001 et al. (Nov. 4, 2011) (March 1, 2009). Where the value of a mobile home park increased by more than 5% (from approximately $1.3 million to $2.95 million), the taxpayer argued that the assessor had the burden to prove the assessment was correct. The parties argued whether the statute (which was effective July 1, 2011) should have been applied retroactively or prospectively. The Indiana Board, however, stated it was "unconvinced that the application of Indiana Code § 6-1.1-15-17 to this case would, in fact, be a retroactive application of the law." (Page 8, ¶ 23.) To the extent it was a retroactive application, the Board found that the burden of proof was a procedural amendment that could be applied retroactively. (Page 8, ¶ 2 n.4.) In reaching this conclusion, the Board reasoned that the "burden of proof" exists only in the field of litigation and has no application in the regulation of conduct among members of society in general. Id. Thus, the change was not a change in the substantive law.

The Indiana Board rejected the assessor's argument that the assessment was the "affected thing" and thus the change of burden applied only for assessments after July 1, 2011. (Page 9, ¶ 25.) The Board explained: "Indiana Code § 6-1.1-15-17 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 9, ¶ 26.) Whether the Assessor has the burden to prove her assessment on appeal does not impact her obligation to assess property at its correct market value-in-use. *Id.* Thus, the "affected thing" was the evidentiary hearing wherein the Board evaluates the proof offered by the parties. *Id.* The General Assembly included no language stating that the change of burden applied only to future assessments. *Id.*

While the Indiana Board recognized that taxpayers would be treated differently depending on when their hearings were scheduled, it noted: "[T]hat is often the result of a change in the law – some litigants enjoy the benefits of the new legislation while others are deprived of the same rights simply based on the date on which some action occurs." (Page 10, ¶ 27.)

The Indiana Board held that the assessor failed to make a prima facie case that the property was correctly assessed for the March 1, 2009 assessment date. (Page 17, ¶ 34.) However, the taxpayer offered "rebuttal" evidence that the property's value as of March 1, 2009 was $2.3 million – higher than its March 1, 2008 assessed value. Taxpayer argued that this evidence should only be considered if the assessor had met her burden or the Taxpayer was found to have had the burden. But the Indiana Board held: "[O]nce probative evidence is submitted on the record, the Board cannot turn a blind eye to its value." (Page 18, ¶ 35.) Thus, the Board accepted that data (an income analysis) and assigned a value of $2.3 million for the March 1, 2009 assessment. (Page 19, ¶ 37.)

**Additional Procedural Note:** Even though the employer of taxpayer's representative was employed on a contingency basis, the Board concluded: "[The representative's] estimate of value may not be as persuasive as a similar analysis made by a non-contingently paid licensed appraiser, [but the representative] supported her calculation with verifiable market evidence." (Page 19, ¶ 37.)

**B. Taxpayer's obligation to submit valuation evidence was not triggered when assessment increased by more than 5% and assessor failed to prove the assessment was correct.** *Stout v. Orange County Assessor*, Pet. No. 59-007-09-1-5-00001 (Nov. 7, 2011) (March 1, 2009 assessment) [Small Claims Docket]. Taxpayer claimed that the assessor had the burden to prove the value of a one-acre home site and 8.12 acres of additional land for the March 1, 2009 assessment date, because the value had increased more than 5% over the prior year's assessment. Taxpayer also argued that additional land should be assessed as agricultural woodland, not excess residential. The Indiana Board ruled that the assessor had the burden to prove the assessment. (Page 7, ¶ 13(i).) The assessor failed to make a prima facie case. The Board explained: "Petitioner’s prior failure to provide proof about the agricultural use of the property during local proceedings is unimportant. What is important is that this record fails to disprove agricultural use or prove the land is used for some other purpose." (Page 9, ¶ 14(g).) The Board further held: "When the Respondent has the burden of proving the assessment is correct and fails to provide probative evidence supporting the assessment, the Petitioner’s obligation to introduce substantial valuation evidence is not triggered." (Page 9, ¶ 14(i).)
Taxpayer only challenged its land assessment. The Board ordered that the land's 2009 value be reduced from $45,600 to its 2008 value of $8,000. (Page 10, ¶ 15.)

C. **Taxpayers failed to prove prior year's assessments, so there was no evidence showing assessed values increased by more than 5%; property was not the "same property" from prior year due to inclusion of omitted land.** *Madden v. Marion County Assessor*, Pet. Nos. 49-801-02-1-5-07175 and 49-801-04-1-5-00995 (Nov. 14, 2011) (March 1, 2002 and 2004 assessments). Taxpayers challenged the valuations of their residential land for the March 1, 2002 and 2004 assessment dates. They claimed the land value increased 13.5% between 2002 and 2004, a fact which shifted the burden to the assessor to prove the correct value. The assessor responded that the value increased due to the addition of a 25 foot strip of land to the assessment. But the taxpayers failed to submit evidence of the property's value in 2001 and 2003 – the years preceding the assessment dates at issue. Thus, there was no evidence as to whether the property's assessed value had increased more than 5% between assessment dates. (Page 8, ¶ 20.)

The Board further observed, *see id.*:

Even if the Board assumed that the property’s 2003 assessment was the same as the property’s 2002 assessment, there is undisputed evidence in the record that the parcel in 2004 incorporated an additional 25 feet of land that had been previously omitted from the Petitioners’ assessment. Therefore, the property at issue in the Petitioners’ 2004 appeal is not the same as the property at issue in their 2002 appeal. Thus, the Board holds that the burden of proof remains on the Petitioners in these matters.

**Additional Procedural Note:** The assessor objected to Petitioner's Exhibit 2 because the taxpayers had not exchanged any exhibits or summaries of witness testimony as required by 52 IAC 2-7-1. Because the property record card is a record from the assessor's office, the ALJ admitted the exhibit. (Page 3, ¶ 6 n.1.)

**Additional Procedural Note:** Taxpayer's counsel objected to Respondent's Exhibit 2, because there was no evidence of the interior amenities of the comparable sales or anyone to cross-examine as to those amenities. Because this objection goes to the weight of the evidence, rather than its admissibility, the ALJ admitted the exhibit. (Page 3, ¶ 7 n.2.)

**Additional Procedural Note:** Taxpayer claimed the land was overvalued based on his "knowledge of the area." But no evidence of value was presented. The Board explained: "While the rules of evidence generally do not apply in the Board’s hearings, the Board requires some evidence of the accuracy and credibility of the testimony. Statements that are unsupported by probative evidence are conclusory and of no value to the Board in making its determination." (Page 9, ¶ 24.)

D. **Assessor had the burden and failed to support 5%+ increases in assessments of contiguous residential parcels.** *Lehman v. Steuben County Assessor*, Pet. Nos. 76-010-08-1-5-00006 *et al.* (Dec. 9, 2011) (March 1, 2008 assessment) [Small Claims
Docket]. Taxpayer contested the land values of four contiguous residential parcels for the March 1, 2008 assessment date. All four parcels' 2008 assessments had increased by more than 5% over their assessments as of March 1, 2007. "Thus, the Assessor had the burden of proving that the parcels' March 1, 2008 assessments were correct." (Page 5, ¶ 17.) The assessor failed to support the assessments, so the Board reduced the land valuations to their 2007 levels. Page 7, ¶ 19.

E. **Parties agreed the assessment increased by more than 5%; assessor had burden to support assessment.** Welbourne G. Williams, Trustee v. Dearborn County Assessor, Pet. No. 15-018-09-1-5-00869 (Dec. 12, 2011) (March 1, 2009 assessment) [Small Claims Docket]. Taxpayer appealed the March 1, 2009 assessment of an unimproved parcel located in a single-family housing subdivision. The parties agreed that the property's assessment had increased by more than 5% over its March 1, 2008 value. The Board made a preliminary ruling that the assessor had the burden of proof, so the assessor presented his case first. (Pages 1-2, ¶ 10.) The Board noted that the assessment had increased by more than 5% and "that fact is the prerequisite specified in section 17." (Pages 4, ¶ 16.) The assessor failed to make a prima facie case that the assessment was correct. (Page 4, ¶ 17.) Therefore, the Board explained that the taxpayer's "obligation to prove the existing assessed value is wrong and to prove a more accurate assessed value was not triggered." (Page 4, ¶ 17(e).)

F. **New burden-shifting rule is "clear and unambiguous".** Hale v. Steuben County Assessor, Pet. No. 76-017-09-1-5-00001A (Dec. 19, 2011) (March 1, 2009) [Small Claims Docket]. After taxpayer filed an appeal challenging the March 1, 2007 assessment for an adjoining lot (Lot 25), the Steuben County PTABOA increased the March 1, 2009 assessment for the contested property (an unimproved lot) from $6,900 to $43,000. There was no evidence that the PTABOA notified taxpayer of that increase other than referring to it on the second page of the Form 115 determination for Lot 25. The Board observed, "Unambiguous statutory language must be given its plain meaning. And this new burden-shifting provision states a basic rule about reviewing certain assessments in clear and unambiguous terms." (Page 4, ¶ 12.) Because the increase of assessment was "far more than 5%," the assessor had the burden of proving that the assessment was correct. (Page 4, ¶ 17.) The property's assessment was reduced to its March 1, 2008 value. (Page 7, ¶ 19.)

**Additional Procedural Note:** When acting as a "primary assessor," the PTABOA must issue proper notice of the taxpayer's right to appear before it. (Page 6, ¶ 18(c).) Nothing in the record showed that the PTABOA gave taxpayer notice of its action increasing the property's March 1, 2009 assessment, except for the reference on the second page of the Form 115 determination for the adjoining Lot 25. "That method, however, was not reasonably calculated to inform Mr. Hale of the PTABOA's action as to the subject property. And it did not purport to inform Mr. Hale of his right to appear before the PTABOA to contest the assessment." (Page 6, ¶ 18(d).) Because the assessor did not meet her burden, the Board did not decide whether the lack of adequate notice invalidated the PTABOA's actions. (Page 6-7, ¶ 18(e).)
G. Assessor had the burden for 2007, but Taxpayers had the burden for 2008, where the property's value had not changed. Kloepper v. Steuben County Assessor, Pet. Nos. 76-011-07-1-5-00092 & 76-011-08-1-5-00007 (Dec. 22, 2011) (March 1, 2007 and 2008 assessments) [Small Claims Docket]. Taxpayers appealed the March 1, 2007 and 2008 assessments of their land assessments for land used to access storage buildings and as green space. The land was part of a lot that had been split in the 1950s, with both halves being the same size and having the same use. The assessor applied a 50% influence factor to the other half lot but none to the contested half lot. The PTABOA applied a 20% factor to the contested half lot.

i. Both the initial and modified assessments were greater than 5%, so the Board concluded that it "need not decide whether the operative assessment to compare to the prior year's assessment is (1) the assessment originally made by the county or township assessor, or (2) the PTABOA's determination." (Page 7, ¶ 18 n.4.) The assessor had the burden of proving that the March 1, 2007 assessment was correct. (Page 7, ¶ 18.) But the assessor failed to do so, and the taxpayers failed to prove that any adjustment below the March 1, 2006 assessed value was justified. (Page 11, ¶ 23.) The assessment was thus reduced to its 2006 value. Id.

ii. The assessor did not change the half lot's assessment from the March 1, 2007 and 2008 assessment dates. The PTABOA reduced both years' assessments to the same amount. "Thus, the Kloeppers bore the burden of proving that they were entitled to any reduction in the subject property's March 1, 2008 assessment." (Page 7, ¶ 19.) The 2008 assessment remained the same, because the taxpayers did not meet their burden of proving that the value should be reduced. (Page 11, ¶ 24.)

H. 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) [Small Claims Docket]. Taxpayer challenged the March 1, 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.)

I. 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.

J. 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 property's use had changed. The Board therefore did not answer the question of whether a change in use affects whether the burden shifts. (Page 6, ¶ 19(c).)

K. 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 Procedural 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.)

L. **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.)

M. **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.
Income Tax

1. **Interest Expenses disallowed.** In Letter of Findings No. 02-20110039, issued December 28, 2011, the Department challenged what it called the "underlying business rationale" of transactions between related entities, ultimately disallowing interest expenses pursuant to I.C. § 6-3-2-2(l)-(m) for the audit years 2003 through 2005. The taxpayer argued that the Department lacked authority to disallow interest expenses, because I.C. § 6-3-1-3.5(b)(9) (the intangible expense add-back statute) is only effective for taxable years beginning after June 30, 2006. The Department stated that while I.C. § 6-3-1-3.5(b)(9) had the effect of requiring an Indiana taxpayer to add-back certain intangibles, nothing in the statute states that the Department **did not have the authority** to add back the same expenses in years prior to July 1, 2006. As the taxpayer was unable to show the transactions were arm's length, the Department denied the taxpayer's protest.

2. **RAR Adjustments allowed.** Letter of Findings No. 02-20110225, issued January 25, 2012, held that the taxpayer was allowed to include the effect of an RAR adjustment from a closed year when calculating the NOL deduction taken in a subsequent open year.

3. **Department agrees that proceeds from asset sale were "nonbusiness income" allocated outside of Indiana.** Letter of Findings No. 02-20110133, Adjusted Gross Income Tax For Tax Years 2005, 2006, and 2007 (January, 2012). Taxpayer, an out-of-state business, was a member of an affiliated group which filed Indiana adjusted gross income tax ("AGIT") returns. It protested the reclassification of income from the sale of a consumer products line as business income for 2006. Taxpayer asserted that its main line of business is in non-consumer products and that it acquired the consumer products line in a merger which occurred before the audit years. According to Taxpayer, the merger allowed Taxpayer to acquire a single, specific non-consumer product which was manufactured by the other entity ("Other Entity") involved in the merger. Other Entity produced consumer products as well as the specific non-consumer product. Following the merger, Taxpayer continued to produce and market the consumer items until it sold the consumer products line in 2006. Taxpayer argued that it made this sale to streamline its operations, which allowed it to focus on its core, non-consumer products business.

The Department sustained the protest, explaining:

Taxpayer was able to provide documentation and analysis which established that the sale of the division in question was not part of its normal business operations. Also, Taxpayer provided documentation and analysis which established that the sale was not necessary or essential to its regular trade or business, since the division in question was not acquired, managed, and disposed of by Taxpayer in a process integral to Taxpayer's regular trade or business. Taxpayer has established that the sale of the division in question does not meet either the transactional test or the functional test as provided in [May Dep't Store Co. v. Indiana]
**Dep't of State Revenue, 749 N.E.2d 651 (Ind. Tax 2001)**. The income from the sale of the consumer products division was therefore non-business income as reported by Taxpayer.

4. **Department of Revenue finds that non-existent company cannot owe income or sales taxes** (originally posted at taxhatchet.com on April 13, 2012).

*Would've, Could've, but Didn't – No Nexus for Taxpayer but related Sci-Fi Gaming Company would have been hit with Indiana income tax and sales tax says Department of Revenue*

*Right theory, wrong taxpayer – at least according to the Indiana Department of Revenue in a letter of findings (a final determination of a taxpayer's protest of a proposed assessment) released in February. In the ruling, a limited liability company (called generically the "Entity") escaped its proposed assessments for the 2004 to 2009 tax years because it did not exist during that time. The company was not formed until January of 2010. Because it did not exist, it had no nexus with the Hoosier State. But a related company ("Retail Merchant" in the decision, but I will call it "GameCo") would have been subject to adjusted gross income tax had the Department elected to assess it, the Department concluded. GameCo is described as a "leader in the Sci-Fi Gaming Industry and mostly sold its games to distributors and retailers. The games were sold during an Indiana convention every year (presumably "GenCon" – which I understand is a "blast" and not just because people dress up like Han Solo). And GameCo sent most of its employees to a "retailer summit" hosted in Indiana for several days each year during the audit period.*

Entity argued that neither it nor GameCo had nexus under 15 U.S.C. § 381 ("Public Law 86-272") for income tax purposes. Under Public Law 86-272, the Department explained, "a state may not impose an income tax on income derived from business activities within that state unless those activities exceed the mere solicitation of sales." The Department quoted a 1981 Indiana Supreme Court decision, where the Court explained: "We also believe that Congress perceived 'solicitation' as embodying 'sundry activities so long as those activities [are] closely related to the eventual sale of a product.' Finally, when a corporate representative performs an 'act of courtesy' in order to accommodate a customer, he has not ventured beyond the realm of 'solicitation.'" *Citing Indiana Dep't. of Revenue v. Kimberly-Clark Corp., 416 N.E.2d 1264, 1268 (Ind. 1981)* (internal quotes omitted).

According to the Department, Entity did not "elaborate on the particular dimension of trivial non-solicitation contact with a state that purportedly does not establish nexus." As noted above, however, that turned out to be irrelevant to the Department's decision. A taxpayer cannot be taxed for years it did not exist, the Department reasoned! But the Department emphasized that GameCo's Indiana activities – a "large presence" and "significant sales" at the annual convention – exceeded "mere solicitation" and were more than *de minimis* or trivial non-solicitation activities.
The Department's final determination on this income tax assessment can be viewed at http://1.usa.gov/GWD6Tw. The Department also released a separate ruling finding that Entity did not owe sales tax for the same audit period. Again, Entity did not exist and made no retail sales. But the Department observed that, under the U.S. Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the totality of facts demonstrated that GameCo's "actions represent a substantial nexus with Indiana." That ruling can be viewed at http://1.usa.gov/GYaTWf.

There is no indication in the ruling why the Entity was assessed and the Retail Merchant was not. Perhaps the auditor was too engrossed in a game of Dungeons and Dragons or was befuddled by an elaborate magical spell.

5. **Taxpayer failed to support claimed qualified research expense credit with adequate records.** Letter of Findings No. 02-20110342, Corporate Income Tax for Tax Years 2007-09 (April, 2012). The taxpayer, a manufacturer, claimed the Indiana qualified research expense tax credit on its corporate income tax returns. The credit is available for qualified research expenses that are incurred for research conducted in Indiana and related wages. Wages paid to individuals who do more than research have their wages allocated for the percent of time spent doing qualified activities. The Department audited the returns and disallowed portions of the credits for 2007 and 2008, though it granted more than was initially claimed for 2009.

The auditor requested source documentation to support the claim that the wage allocation for 300 employees rose from 1% to 52%. The taxpayer declined to provide any documentation, arguing that it was not required to provide records or other evidence other than its own statement to substantiate the amount of qualified expenses. Without other evidence, the auditor used an organizational chart, interview recaps, and wage reports to reduce the allocation percentage. The auditor removed the wages of high-level employees who did not directly supervise research, and where there were significant numbers of employees with the same job title listed as performing the same job, the auditor reduced the number by half.

At the protest hearing, the taxpayer focused on the applicable burden of proof, asserting that it was not required to corroborate its research expenses, and that the auditor reduced the expenses arbitrarily or without basis. The taxpayer cited to a 1930 case from the Second Circuit, but the Department found the case to be inapplicable and noted that the case was overturned by Congress. Further, taxpayers have a duty to retain all relevant documents to allow the Department to properly calculate taxes owed.

The taxpayer provided the statements of two vice presidents and 346 pages of questionnaires and wage allocations, but the Department found that the documents were inconsistent, unreliable, and failed to support the claimed expenses. The research projects were conducted inside and outside of Indiana, and it was not clear which employees performed qualified research services in Indiana. Thus, the taxpayer did not meet its burden of proving that the Department erroneously disallowed some of the claimed credit.
6. **Department removes two affiliates from Taxpayer's consolidated return: one lacked Indiana sourced income, and the second's income could not be taxed under Public Law 86-272. Letter of Findings No. 02-20110301, Adjusted Gross Income Tax for Tax Year 2007 (April, 2012).** The taxpayer filed a consolidated corporate income tax return on behalf of itself and two affiliated companies ("Member A" and "Member B"). After an audit, the Department determined that Member A and Member B were not doing business in Indiana and removed them from the consolidated group, resulting in the assessment of additional tax.

The taxpayer argued that under earlier case law, both Member A and Member B had sufficient nexus with Indiana to be included in the return. As to Member A, it reported no payroll or other apportionment factors to Indiana. Further, while its president performed services in Indiana, the services were performed for the taxpayer rather than Member A. Absent a showing that the president was working as Member A's president in Indiana, the Department found that Member A did not derive income from Indiana sources and disallowed its inclusion in the consolidated return. Member B's employees attended training at the taxpayer's Indiana facility, and its executives travel to Indiana monthly to engage in reviews of products in Indiana. The Department found that these activities served no purpose apart from their role in facilitating solicitation of sales, so the activities were ancillary to the solicitation and therefore protected by Public Law 86-272. The Department thus found that Member B was properly removed from the group filing.

The taxpayer was the subject of a previous audit that also involved the Department removing affiliates from the taxpayer's consolidated group. That audit was eventually resolved through a settlement agreement. The taxpayer argued that the settlement agreement required the Department to include Member A and Member B in its consolidated group. The Department disagreed, holding that the agreement referred to consolidated returns under Ind. Code § 6-3-4-14, rather than consolidated returns based on other legal or factual grounds. Therefore, because the settlement simply permitted a consolidated return under Ind. Code § 6-3-4-14, subject to the conditions set forth therein, rather than a consolidated return including companies that did not conduct business in Indiana, the settlement did not apply to the present case.

7. **Department removes one affiliate from Taxpayer's consolidated return, and it allows the inclusion of a second for one of two tax years. Letter of Findings No. 02-20110565, Corporate Income Tax for Tax Years 2007-08 (April, 2012).** The taxpayer, a parent corporation doing business both inside and outside of Indiana, filed on a consolidated basis with its subsidiaries, including Sub L and Sub G. On audit, the Department determined that both Sub L and Sub G should be excluded from the taxpayer's consolidated return. Sub L was excluded because it did not have Indiana source income; Sub G was excluded because its inclusion resulted in an unfair reflection of the taxpayer's overall income. The taxpayer was assessed additional tax and protested.

As to Sub L, the taxpayer argued that since Sub L's managers were the same as the taxpayer's managers, Sub L had a commercial domicile in Indiana. The taxpayer
effectively asserted that Sub L can acquire nexus through the activities performed by the managers of it and its filing affiliates. The Department disagreed, because Indiana requires that each entity in the consolidated group have income derived from Indiana sources to the extent that it has Indiana property, payroll, or sales factors. Because Sub L had no apportionment factors in Indiana, it could not be included in the consolidated return.

As to Sub G, the taxpayer argued that it was formed as an umbrella corporation for certain foreign operations. Other subsidiaries loaned Sub G several hundred million dollars to purchase businesses, and Sub G paid interest on those loans. The mechanical application of the tax statutes can result in an unfair reflection of income, so in certain cases the Department is permitted to use more appropriate calculations. The Department held that an alternative calculation was not appropriate for the interest paid in 2007 by Sub G to another subsidiary which was offset by an equal and opposite inclusion of income. However, for 2008, the Department held that the payment of interest with zero net financial effect became a loss because the recipient subsidiary was not included in the taxpayer's Indiana consolidated return. Therefore, the Department allowed the inclusion of Sub G for 2007 but denied it for 2008.

8. **Indiana Department of Revenue reclassifies sales of various assets and a termination fee as “business income” that could be apportioned to Indiana.** Supplemental Letter of Findings No. 02-20100199, Corporate Income Tax for Tax Years 2005, 2006, and 2007 (June, 2012). The Department reclassified income from a Taxpayer’s asset sales from nonbusiness to business income for the 2005 to 2007 tax years. In its original ruling, the Department denied Taxpayer’s protest regarding the reclassification. Taxpayer was an out-of-state company which owned and operated various facilities throughout the United States and internationally. In Indiana, Taxpayer conducted its business through a limited liability company ("Indiana LLC"). The Indiana LLC initially was treated as a partnership, consisting of two partners. Taxpayer owned a majority of the Indiana LLC shares. The other partner was an unrelated third party. At some point, Taxpayer acquired the remaining interest from the other partner and thereafter wholly owned the Indiana LLC. As a single member LLC, the Indiana LLC became a disregarded entity for federal income tax purposes and was treated as a division of Taxpayer. Taxpayer does not file a consolidated return with any other entity. It files its own Indiana corporate income tax returns, having income both from within and without Indiana.

As the Department explains:

The Department's audit determined that Taxpayer had misclassified some of its income as nonbusiness income. The disputed income classification was attributed to the following transactions: (1) the sale of one of Taxpayer's facilities ("Facility at issue") in 1999 ("1999 asset sale"), (2) the sale of land adjacent to the Facility at issue in 2000 ("2000 asset sale"), (3) another sale of land adjacent to the Facility at issue in 2004 ("2004 asset sale")
(collectively, "Asset Sales"), (4) the termination fee which resulted from an unsuccessful merger ("Termination Fee") in 2006. The Department considered the income attributed to the above-mentioned four transactions ("Income at issue") as business income. The Department's reclassification of the Income at issue reduced Taxpayer's NOLs and, as a result, the audit assessed Taxpayer additional income tax, penalty, and interest for the 2006 and 2007 tax years.

Taxpayer had two arguments. First, Taxpayer asserted that it and the Indiana LLC were not unitary and therefore, “Indiana has no right to tax the gain.” Second, Taxpayer claimed the income was nonbusiness income. The Department first reviewed the Indiana Tax Court’s holding in *May Dep’t Store v. Indiana Dep’t of State Revenue*, 749 N.E.2d 651, 661-63 (Ind. Tax Ct. 2001), where the Court concluded that Indiana applies two test in determining what is “business income,” a transactional test and a functional test.

The Department addressed each of Taxpayer’s arguments.

A. **Unitary Business.** Taxpayer argued that its operations outside Indiana were “fundamentally different” than the Indiana LLC’s operations: the entities provided different forms of entertainment and earned money in different ways. But the Department concluded that their respective operations within the entertainment business “essentially align with each other.” In addition, the Indiana LLC’s facility was described in Taxpayer’s documents as its “first company-designed and developed” facility. Taxpayer planned and constructed another facility adjacent to the Facility at issue, which offered the same form of entertainment. Further, according to SEC reports, Taxpayer’s strategic plan included developing real estate at existing properties and developing projects at new sites. The Department found, “Taxpayer's documentation demonstrates that there is functional integration, centralization of management, and economies of scale within its business enterprise. Taxpayer and the Indiana LLC thus are in a unitary business.”

B. **Sale of the Facility at Issue (1999 Asset Sale).** Taxpayer argued that the income attributed to the 1999 Asset Sale was an installment sale contract, which dealt with real property outside of Indiana, and that its income from the sale was not attributable to Indiana. The Department concluded that the income was business income but that income from the sale should have been included in its sales factor denominator (Taxpayer’s everywhere sales) and not the numerator (Indiana sales).

C. **Sales of Two Parcels adjacent to the Facility at Issue.** Taxpayer asserted that the income attributed to the 2000 and 2004 sales of two parcels of land adjacent to the Facility at issue was non-business income pursuant to 45 IAC 3.1-1-41, Example 4, and 45 IAC 3.1-1-58.

Taxpayer reasoned:
The vacant land adjacent to [the Facility at issue] was used in [Taxpayer’s] business when it operated [its entertainment] business. After [Taxpayer] sold [the Facility at issue] in 1999, it did not use the adjacent vacant parcels in the regular course of business for its remaining business divisions. [Taxpayer] held onto the parcels solely for investment purposes: in the event that [the state where the real property is located changed its state law], [Taxpayer] would have developed the properties for [another entertainment] purpose.

The Department disagreed, explaining that Taxpayer’s holding onto the land pending a change of state law was not an “identifiable event” establishing the land’s “permanent withdrawal,” as required by 45 IAC 3.1-1-41. The income from the sales was business income that should be apportioned.

D. **Termination Fee.** Taxpayer further contended that, since both parties to the merger agreement were not domiciled in Indiana, the Termination Fee was not subject to Indiana income tax as "nonbusiness income." The income should have been allocated to its state of domicile, Taxpayer contended. The Department and Taxpayer agreed the income was not business income under the transactional test. Only its characterization under the functional test was at issue. Turning to Black’s Law Dictionary (8th ed. 2004), the Department defined a “termination fee” as a “fee paid if a party voluntarily backs out of a deal to sell or purchase a business or a business's assets.” Taxpayer claimed it was in the business of operating entertainment facilities, not collecting termination fees. But the Department reasoned differently, finding “Taxpayer’s entertainment business includes selectively targeted mergers to increase its market share.” “Taxpayer negotiated and Seller agreed to the Termination Fee to ensure the desired result – completion of the acquisition. . . . Thus, the Termination Fee was [an] essential and integral part of Taxpayer’s business operations.” The fee was business income that should have been apportioned under Ind. Code § 6-3-2-2(b), the Department ruled.

**Withholding Tax**

1. **10% late-filing penalty removed by Department, where Taxpayer had "acceptable" payment history** (originally posted at www.taxhatchet.com on June 28, 2012).

*A day late, but not a penalty dollar short: Indiana Department of Revenue waives 10% penalty for taxpayer who filed employee withholding tax return one day late but had "acceptable" payment history*

A Taxpayer (for purposes of this post, "LateCo"), through its payroll service provider, in November 2011 filed its Indiana employee withholding taxes one day late – November 22d instead of November 21st. The Department of Revenue applied a 10% penalty, and LateCo protested. The letter of findings does not outline LateCo's defense. Conceivably, the pressure of hosting one's family for Thanksgiving dinner may have distracted the responsible remitter. We'll never know. Whatever LateCo's argument may have been, it worked. The Department
abated the penalty. The Department can waive a penalty if a taxpayer can show that its failure to file was due to a "reasonable cause and not due to willful neglect." (citing Ind. Code § 6-8.1-10-2.1(d).) "Reasonable cause" requires a taxpayer to show that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty." (citing 45 IAC 15-11-2(c).)

LateCo had filed a day late for the month ending September 30, 2011 as well, but the Department had abated the penalty before issuing an assessment. Regardless of this previous, similar transgression, the Department concluded: "[LateCo] has a solid history of remitting its tax payments and filing its tax returns on or before the statutory deadlines for the payments and returns. [LateCo] has provided sufficient information to justify penalty waiver in this case. Thus, [LateCo]'s protest is sustained." But the Department further warned, "[LateCo] is reminded that the Department may not necessarily waive potential future penalties for late payments."

LateCo also protested the imposition of interest, but the Department explained that it "may not waive interest as provided by IC § 6-8.1-10-1(e)."

Gross Retail (Sales) & Use Tax

1. "Trip charges" not subject to sales tax, but heating and cooling equipment provider subject to sales tax on unitary transactions. Letter of Findings 04-20110121, Sales and Use Tax for the Years 2007, 2008, and 2009 (January, 2011). Taxpayer ("HVAC Co.")) in this protest was an Indiana company which sold, installed, maintained, and serviced heating and cooling equipment for both commercial and residential customers. The Department of Revenue concluded that the "trip charges" charged to HVAC Co.'s customers were not subject to the sales tax. The Department's auditor had imposed the sales tax on "trip charges" identified on HVAC Co.'s invoices. HVAC Co. argued that the "trip charge" was a nontaxable service, not a "delivery fee." According to HVAC Co., the trip charges represented compensation for the time and skill of the provider's technicians, who were sent to a customer's site to diagnose and assess problems with the customer's heating and air conditioning systems. The trip charges were assessed whether HVAC Co. ultimately provided materials to the customer or whether the service provided included no transfer of materials. Thus, HVAC Co. asserted that no sales tax was due.

The Department agreed, concluding: "[HVAC Co.] has provided sufficient documentation demonstrating that the 'trip charges' were charges for services rendered and, therefore, not subject to sales tax . . . ."

The Department also assessed taxpayer for sales tax that the Department concluded should have been collected on personal property sold to customers (including filters, water panels, capacitors, igniters, compressors, condensers, inducer motors, humidifiers, transformers, coil cleaners, and blower motors). Relying on the Department's sales tax Information Bulletin No. 60, HVAC Co.
asserted that the items at issue qualified as "improvements of real property" and were therefore exempt. HVAC Co. also argued that the items were sold on a "lump-sum basis," which included the cost of labor and materials and that it paid sales tax at the time it purchased the materials. HVAC Co. believed that, because a central air conditioning unit was an improvement to real estate, the parts used to repair central air conditioning units were not taxable. But even if the items at issue were incorporated into real estate, the conversion of tangible personal property into realty did not relieve the taxpayer from its burden of paying sales or use tax with respect to the property, the Department ruled. (citing 45 IAC 2.2-4-21(a).) The Department observed that HVAC Co. did not separate its charges for labor and materials. Accordingly, the Department found that the items at issue "fell squarely under the definition of the unitary transactions pursuant to IC § 6-2.5-1-1(a) and 45 IAC 2.2-1-1(a)." HVAC Co. was required to collect sales tax on its total charges.

HVAC Co.'s documents did show that it had paid sales tax on certain materials it had purchased and sold to customers. The Department allowed HVAC Co. credit for sales tax it had paid on those purchases.

2. **Department allowed industrial processor's partial exemption for utilities purchased but denied exemption for "coatings" applied to steel. Letter of Findings No. 04-20110404, Sales and Use Tax for Tax Years 2008-10 (February, 2012).** The taxpayer, an industrial processor that applied liquid coatings to steel, protested the imposition of sales and use tax on its purchases of utilities and packaging supplies. The taxpayer claimed that its purchases of natural gas and water were predominantly used in its processing operations and therefore qualified for an exclusion from tax, an exclusion that is only available if the utilities are purchased from a public utility. The utilities were purchased from a vendor rather than the local public utility. The taxpayer argued that the vendor had been found to be a public utility under Title 8 of the Indiana Code by the Indiana Utility Regulatory Commission, but the Department rejected the Title 8 definition and instead relied on the definition in the Department's Bulletin No. 55. Although the vendor did not qualify under Bulletin No. 55, the Department found that the utilities qualified for a partial exemption subject to supplemental audit.

With regard to its purchases of packaging supplies, the taxpayer sought the exemption which is available for packaging supplies where the buyer acquires the supplies for use as nonreturnable packaging for selling the contents the person adds. The taxpayer argued that it manufactured and sold coatings which it applied to steel; the taxpayer sold coatings and added them to the packaging supplies that were used to ship the final product. The Department disagreed, holding that an industrial processor is specifically excluded from the exemption for nonreturnable packaging supplies. The taxpayer's purchases were therefore fully taxable.

3. **Department applies use tax to entire amounts paid to direct mail vendor to send bills to customers. Letter of Findings No. 04-20110367, Use Tax for Tax Years 2008-09 (February, 2012).** The taxpayer paid direct mail vendors to send bills to customers,
and was charged for the direct mailers and the postage associated with the mailers. Following an audit, the Department imposed use tax on the full amounts paid to the vendors. The taxpayer protested that the direct mailings were a service and were not taxable. In support of its argument, the taxpayer stated that the main purpose of the transactions at issue was the billing services provided by the vendors. Further, the taxpayer argued that the postage was paid upfront and that it should not be included in the taxable amount.

The Department disagreed with the taxpayer's statement of the facts. The actual invoices at issue showed that the costs of services and tangible personal property were not separately stated. Because there was no breakdown of services and property, the Department held that the transaction "fell squarely within" the definition of a unitary transaction. The invoices did not establish that the value of the property transferred was less than ten percent of the service charge, and as a practical matter, the vendors pay the postal service and are in turn paid by the taxpayer. Thus, the entire invoiced amounts were subject to use tax.

4. Department rejects taxpayer's protest of audit results, where taxpayer's estimate was derived from alternative sample of transactions. Letter of Findings No. 04-20110331, Sales and Use Tax for Tax Years 2007-09 (February, 2012). The taxpayer sold goods via the internet and a physical location to customers inside and outside of Indiana. During an audit, the taxpayer and the auditor agreed to use statistical sampling to determine the amount of additional sales tax due. The parties agreed upon two months from each year, and, after fully examining the transactions in those months, the audit assessed additional tax. The taxpayer protested the results of the audit and claimed the projection result was not correct.

To support its position, the taxpayer stated that 99.5% of its business was internet-based, and that it had only two accounts with third-party vendors to process its internet sales. The taxpayer selected transactions from four months to show that it had limited sales in Indiana for the audit years; none of the months presented were the same months used in the statistical sample.

The Department rejected the new records. Using a different set of sales records "certainly could" produce different results than the audit, but it does not demonstrate that the audit's projection was incorrect. Further, the taxpayer and the Department agreed, in writing, to use statistical sampling to project the audit result. Both parties were bound by the result, and neither the Department nor the taxpayer could subsequently argue that the projection result was not correct by using a different set of record just because the initial result was undesirable. Thus, the taxpayer's protest was denied.
5. **Letter of Findings No. 04-20110504, Gross Retail Tax for Tax Year 2010 (February, 2012).** The taxpayer was the president of an Indiana farming business. The business, with the taxpayer acting as an agent, formed a Montana LLC which was approved by the Montana Secretary of State. Then, as an agent of the LLC, the taxpayer purchased a recreational vehicle ("RV") in Florida without paying sales tax. The LLC held title to the RV, and because Montana has no use tax on RVs, no tax was paid to any state on the RV.

The Department assessed use tax on the RV and imposed a 100% fraud penalty on the taxpayer. Taxpayer protested the imposition of both the tax and the penalty. In abating the penalty, the Department found that the taxpayer lacked scienter, i.e., the taxpayer lacked the intent to defraud. The taxpayer consulted a Montana attorney in good faith, paid that attorney to establish the LLC, and believed the attorney's explanation that establishing the LLC would allow the taxpayer to avoid paying Indiana use tax. Thus, it was not possible to show that the taxpayer had the requisite intent needed to sustain the penalty.

The Department found, however, that use tax was owed on the RV. The taxpayer argued that he used the RV for the legitimate business purpose of travelling from state to state in order to examine farming practices in other states, and that Indiana was required to give "full faith and credit" to Montana's decision that RVs are not subject to use tax. The Department did not deny that the LLC could have been formed for nontax purposes, but information on the Montana attorney's website noted that the purpose of establishing a Montana LLC was to "save a great deal of money on taxes and licensing fees." Thus, the Department was not persuaded by the taxpayer's evidence and held that use tax was owed on the RV.

6. **Department cannot prove "scienter" element to impose 100% fraud penalty; without proof of fraud, statute of limitations prevented assessment of use tax against RV owner** (originally posted at www.taxhatchet.com on April 26, 2012).

*Indiana RV owner outruns 100% fraud penalty and use tax on 3 vehicles purchased with Montana LLC, where assessments were issued beyond statute of limitations*

Montana is called “The Treasure State,” but the Indiana Department of Revenue charged an Indiana resident with fraud in using a Montana LLC to make the “Hoosier State” a “State of Lost Treasure.” In its Letter of Findings No. 04-20110450 released last month, the Department reported its proposed assessments of use tax against the resident and his wife, who were the sole members/owners of a Montana LLC which held title to three recreational vehicles (RVs). One RV was purchased from an Indiana vendor in 2007. The other two were acquired in 2006. The owner had paid no sales tax and remitted no use tax on the purchases. The Department issued proposed assessments of use tax, a fraud penalty, and interest. The standard penalty is 10% of the unpaid tax; the fraud penalty is 100% of the tax if no return is filed. See Ind. Code § 6-8.1-10-4.

The Department’s rule defines “fraudulent intent” as the “making of a misrepresentation of a material fact which is known to be false, or believed not to be true, in order to evade
taxes.” See 45 IAC 15-11-4. Negligence is not the required intent. See id. The Department’s rule also requires a showing by “clear and convincing evidence” that these five elements of fraud are present: (1) misrepresentation of a material fact; (2) scienter ("a legal term meaning guilty knowledge"); (3) deception; (4) reliance; and (5) injury. See 45 IAC 15-5-7. These factors, if present, might form the basis for the next great American tax-mystery novel, but the Department found the scienter element missing.

Taxpayer had hired a Montana lawyer to form an LLC in 2005. That lawyer, according to the Department’s citations to public information, represented that clients potentially could “eliminate all sales taxes” in buying and registering an RV using a Montana LLC. The Department reasoned: “However unlikely the legal contortions may have been, Taxpayer apparently consulted the Montana attorney in good faith, paid that attorney to establish a Montana LLC, and believed the attorney’s explanation that establishing the LLC would allow Taxpayer” to eliminate sales tax. The Department could not establish by “clear and convincing” evidence that Taxpayer possessed sufficient scienter to sustain the 100% fraud penalty.

A fraud penalty, the Department observed, effectively tolls the statute of limitations for issuing a proposed assessment. See 45 IAC 15-5-7. Since fraud was not proven, the three-year statute of limitations applied. The Department’s assessments were issued too late, so the RV owner’s protest was sustained. Nevertheless, the Department observed that, had the assessments been timely, “Taxpayer’s protest of the Department’s assessments would only have succeeded if Taxpayer had been able to demonstrate that the vehicle was used exclusively outside of Indiana and the ownership by the Montana LLC would have been found to be a sham.”

7. Department applies Sales Tax exemption to computer software used in manufacturing but denies it for gas cylinders. Letter of Findings 04-20110214, Use Tax for the Years 2008, 2009 (March, 2012). Taxpayer argued that the contested software produced a computer disc, which in turn was used to program Taxpayer's equipment. The Department agreed that the software was exempt, relying (despite the outdated technology referenced) on its rule 45 IAC 2.2-5-8(g), Ex. 6 (which provides: "Computers which are interconnected with and control other production machinery or are used to make tapes which control computerized production machinery are exempt from tax."). But the Department imposed use tax on the rental of gas cylinders. The gases in the tanks were used in manufacturing. The Department noted, "In the case of tanks and storage, the use of the tanks is fact sensitive." The tanks here contained gas "just prior to the manufacturing process." According to the Department:

Taxpayer's manufacturing process relating to welding begins with the heating of the gases necessary to properly weld Taxpayer's equipment. The tanks do not serve a function during the manufacturing process but rather as containment prior to the manufacturing process. Even though the cylinders serve a crucial function in Taxpayer's overall process, the function of the cylinders is prior to the manufacturing process as opposed to a function during the steps of the manufacturing process.
8. **Department rules that design software was subject to sales tax** (originally posted at www.taxhatchet.com on April 28, 2012).

Department of Revenue finds that design software was used in “pre-production” and not exempt from Indiana sales tax

In Letter of Findings 04-20110391 (posted April 25, 2012), the Indiana Department of Revenue found that software and related items used to design plastic injection molds, tools and dies were used in “pre-production” and therefore not exempt from sales tax. Indiana exempts from sales tax the acquisition of manufacturing machinery, tools and equipment for “direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property.” Ind. Code § 6-2.5-5-3 (Section 3). Indiana also exempts transactions involving materials acquired for “direct use in the direct production of” the machinery, tools, or equipment described in Section 3. Ind. Code § 6-2.5-5-4. These exemptions apply a “double direct” test, i.e. the property must be directly used in direct production of other property. By rule, the Department has stated that machinery, tools and equipment are directly used in production if they have an “immediate effect” on the property being produced. 45 IAC 2.2-5-8. Property has an “immediate effect” on production “if it is an essential and integral part of an integrated process which produces tangible personal property.” Id.

The Department’s rules include the following example of property that does not have an “immediate effect” on production and is therefore taxable: “Computers which produce designs which are not sold as products are not exempt. Thus, computer-aided design is a nonexempt function.” 45 IAC 2.2-5-8(g)(7) (emphasis added).

Taxpayer was a tool and die manufacturer. According to the taxpayer, its designs of molds, tools and dies were sold to customers, along with the manufactured molds. Thus, taxpayer asserted that the Department’s example supported application of the manufacturing exemption to taxpayer’s purchases of design software and related items. As proof, taxpayer submitted design/building specification documents containing language that required taxpayer to present any “prints or tracings” of the mold designs to customers at the conclusion of the production process. The Department, however, was not persuaded and concluded that the design software and related items were used in “pre-production” and thus taxable. The Department reasoned: “Taxpayer's design services are akin to those services provided by an architect for example. Taxpayer's actual design, like the architect's blueprint, is associated with a service Taxpayer provides its customers in preparation for the actual production of the mold, tool, or die.” (emphasis added).

The Department also noted that Taxpayer did not present evidence showing that it actually sold the designs themselves. That customers requested the Taxpayer’s designs at the end of the production process was, according to the Department, not evidence that Taxpayer actually sold the designs to the customers.
9. **Purchases of diesel fuel and repair parts used in the transportation of waste products from steel mill qualified for public transportation exemption. Letter of Findings No. 04-20110476, Gross Retail Tax for Tax Years 2008-09 (April, 2012).**

The taxpayer's operations consist of transporting waste products on behalf of a steel mill. The steel mill contracted with a landfill for the disposal of the waste, the landfill contracted with a broker to handle the waste, and the broker contracted with the taxpayer to actually transport the waste. The taxpayer made various purchases of diesel fuel and repair parts for its vehicles that it claimed were entitled to the public transportation exemption from gross retail tax. During an audit, the auditor determined that the exemption did not apply and issued an assessment for use tax.

The Department found that the taxpayer's purchases were entitled to the exemption. The exemption is available for taxpayers who transport the property of other persons. In general, transportation of residential and general business garbage does not qualify for the exemption, but the steel mill's waste is governed by contractual and regulatory requirements that the waste cannot be owned by anyone other than the landfill or broker. Thus, under the circumstances as demonstrated by the taxpayer, the waste in question was the customer's property, and the taxpayer qualified for the exemption.

10. **Taxpayer proved that it did not pay software vendor for updates, only a non-taxable service. Letter of Findings No. 04-20110472, Gross Retail Tax for Tax Years 2008-10 (April, 2012).**

The taxpayer, a homebuilder, purchased software maintenance agreements on which it did not pay sales tax. During an audit, the Department assessed use tax on the agreements. The audit reflected the Department's position that maintenance agreements are subject to tax because there is a rebuttable presumption that such agreements will include the transfer of tangible personal property. The Department presumes that taxable software is included in software maintenance agreements.

The taxpayer argued that the agreement provided only for the provision of services and that no property was transferred under the agreement. The taxpayer's vendor stated that the software that it installed under the agreement was services packs and security patches that were freely available on the internet; the taxpayer simply hired the vendor to access those free updates as part of the vendor's service to make the taxpayer's servers operate properly. The Department held that the taxpayer proved that it did not pay the vendor for software updates; therefore, the vendor performed a service "pure and simple" and the related payments are not subject to use tax.

11. **Department assesses law firm's purchases of online database subscriptions. Letter of Findings No. 04-20110421, Sales and Use Tax for Tax Years 2008-09 (April, 2012).**

The taxpayer, a law firm, purchased software licenses and online database subscriptions on which it did not pay sales tax. The Department assessed sales tax on the purchases during an audit. With regard to the software licenses, the taxpayer argued that its purchases involved access and storage services, not the acquisition of tangible personal property. During the audit, the auditor requested copies of documents showing the terms of the various software licenses, as well as invoices, but the taxpayer did not provide the requested documents to the auditor or in the protest hearing. The Department
accordingly found that the taxpayer did not provide evidence showing that the purchases were outside the definition of tangible personal property upon which tax is due.

The taxpayer also asserted that its purchase of subscriptions to online databases – namely, Accurint and LexisNexis – were purchases for the use of services rather than the acquisition of property. The taxpayer argued that it had not received a transfer of property that had been packaged for sale to the general public, and thus was a service. The Department pointed to its Information Bulletin No. 8, which states that the sale of information compiled by a computer and sold in substantially the same form as it is produced is a sale of tangible personal property. The taxpayer did not show that its purchases did not meet this definition, so the Department found the purchases taxable.

12. **Taxpayer could not escape 10% penalty based on reliance of advice from CPA**


   "Bad Advice from my CPA" defense does not work to abate 10% penalty against Sales Tax Delinquency applied by Indiana Department of Revenue

   This weekend I came across an article by Robert W. Wood, contributor to *Forbes*, titled "In a Nation of Computerization and Robotics, Should TurboTax Defense Be Respected?" See http://onforb.es/Lgjs5S. The article addresses two cases (one involving then-nominated-but-not-yet-confirmed Treasury Secretary Timothy Geithner) concerning reporting errors and tax preparation software. Mr. Wood asks, "[S]hould TurboTax (and other software) be considered professional tax advice qualifying for penalty relief?" His answer, "Perhaps, but one problem is user error." That issue was raised in the second case, where the taxpayer avoided a penalty, even though the cause of the underpayment was the taxpayer's own data entry mistake (not an error by the software). The Tax Court had concluded that the taxpayer was acting in good faith sufficient to avoid penalties.

   I later came across a Supplemental Letter of Findings, see http://1.usa.gov/L9EWQrz, by the Indiana Department of Revenue, where the Taxpayer (for our purposes, SteelCo) blamed its failure to remit sales or use tax on bad advice from its CPA. In this administrative appeal, SteelCo was a fabricator of structural steel parts, including joists, floor decks, stairways, and handrails. The Department audited and assessed sales and use tax. SteelCo protested a portion of the assessment. The supplemental determination dealt only with the 10% negligence penalty. SteelCo argued that its underpayment "was the result of reasonable cause" because it had consulted "with a third party CPA in determining its sales/use tax obligations" and had followed the CPA's advice during the audit period. The primary issue related to SteelCo's failure to pay sales tax when it purchased construction materials, its failure to self-assess use tax when it incorporated the materials into its structural steel parts and its failure to collect sales tax from its sister corporation when it sold the parts, because the sister corporation presented SteelCo with an exemption certificate for each transaction. (SteelCo did not protest all issues, and the Department sustained its protest in part and denied its protest in part.)
The Department concluded that SteelCo received and relied upon "bad advice" from its CPA. To abate the penalty, SteelCo had to demonstrate that it acted with "reasonable cause and not due to willful neglect." (citing Ind. Code § 6-8.1-10-2.1(d)). SteelCo was required to show that it "exercised ordinary business care and prudence in carrying out" its sales and use tax collection and reporting responsibilities. (citing 45 IAC 15-11-2(c)). The Department ruled that SteelCo's reliance on its CPA's advice was insufficient to satisfy its burden, explaining:

It should be noted that [SteelCo] acted on that 'bad advice.' As a result, the assessment of the additional tax was based – at least in part – on [SteelCo] and its sister corporation's aggressive tax planning strategy. Although [SteelCo] may well have arrived at this strategy after consulting with its third-party CPA, [SteelCo] was ultimately responsible for the consequences. Based on a 'case-by-case' analysis and after reviewing 'the facts and circumstances of each taxpayer' the Department is unable to agree that SteelCo acted as an 'ordinary reasonable taxpayer,' that it exercised 'ordinary business care,' or that abatement of the penalty is justified.

The above cases involve different taxes, different facts, different jurisdictions and different theories. If there is a common thread to these cases, however, it appears to that the abatement of a penalty will be considered on a case-by-case basis. The tax authority will consider how the error was made and who (or, in the case of computer software, what) made the error. And, of course, any resolution will depend on the specific tax and taxing regime, including any applicable precedent, at issue.

13. **Department concludes that stone crusher was used in production and therefore exempt, while loaders were used outside of production and thus taxable** (originally posted at [www.taxhatchet.com](http://www.taxhatchet.com) on June 29, 2010).

*Crusher Yes! Loaders No! – Indiana Limestone Processor receives partial Sales Tax Exemption for its Equipment*

In Indiana, we love our limestone. As noted by State Symbols USA: "Indiana designated limestone as the official stone in 1971. Bedford, Indiana is known as the 'Limestone Capital of the World.' Limestone quarried and carved in Bedford is featured on famous buildings across America, including the Pentagon and the Empire State Building. Indiana's State House in Indianapolis is also built with southern Indiana Limestone." See [http://bit.ly/LlJthg](http://bit.ly/LlJthg) (last visited June 29, 2012). And limestone was the focus of the Department of Revenue's letter of findings no. 04-20110122 (posted June 27, 2012). See [http://1.usa.gov/LFWapP](http://1.usa.gov/LFWapP). Taxpayer (here, "LimeCo") was an Indiana S corporation that processed and sold various limestone products such as agricultural lime, crushed stone, gravel, rip rap, top soil, and fill dirt. For the 2007 tax year at issue, LimeCo bought overburden limestone from an unrelated quarry for processing.
The Department assessed LimeCo sales and use tax on its purchases of a stone crushing machine and loaders, as well as equipment, tools and supplies related to the crusher and loaders. LimeCo protested, arguing that the property was exempt under the "industrial production exemptions." LimeCo asserted that its stone crusher was exempt, because the crusher processed "raw" limestone slabs acquired from the nearby quarry to create various crushed stone materials that were resold. Stone was crushed and then moved via conveyor belt to stockpiles. Some of LimeCo's products required a further "blending" process, where a loader moved materials from the piles at the end of conveyors to turn or mix the materials to achieve a desired "consistency." LimeCo claimed a 100% exemption for the crusher and its related items, and it claimed a 30% exemption for the loaders and its related items. The percentage for loaders was based on the estimated time they were used for the "blending" process and in the maintenance of conveyor belts.

Crusher Yes! To be exempt, the Department explained that the raw material had to undergo a "substantial change" in the production process. (citing 45 IAC 2.2-5-8(k).) The Department also turned to the Indiana Tax Court's analysis in Rotation Products Corp. v. Dep't of State Revenue, 690 N.E.2d 795, 802-03 (Ind. Tax Ct. 1998), where the Court identified factors for determining whether a taxpayer is engaged in "manufacturing":

The case law reveals three factors germane to this fact-sensitive inquiry. The first is an adaptation of the requirement of a substantially different end product: the substantiality and complexity of the work done on the existing article and the physical changes to the existing article, including the addition of new parts. The other two factors derive from the observations of the courts dealing with this issue: a comparison of the article's value before and after the work, and how favorably the performance of the remanufactured article compares with the performance of newly manufactured articles of its kind. Additionally, this Court concludes that another factor is applicable to this inquiry: whether the work performed was contemplated as a normal part of the life cycle of the existing article. This additional factor will prevent work that merely perpetuates existing products from qualifying for an industrial exemption.

The Department decided to examine the following: "[1] the nature of the items produced, [2] the complexity of a taxpayer's process, [3] the creation of a marketable product, [4] physical and/or chemical changes that occur to the raw materials, [5] the complexity of the resulting products, and [6] the transformation of the raw materials from items of no or little value to some value." In so doing, the Department concluded that it was "prepared to agree that Taxpayer's process qualified for the industrial production exemptions." The Department found that LimeCo's "exempt process begins with the placement of materials into the crusher and ends with the various processed products that come out of the crusher." Although LimeCo's process was not complex, the Department found that the "limestone slab clearly undergoes a physical change that results in products substantially
different in character from the raw material and from each other." The crusher and related items were exempt.

**Loaders No!** The Department explained that items used in pre- and post-production are not exempt from sales or use tax. And the loaders fell outside the scope of the production process, it concluded. According to the Department: "[T]he 'blending' process merely mixes already formed aggregate. This is a post-production activity as the aggregate has been formed. Neither the loaders nor the conveyor belts are exempt; nor are any items related to the loaders and/or conveyor belts exempt."

14. **Sales Tax imposed where taxpayer presented invalid exemption certificate.** In Letter of Findings No. 04-20120011, Sales Tax for the Years 2008-2010 (June, 2012), Taxpayer protested the Department's assessment of sales tax on sales to two of Taxpayer's customers on the grounds that those customers had provided exemption certificates. The Department explained, "As provided by IC § 6-2.5-8-8(a), a seller accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase." Taxpayer presented two exemption certificates. One was valid; the other was not. The valid certificate was dated 1996, but it had the required information. The invalid certificate lacked the required information (i.e. an Indiana or Federal taxpayer identification number) and it was not an Indiana certificate. It was from a neighboring state. The Department concluded: "Taxpayer has met the burden of proving the proposed assessment of sales tax incorrect regarding Taxpayer's sales to the customer with the valid exemption certificate, as required by IC § 6-8.1-5-1(c). Taxpayer has not met the burden of proving the proposed assessment of sales tax regarding Taxpayer's sales to the customer with the non-Indiana exemption certificate."

15. **Drop shipments and software maintenance agreements for exempt software found not taxable.** Letter of Findings No. 04-20120001, Gross Retail Tax For the Years 2007 – 2010 (June, 2012). Taxpayer is an Indiana business which manufactures various architectural glass products. The Taxpayer contested the inclusion of two transactions with two different vendors on the ground that the transactions with these two vendors represent "drop shipments." Relying on Sales Tax Bulletin #57 (March 1995) for support, which provided in part:

If the purchaser is not required to be registered with the Department, the seller may accept documentation from the purchaser indicating that the purchaser is not required to be registered and that the purchaser is reselling the property being purchased. Such documentation must include the following:

1. Purchaser's name;
2. Purchaser's address
3. Purchaser's federal ID number or Social Security number and home state sales tax registration number if applicable;
4. Description of the articles purchased;
5. Statement indicating that the articles purchased are to be resold and that the purchaser is not required to register as an Indiana retail merchant; and
6. Authorized signature of the purchaser.
Taxpayer's protest thus essentially relied upon the "sale-for-resale" exemption set out in IC § 6-2.5-5-8(b). The Department ruled: "Taxpayer has provided documents labeled "Statement of Drop Shipment" meeting the requirements set out in Sales Tax Information Bulletin 57 (March 1995). Therefore, Taxpayer has met its burden under IC § 6-8.1-5-1(c) of establishing that the subject transactions are exempt pursuant to IC § 6-2.5-5-8(b) . . . ."

The Department also sustained the Taxpayer's protest of the assessment of sales tax against software maintenance agreements. Taxpayer argued that the software was used "to digitize production drawings and then to use that digitized information to guide the fabrication of Taxpayer's glass products." The Department noted that 45 IAC 2.2-5-8(g)(6) states that, "Computers which are interconnected with and control other production machinery or are used to make tapes which control computerized production are exempt from tax." Even though software maintenance agreements are presumed taxable, the software at issue was exempt, and, therefore, the maintenance agreements were also exempt.

16. **Medical Practice's contract with Imaging Company was, by its plain language, a lease of tangible personal property subject to Use Tax** (originally posted on www.taxhatchet.com on July 2, 2012).

*Indiana Department of Revenue rules that Contract between Imaging Company and Medical Provider for Equipment and Operators was a Lease subject to Use Tax*

In Letter of Findings No. 04-20110484 (June, 2012), an Indiana medical practice (the "Practice") contracted with an unrelated third party ("Imaging Company") to provide imaging equipment and operators. See [http://1.usa.gov/P1ZVZO](http://1.usa.gov/P1ZVZO). The Department of Revenue audited Practice for the 2008 – 2010 tax years. The Department found that the contract was a lease of tangible personal property and that Practice owed used tax on the lease payments. The Practice protested the assessment. The issue was whether the contract between Practice and Imaging Company was a lease of tangible personal property.

In determining whether a transaction is taxable, courts will examine the "substance" of the transaction, and the "substance" will control over the "form" of the transaction. For example, the Indiana Tax Court has explained, "In Indiana, the substance, not the form, of a transaction determines its tax consequences." *Maurer v. Indiana Dept. of State Revenue*, 607 N.E.2d 985, 987 (Ind. Tax Ct. 1993). In *Maurer*, the Court applied this principle in a sales tax appeal, holding, "[T]he substance of a raffle ticket sale transaction is the purchase of the opportunity to win, not the purchase of the ticket. The sale of a raffle ticket to a raffle player is therefore not a sale of tangible personal property." 607 N.E.2d at 987. (Because there was no transfer of tangible personal property, the purchase of the ticket was not subject to sales tax. *See id.* at 989.)

In this case, the Department first reviewed the applicable statute. Ind. Code § 6-2.5-1-21 (emphasis added) states:
(a) "Lease" or "rental" means any transfer of possession or control of tangible personal property for a fixed or indeterminate term for consideration and may include future options to purchase or extend. "Lease" or "rental" does not include:

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(3) providing tangible personal property along with an operator for a fixed or indeterminate period, if:
(A) the operator is necessary for the equipment to perform as designed; and
(B) the operator does more than maintain, inspect, or set up the tangible personal property.

The Department next considered its regulation at 45 IAC 2.2-4-27(d)(3)(A), which provides:

The renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised.

Practice claimed that, regardless of the contract terms, in reality it controlled neither the equipment nor the personnel provided to operate the equipment. In other words, Practice contended that the substance of the parties' conduct under the contract – and not its form or the plain language of the contract – should control to determine whether use tax applied to the transaction.

The Department disagreed. The plain language of the parties' contract provided that Practice would "control and supervise the [operators] to the same extent as if [Practice] employed the [operators] directly." According to the Department:

While the Department understands [Practice's] contentions, the language of the contract indicates a lease of tangible personal property and explicit control over the personnel responsible for using the equipment, even though the personnel are explicitly Imaging Company's employees.

However, in a case such as this, the plain terms of the contract controlled. If [Practice] and Imaging Company seek an arrangement, such as one with the lack of control asserted by [Practice], [Practice] and Imaging Company must so indicate that relationship in their written contracts. As such, [Practice] has not affirmatively established that its contract with Imaging Company is anything other than a lease as defined by IC § 6-2.5-1-21.
Thus, the Department found that the disputed contract's plain language trumped the parties' alleged conduct under the contract.

17. **Fees for e-mail generation service not subject to sales tax** (originally posted at [www.taxhatchet.com](http://www.taxhatchet.com) on July 3, 2012).

**You've Got (Non-Taxable) E-Mail: Indiana Department of Revenue rules that Sales Tax did not apply to fees for generating E-Mails**

The Department of Revenue found that fees charged to Taxpayer by a vendor ("Company R" in the ruling) that provided mass e-mail services were not subject to sales tax. *See* [http://1.usa.gov/LuElY6](http://1.usa.gov/LuElY6). Company R provided a licensed software package for emailing Taxpayer's clients and prospects, and it charged Taxpayer approximately 3.5 cents per email generated. Taxpayer agreed that the licensed software was subject to sales tax, but it asserted that sending e-mails was a non-taxable service. This fee was not, Taxpayer argued, a cost paid for licensing the software.

The Department noted that imposition of the sales or use taxes requires acquisition of tangible personal property. The Department also considered the definition of "specified digital products" – digital audio works, digital audiovisual works or digital books – which are subject to sales tax when electronically transferred to an end user who is granted the right of permanent use of the specified digital product that is not conditioned upon continued payment by the purchaser. *See* Ind. Code §§ 6-2.5-1-26.5 and 6-2.5-4-16.4. The Department determined: "Based upon the information provided by Taxpayer, the Department finds that there is no transfer of tangible personal property nor specified digital product for the protested issue and the fees charged to send e-mails are not subject to sales/use tax."

**County Food and Beverage Tax**

1. **Department of Revenue's value to issue vouchers did not excuse Taxpayer's failure to file returns. Letter of Findings No. 10-20110599, County Food and Beverage Tax, 2010 (May, 2012).** Taxpayer operated a restaurant and bar. For 2010, it failed to collect and remit the county food and beverage tax ("CFBT"). Taxpayer protested the imposition of CFBT on the grounds that the Department never sent it monthly vouchers for the tax. This failure, the Taxpayer argued, relieved it of the responsibility to collect and remit the CFBT. Examining Ind. Code §§ 6-9-35-1, -5, & -11, the Department observed, "the CFBT may be filed with a separate return or may be combined with the return filed for the payment of the state gross retail [Sales] tax." The Department reasoned that, because Taxpayer did file sales tax returns, the CFBT could have been included with those returns. Moreover, the Court noted, "Taxpayer has not referred to any statute or regulation which states that lack of CFBT vouchers relieves it of the duty to collect and remit the CFBT." The protest was denied.
P.L. 137-2012 – Tax Administration
- Ind. Code § 6-8.1-9-1, effective July 1, 2012, removes from current law the prohibition against taking a case to Tax Court if a refund appeal is filed more than three (3) years after a claim for refund was filed with the Department of Revenue.

P.L. 133-2012 – Elimination of Commissions, Boards, and Committees
- Ind. Code § 6-3.1-13.5-14, effective July 1, 2012, provides that a capital investment tax credit may not be awarded after December 31, 2016. Until January 1, 2020, a taxpayer may carry over unused credit attributable to a year beginning before January 1, 2017.

P.L. 6-2012 – Technical Corrections
- Ind. Code § 6-3.1-26-26, effective July 1, 2012, extends the venture capital investment tax credit through December 31, 2016.
- Ind. Code § 6-3.1-33-9, effective July 1, 2012, extends the new employer tax credit through December 31, 2016.
- P.L. 137-2012 § 130, effective upon passage, requires the commission on state tax and financing policy to study all income tax credits during the 2012 and 2013 legislative interims.

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4 To view the Department of Revenue's Synopsis of 2012 Legislation Affecting the Indiana Department of Revenue, please visit the Department's web site at www.in.gov/dor/reference/files/summary2012.pdf.
P.L. 137-2012 – Tax Administration

- Ind. Code § 6-2.5-5-5.1, effective July 1, 2012, provides that a sales tax refund claim based on the exemption for electrical energy, natural or artificial gas, water, steam, and steam heat may not cover transactions that occur more than 36 months (rather than 18 months, under current law) before the date of the refund claim.
- Ind. Code § 6-2.5-4-5, effective January 1, 2012, provides that public utilities or power subsidiaries are not "retail merchants" making retail transactions when furnishing or selling electrical energy, natural/artificial gas, water, steam, or steam heating service to a person for use in processing, repairing, recycling, floriculture, or arboriculture.
- Ind. Code § 6-2.5-5-9, effective July 1, 2012, provides a sales tax exemption for sales of wrapping material and empty containers that are acquired by industrial processors for shipping certain tangible personal property.
- Ind. Code § 6-2.5-5-45.8, effective January 1, 2012, provides certain sales tax exemptions concerning recycling.
  - Exempts transactions involving machinery, tools, and equipment if (1) the person acquiring the property acquires it for direct use in the direct processing of recycling materials, and (2) the person acquiring the property is occupationally engaged in recycling.
  - Exempts transactions involving recycling materials and other tangible personal property to be consumed in the processing of recycling materials, or to become a part of the product produced by the processing of recycling materials, if (1) the person acquiring the property acquires it for direct use in the direct processing of recycling materials, and (2) the person acquiring the property is occupationally engaged in recycling.

P.L. 98-2012 – Corn Marketing Council

- Ind. Code §§ 6-2.5-7-5 and -6, effective July 1, 2012, repeal provisions for deductions to retail merchants under the E85 reimbursement program.

P.L. 153-2012 – Sales and Use Tax Exemptions

- Ind. Code § 6-2.5-3-2, effective January 1, 2009, specifies a use tax exemption for aircraft when there is an addition to or reconfiguration of the interior of an aircraft which requires the issuance of an airworthiness certificate. Also specifies when delivery of the aircraft occurs.
- Ind. Code § 6-2.5-5-42, effective January 1, 2009, expands the state gross retail tax exemption for certain transactions involving an aircraft to also include completion work.
- Ind. Code § 6-2.5-5-45, effective July 1, 2012, provides an exemption from the state gross retail tax for tangible personal property, including excise tax meter machines and related accessories, acquired for the exclusive purpose of complying with the state tobacco tax laws.
- Ind. Code § 6-2.5-5-46, effective July 1, 2012, provides an exemption from the state gross retail tax for transactions involving tangible personal property related to the repair, maintenance, refurbishment, remodeling, or remanufacturing of certain aircraft or avionics systems.
• P.L. 153-2012 § 6, effective upon passage, requires the commission on state tax and financing policy to study issues related to whether the above exemption should be made to apply to all aircraft and avionic devices during the 2012 legislative interim.

**Legislative Changes Affecting Property Taxes**

**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.

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• 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.
  o 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.
  o 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.
  o 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.
  o 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.
  o 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.

LEGISLATIVE CHANGES AFFECTING MISCELLANEOUS TAXES

P.L. 137-2012 – Tax Administration
- Ind. Code § 6-2.3-4-7, effective January 1, 2013, exempts from the utilities receipts tax any payments of severance damages or other compensation resulting from a change in assigned service area boundaries between electricity suppliers.

P.L. 155-2012 – Sales and Tobacco Products Taxes
- Ind. Code § 6-2.5-5-45, effective July 1, 2012, provides an exemption from the state gross retail tax for tangible personal property acquired for the exclusive purpose of complying with the state tobacco tax laws.
- Ind. Code § 6-7-2-6, effective July 1, 2012, changes the wholesale price on which the tobacco products tax is based (excludes cigarettes and moist snuff) to make the wholesale price the net price as shown on the manufacturer's invoice, excluding any discounts.

P.L. 157-2012 – Inheritance Tax
- Ind. Code § 6-4.1-11-6, effective July 1, 2012, phases out the inheritance tax over 9 years beginning in 2013.
- Ind. Code § 6-4.1-3-10, effective January 1, 2012, increases the inheritance tax exemption amount for Class A transferees from $100,000 to $250,000 with respect to taxable transfers resulting from the deaths of individuals dying after December 31, 2011.
P.L. 132-2012 – Statewide 911 system

- Ind. Code § 36-8-16.7-32, effective July 1, 2012, requires the board to impose a monthly statewide 911 fee on each standard user of communications service in Indiana. The amount of the fee is initially $0.90. (Replaces the fees currently applied to land-line and cellular telephones.)
<table>
<thead>
<tr>
<th>Subject</th>
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<tbody>
<tr>
<td>Assessing Mobile Homes - John Toumey</td>
<td>Jan. 18-20, 2012</td>
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<tr>
<td>2012 Cost Table Corrections - David Schwab and Terry Knee</td>
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<td>Personal Property - Joe Lukomski</td>
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<td>Reassessment / PTABOA - Barry Wood</td>
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<td>Location Cost Multipliers</td>
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<td>Manufactured Housing Circuit Breaker Clarification</td>
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<td>Soil Productivity Factor Update</td>
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<td>Future of Sales Disclosure Reporting</td>
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<td>Nursing Home Exemption Decision</td>
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<td>Supplement to 50 IAC 4.2-15-14 Present Value of Personal Property Leases</td>
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<td>Addendum to: 50 IAC 1-3-1 (STB Directive 78-101 – Real Property) – Assessments of Oil and Gas</td>
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<td>Golf Course Guidance</td>
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<td>Land Type Codes – Farmland</td>
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<td>Adjustments to Transportation Fund Maximum Levy</td>
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<td>Mandatory Adoption of Anti-Nepotism Policy</td>
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<td>Review and Adoption of Budgets and Leves of Certain Public Libraries</td>
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<td>New Legislation in 2012 – Commissioner Brian Bailey</td>
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<td>Handling Public Buildings – Cathy Wolter, General Counsel</td>
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<tr>
<td>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</td>
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<tr>
<td>Assessment and Appeal Changes</td>
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<td>Homestead/Tax Cap Guidance</td>
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<td>Assessor Certification and Qualifications for County Assessor Candidates</td>
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<td>The Establishment of Fire Protection Territories</td>
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<tr>
<td>Additional Appropriations, HEA 1072, IC 6-1.1-18-5</td>
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6 The DLGF's memos and presentations can be viewed at http://www.in.gov/dlgf/2444.htm (last visited June 30, 2012).
<table>
<thead>
<tr>
<th>Topic</th>
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<td>2012 - 2013 Budget Calendar</td>
<td>5/25/12</td>
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<tr>
<td>50 IAC 26 Amendment (Computer Standards for a Common Property Tax Management System)</td>
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<td>Assessment Appeals 101</td>
<td>6/22/12</td>
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<tr>
<td>Assessment Appeals Flow Chart <em>(attached as Exhibit 1)</em></td>
<td>6/29/12</td>
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<tr>
<td>Tax Sales &amp; Payment of Delinquent Property Tax, HEA 1090</td>
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<tr>
<td>Title</td>
<td>Date</td>
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<tr>
<td><strong>2012 Updated Income Tax Bulletins:</strong></td>
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<tr>
<td>1 Fiduciary Income Tax Return</td>
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<td>19 Government Obligations</td>
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<td>28 Application of State and County Income Taxes to Residents with Out-of-State Income and Nonresidents with Indiana Source Income</td>
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<td>52 Wholesalers</td>
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<td>60 Taxation of Unemployment Compensation Benefits</td>
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<td>72 S Corporation of Partnership Mandate to File a Composite Return on Behalf of Nonresident Shareholders and Partners</td>
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<td><strong>2012 Updated Sales Tax Bulletins:</strong></td>
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<td>9 Agricultural Production Exemptions</td>
<td>July 2012</td>
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<td>10 Application of Sales Tax to Nonprofit Organizations</td>
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<td>28S Sales of Motor Vehicles and Trailers</td>
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<td>29 Sales of Food</td>
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<td>55 Application of Sales Tax to Sales of Utilities Used in Manufacturing, Production, Recycling, Floriculture, and Arboriculture</td>
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<td>67 Exemption Available to Professional Motor Racing Teams and Two-Seater Istanbul 500-Style Race Cars</td>
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<td>74 Sales and Use Tax Exemption for Aircraft Being Repaired or Remanufactured</td>
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<td>77 Sales Tax Returns Filed Monthly if the Retail Merchant Is Remitting by Electronic Funds Transfer</td>
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<td>80 Assessment of Retail Sales Tax Liability for Certain Sellers Registered Under the Streamlined Sales and Use Tax Agreement (SSUTA)</td>
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The Department of Revenue's bulletins can be viewed at [http://www.in.gov/dor/3650.htm](http://www.in.gov/dor/3650.htm) (last visited July 1, 2012). Commissioner's Directives can be viewed at [http://www.in.gov/dor/3617.htm](http://www.in.gov/dor/3617.htm) (last visited July 1, 2012).
<table>
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<th>Commissioner's Directives:</th>
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<td>13    Claim for Refund Procedures</td>
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<td>18    Utility Receipts Tax</td>
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<td>39    Enhanced Prepaid Wireless Telecommunications Service Charge</td>
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<td>43    Other Tobacco Products Tax</td>
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<tr>
<td>44    2012 Legislative Changes to Inheritance Tax&lt;sup&gt;8&lt;/sup&gt;</td>
<td>April 2012</td>
</tr>
</tbody>
</table>

Indiana Board of Tax Review – 2012 Proposed Rule Changes

- Adds 52 IAC 2-11-1.5 governing the Voluntary Resolution process.

- Amendments to Petitions:
  - Old - 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 - "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."

- Issues raised before the IBTR:
  - Old - 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 - This provision is being eliminated.

- Prehearing Disclosures
  - Old - Copies of documentary evidence or summaries of statements of testimonial evidence at least five business days before the hearing
  - New - The IBTR is eliminating the requirement to file summaries of statements of testimonial evidence, see Exhibit 9A);

- Subpoenas.
  - 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 - 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."

- 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.

- Continuances. The IBTR is adding a new 52 IAC 2-8-1(b) to provide:

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9 A copy of the Indiana Board of Tax Review's proposed rule changes is attached as Exhibit 2.
"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."

- **Briefs:**
  - **Old** - A party must file an original and two copies of a brief, and the party must file the brief at the IBTR's central office. *See 52 IAC 2-8-6(c).*
  - **New** - The IBTR is eliminating the requirement that an "original and two copies" of the brief be filed.

- **Joint Stipulations.**
  - **Old** - The IBTR must approve all stipulations submitted by the parties concerning the value or status of property.
  - **New** - "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."

- **Small Claims 52 IAC 3-1-5(d):**
  The 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.
Fiscal Policy Matters: The 2012 Indy Bar
State & Local Tax Update

Exhibit No. 1
Procedure for Appeal of Assessment

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.

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.

3. For a proceeding pending or commenced after June 30, 2012, to accurately determine market value, 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 introduce evidence of any comparable property, but preference is given to comparable property in taxing district or within 2 miles of taxing district.

Assessor Bulletin 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 last 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.
Fiscal Policy Matters: The 2012 Indy Bar State & Local Tax Update

Exhibit No. 2
DIGEST

Amends 52 IAC 1-1-3.5, 52 IAC 1-1-4, 52 IAC 1-1-6, 52 IAC 1-2-1, 52 IAC 1-2-3 through 52 IAC 1-2-5, 52 IAC 2-2-2, 52 IAC 2-2-4, 52 IAC 2-2-16, 52 IAC 2-3-2, 52 IAC 2-5-2, 52 IAC 2-6-2, 52 IAC 2-6-8, 52 IAC 2-7-1, 52 IAC 2-8-1, 52 IAC 2-8-4, 52 IAC 2-8-6, 52 IAC 2-9-4, 52 IAC 2-10-1, 52 IAC 3-1-2, and 52 IAC 3-1-5 and adds 52 IAC 2-11-1.5, pertaining to the Indiana Board of Tax Review's procedural rules, to clarify that a certified public accountant cannot practice before the board for matters involving personal property tax exemptions, to make the definition of "practice before the board" consistent in 52 IAC 1 and 52 IAC 2, to clarify that the prohibitions restricting the practice before the board for certified tax representatives also applies to certified public accountants, local government representatives, and representatives of minor and incapacitated parties, to allow a hearing to be held in any county in which an administrative law judge has an office, to clarify that filing a motion for summary judgment is a delay reasonably caused by a party, to incorporate the notice requirements of Trial Rule 34(c) relating to subpoenas to nonparties, to clarify that a party that does not object to the election of the board's small claims procedures for a property that does not qualify for participation in such procedures may be deemed to consent to the small claims procedures for that matter, to establish a time limit for requesting documentary evidence under the board's small claims procedures, to comply with the Indiana Supreme Court's pro hac vice rule promulgated on September 20, 2011, and to add rules for the board's voluntary resolution program authorized by IC 6-1.5-3-4, effective July 1, 2010. Repeals 52 IAC 2-12-1. Effective 30 days after filing with the Publisher.

IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses

52 IAC 1-1-3.5; 52 IAC 1-1-4; 52 IAC 1-1-6; 52 IAC 1-2-1; 52 IAC 1-2-3; 52 IAC 1-2-4; 52 IAC 1-2-5; 52 IAC 2-2-2; 52 IAC 2-2-4; 52 IAC 2-2-16; 52 IAC 2-3-2; 52 IAC 2-5-2; 52 IAC 2-6-2; 52 IAC 2-6-8; 52 IAC 2-7-1; 52 IAC 2-8-1; 52 IAC 2-8-4; 52 IAC 2-8-6; 52 IAC 2-9-4; 52 IAC 2-10-1; 52 IAC 2-11-1.5; 52 IAC 3-1-2; 52 IAC 3-1-6

SECTION 1. 52 IAC 1-1-3.5 IS AMENDED TO READ AS FOLLOWS:

52 IAC 1-1-3.5 "Local government representative" defined

Authority: IC 6-1.5-6-1
Affected: IC 6-1.1-15

Sec. 3.5. (a) "Local government representative" means a person who meets the requirements in 50 IAC 15-4-1 and who represents a local assessing official at a proceeding before the board under IC 6-1.1-15. The term does not include any of the following:

(1) An assessing official who is a party to the proceeding or a permanent full-time employee of any such assessing official.
(2) A certified public accountant when the certified public accountant is representing a local assessing official in a matter that relates only to personal property taxation valuation. A certified public accountant may not represent a client on a personal property exemption matter.
(3) An attorney who is a member in good standing of the Indiana bar or any person who:
(A) is a member in good standing of any other state bar; and
(B) has been granted leave by the board to appear before the board.

(b) A local government representative must file a written verification that the representative is a professional appraiser approved by the department. A separate verification must be filed in each proceeding where such representation is provided.

(c) A local government representative is subject to the same practice limitations that apply to certified tax representatives as stated in 52 IAC 1-2-1(b).

(Indiana Board of Tax Review; 52 IAC 1-1-3.5; filed Nov 14, 2007, 11:11 a.m.: 20071212-IR-052060571FRA)
SECTION 2. 52 IAC 1-1-4 IS AMENDED TO READ AS FOLLOWS:

52 IAC 1-1-4 "Practice before the board" defined
Authority: IC 6-1.5-6-1
Affected: IC 6-1.1-15; IC 6-1.5

Sec. 4. "Practice before the board" means participation in any matters connected with a presentation to proceeding before the board or any of its members, or employees relating to a client's rights, privileges, or liabilities under Indiana's property tax laws or rules. Such presentations include, but are not limited to, the following: any contractor or employee designated to act in the capacity of an administrative law judge.

(1) Preparing and filing necessary documents, except personal property returns.
(2) Corresponding and communicating with the board.
(3) Representing a client at hearings, on site inspections, and meetings.
The term does not include the activities of any local unit of government participating before the board.

(Indiana Board of Tax Review; 52 IAC 1-1-4; filed Feb 13, 2003, 9:41 a.m.: 26 IR 2316)

SECTION 3. 52 IAC 1-1-6 IS AMENDED TO READ AS FOLLOWS:

52 IAC 1-1-6 "Tax representative" defined
Authority: IC 6-1.5-6-1
Affected: IC 6-1.1-2-4; IC 6-1.1-15

Sec. 6. "Tax representative" means a person who represents another person at a proceeding before the board under IC 6-1.1-15. The term does not include any of the following:
(1) The owner of the property (or person liable for the taxes under IC 6-1.1-2-4) that is the subject of the appeal.
(2) A permanent full-time employee of the owner of the property (or person liable for the taxes under IC 6-1.1-2-4) who is the subject of the appeal.
(3) Assessing officials and permanent full-time employees of local units of government appearing on behalf of the unit or as the authorized representative of another unit.
(4) Local government representatives as defined in section 3.5 of this rule appearing on behalf of the local governmental unit.
(5) A representative of a minor or incapacitated party as defined in 52 IAC 1-2-1.1.
(6) A certified public accountant when the certified public accountant is representing a client in a matter that relates only to personal property taxation. A certified public accountant may not represent a client on a personal property exemption matter.
(7) An attorney who is a member in good standing of the Indiana bar, or any person who:
   (A) is a member in good standing of any other state bar; and
   (B) has been granted leave to appear before the board.

(Indiana Board of Tax Review; 52 IAC 1-1-6; filed Feb 13, 2003, 9:41 a.m.: 26 IR 2316; filed Nov 14, 2007, 11:11 a.m.: 20071212-IR-05200571FRA)

SECTION 4. 52 IAC 1-2-1 IS AMENDED TO READ AS FOLLOWS:

52 IAC 1-2-1 Practice requirements for tax representatives
Authority: IC 6-1.5-6-1
Affected: IC 6-1.1

Sec. 1. (a) In order to practice before the board, a tax representative under 52 IAC 1-1-6 must:
(1) be properly certified by the department; and
(2) have a copy of a properly executed power of attorney from the taxpayer on the form prescribed by the board on file with the board before a hearing will be scheduled.
Indiana Register

(b) Tax representatives will not be allowed to practice before the board for:
(1) matters relating to real and personal property exemptions; claimed on a Form 132 or 136;
(2) claims that assessments or taxes are "illegal as a matter of law"; whether brought on:
(A) a Form 133 under IC 6-1.1-15-12(a)(6);
(B) a Form 17-T under IC 6-1.1-26(4);
(C) a Form 130 under IC 6-1.1-15-1; or
(D) any other form;
(3) claims regarding the constitutionality of an assessment; or
(4) any other representation that involves the practice of law.

(c) Notwithstanding subsection (a)(1), the board may grant leave to practice before the board to a tax representative who is properly licensed or certified in another state.

(Indiana Board of Tax Review; 52 IAC 1-2-1; filed Feb 13, 2003, 9:41 a.m.: 26 IR 2317; filed Nov 14, 2007, 11:11 a.m.: 20071212-(R-052060571FRA)

SECTION 5. 52 IAC 1-2-3 IS AMENDED TO READ AS FOLLOWS:

52 IAC 1-2-3 Prohibitions; obligations
Authority: IC 6-1.5-6-1
Affected: IC 6-1.1-15

Sec. 3. A certified tax representative, a certified public accountant, a representative of a minor or incapacitated party, or a local government representative shall:
(1) not knowingly misrepresent any information or act in a fraudulent manner;
(2) not prepare documents or provide evidence in a property assessment appeal unless the representative is authorized by the property owner (or person liable for the taxes under IC 6-1.1-2-4) a party to do so and any required authorization form has been filed;
(3) not knowingly submit false or erroneous information in a property assessment appeal;
(4) use the appraisal standards and methods required by rules adopted by the department or the board when the representative submits appraisal information in a property assessment appeal; and
(5) notify the property owner (or person liable for the taxes under IC 6-1.1-2-4) party of all matters relating to the review of the assessment of taxpayers' property before the board, including, but not limited to, the following:
(A) The tax representative's filing of all necessary documents, correspondence, and communications with the board.
(B) The dates and substance of all hearings, on-site inspections, and meetings.

(Indiana Board of Tax Review; 52 IAC 1-2-3; filed Feb 13, 2003, 9:41 a.m.: 26 IR 2317)

SECTION 6. 52 IAC 1-2-4 IS AMENDED TO READ AS FOLLOWS:

52 IAC 1-2-4 Contingent fees
Authority: IC 6-1.5-6-1
Affected: IC 6-1.1-15

Sec. 4. (a) In the event a tax representative charges a contingent fee for any matter relating to practice before the board, the tax representative may not testify at a hearing without first disclosing the existence of the contingent fee arrangement.

(b) As used in this section, "contingent fee" includes a fee, whether accruing to the tax representative or to the entity with which the tax representative is affiliated, that is based on a percentage of the:
(1) refund obtained;
(2) taxes saved; or
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(3) reduction in assessed value.

(c) Failure to disclose the existence of a contingent fee arrangement, the tax representative's method of compensation may result in the presumption that a contingent fee arrangement exists between the taxpayer and the tax representative.

(Indiana Board of Tax Review; 52 IAC 1-2-4; filed Feb 13, 2003, 9:41 a.m.: 26 IR 2318)

SECTION 7. 52 IAC 1-2-5 IS AMENDED TO READ AS FOLLOWS:

52 IAC 1-2-5 Certification; revocation
Authority: IC 6-1-5-6-1
Affected: IC 6-1-1-15; IC 6-1-3-5-5-8

Sec. 5. The board may recommend to the department the denial, suspension, or revocation of the certification of a certified tax representative or local government representative for any of the following:
1. Violation of any rule of practice established under this article.
2. Gross incompetence in the tax representative’s practice before the board.
3. Dishonesty or fraud committed while practicing before the board.
4. Violation of the standards of ethics or rules of solicitation adopted by the department or the board.
5. Failing to appear at a hearing after proper notice has been given.

(Indiana Board of Tax Review; 52 IAC 1-2-5; filed Feb 13, 2003, 9:41 a.m.: 26 IR 2318; filed Nov 14, 2007, 11:11 a.m.: 20071212-IR-052060571FRA)

SECTION 8. 52 IAC 2-2-2 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-2-2 "Administrative law judge" defined
Authority: IC 6-1-5-6-2
Affected: IC 6-1-5-3-3; IC 6-1-5-3-4

Sec. 2. "Administrative law judge" refers to an individual appointed under IC 6-1-5-3-3 to conduct a hearing that the board is required by law to hold or to participate in a voluntary resolution program under 52 IAC 2-11-1 as authorized by IC 6-1-5-3-4.

(Indiana Board of Tax Review; 52 IAC 2-2-2; filed Jan 26, 2004, 11:30 a.m.: 27 IR 1776)

SECTION 9. 52 IAC 2-2-4 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-2-4 "Authorized representative" defined
Authority: IC 6-1-5-6-2
Affected: IC 6-1-1-15

Sec. 4. "Authorized representative" means any of the following authorized to represent a party in a matter governed by this article:
1. A permanent full-time employee of the owner of a property.
2. Assessing officials and permanent, full-time employees of local units of government appearing on behalf of the unit or as the authorized representative of another unit.
3. A tax representative as defined in 52 IAC 1-1-6.
4. A representative of a minor or incapacitated party as defined in 52 IAC 1-2-1-1.
5. A local government representative as defined in 52 IAC 1-1-3.5.
6. A certified public accountant when the certified public accountant is representing a client in a matter that relates only to personal property taxation or valuation. A certified public accountant may not represent a client on a personal property exemption matter.
(7) An attorney who is a member in good standing of the Indiana bar or any person who
(1) is a member in good standing of any other state bar; and
(2) has been granted leave to appear before the board; temporary admission by the Indiana supreme
court under the Indiana Rules for Admission to the Bar and the Discipline of Attorneys, Rule 3,
Section 2.

authorized to represent a party in a matter governed by this article.

Indiana Board of Tax Review; 52 IAC 2-2-4; filed Jan 26, 2004, 11:30 a.m.: 27 IR 1776; filed Nov 14, 2007, 11:11
a.m.: 20071212-IR-052060571FRA)

SECTION 10. 52 IAC 2-2-16 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-2-16 "Practice before the board" defined

Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 16. "Practice before the board" means participation in any matters connected with a proceeding before
the board, any of its members, or any contractor or employee designated to act in the capacity of an
administrative law judge relating to a client's rights, privileges, or liabilities under Indiana's property tax laws or
rules. Such presentations include, but are not limited to, the following:

(1) Preparing and filing necessary documents except personal property returns.
(2) Corresponding and communicating with the board on a substantive issue in a pending proceeding.
(3) Representing a client at a hearing, on site inspection, or meeting.

has the meaning set forth in 52 IAC 1-1-4.

Indiana Board of Tax Review; 52 IAC 2-2-16; filed Jan 26, 2004, 11:30 a.m.: 27 IR 1777)

SECTION 11. 52 IAC 2-3-2 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-3-2 Notice of appearance; power of attorney

Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 2. (a) If the party is represented by a:
(1) tax representative under 52 IAC 1-2-1;
(2) local government representative under 52 IAC 1-1-3.5; or
(3) certified public accountant under 52 IAC 1-1-6(6);
the tax representative, local government representative, or certified public accountant must file a power of
attorney with the board.

(b) Representatives of minor or incapacitated parties as defined by 52 IAC 1-2-1.1 must file the documentation
required under that rule.

(c) Attorneys must file a notice of appearance with the board, stating that the party has authorized the attorney
to appear on the party's behalf.

(d) Attorneys not admitted to practice in Indiana seeking to appear before the board must also file a verified
petition with the board setting forth the following:
(1) The name, address, and phone number of the attorney's law firm or employer.
(2) The states or territories in which the attorney is licensed to practice law, and that the attorney is currently a
member in good standing in all jurisdictions.
(3) That the attorney has never been suspended or disbarred or resigned as a result of a disciplinary charge,
investigation, or proceeding from the practice of law in any jurisdiction, or, if the attorney has been suspended
or disbarred or resigned from the practice of law, the petition shall specify the following:
(A) The jurisdiction.

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(B) The charges.
(C) The address of the court and disciplinary authority that imposed the sanction.
(D) The reasons why the board should grant temporary admission notwithstanding prior acts of misconduct.

(4) That no disciplinary proceeding is presently pending against the attorney in any jurisdiction, or, if any proceeding is pending, the petition shall specify the jurisdiction, the charges, and the address of the disciplinary authority investigating the charges. An attorney admitted under this rule shall have a continuing obligation during the period of such admission promptly to advise the board of:

(A) a disposition made of pending charges; or
(B) the institution of new disciplinary proceeding.

(5) A statement that the attorney has read and will be bound by the rules of professional conduct adopted by the supreme court and that the attorney consents to the jurisdiction of the:
(A) state of Indiana;
(B) Indiana supreme court; and
(C) Indiana supreme court disciplinary commission;

to resolve any disciplinary matter that might arise as a result of the representation. petition the Indiana supreme court for temporary admission under the Indiana Rules for Admission to the Bar and the Discipline of Attorneys, Rule 3, Section 2.

(d) (e) The:
(1) power of attorney;
(2) documentation of incapacity or minority under 52 IAC 1-2-1.1; or
(3) notice of appearance;
must contain the authorized representative's name, address, and telephone number.

(Indiana Board of Tax Review; 52 IAC 2-3-2; filed Jan 26, 2004, 11:30 a.m.: 27 IR 1778; filed Nov 14, 2007, 11:11 a.m.: 20071212-IR-052060571FRA)

SECTION 12. 52 IAC 2-5-2 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-5-2 Amendments to appeal petitions; additional written specification
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 2. (a) Timely filed amendments to appeal petitions are permitted.

(b) The petition may be amended once as a matter of course within thirty (30) days of the filing of the original appeal petition.

(c) Amendments A motion to amend a petition may be filed later than thirty (30) days following the filing of the date a petition must be approved by the board for good cause shown. Amendments filed solely for the purpose of adding new issues will be approved if filed not later than fifteen (15) business days before the hearing is filed and such motion may be approved by the board upon good cause shown.

(d) Notwithstanding subsection (b), (c), the board will not approve an amendment filed fewer than fifteen (15) business days before the hearing without the consent of the other parties to the hearing.

(e) Amendments to appeal petitions must be:
(1) filed at the central office; and
(2) served upon all parties.

(f) Amendments to appeal petitions must be filed under 52 IAC 2-4.

(g) Only issues raised in:
(1) the appeal petition; or
(2) any approved amendments to the petition;
may be raised at the hearing.
SECTION 13. 52 IAC 2-6-2 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-6-2 Place of hearing
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 2. (a) Hearings held before an administrative law judge will be held in:
(1) the central office;
(2) the county in which the property subject to the appeal is located; or
(3) any county in which an administrative law judge has an office;
unless the parties and the designated administrative law judge agree to a different location.

(b) All hearings conducted by:
(1) a member of the board; or
(2) the board sitting in its entirety;
will be held in the central office unless otherwise agreed to by the board.

SECTION 14. 52 IAC 2-6-8 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-6-8 Summary judgment; partial summary judgment
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 8. (a) A party may, prior to the hearing, move for:
(1) summary judgment; or
(2) partial summary judgment;
pursuant to the Indiana Rules of Trial Procedure.

(b) A motion for summary judgment or partial summary judgment may:
(1) be considered a delay reasonably caused by the party filing the motion; and
(2) extend the time during which the hearing must be held.

SECTION 15. 52 IAC 2-7-1 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-7-1 Evidence
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 1. (a) Except as provided in subsection (b), a party participating in the hearing may introduce evidence
that is otherwise proper and admissible without regard to whether that evidence has previously been introduced at
a hearing before the county PTABOA.

(b) A party to the appeal must provide the following to all other parties:
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(1) Copies of documentary evidence and summaries of statements of testimonial evidence at least five (5) business days before the hearing.

(2) A list of witnesses and exhibits to be introduced at the hearing at least fifteen (15) business days before the hearing. 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 (10) business days before the hearing in order to address the new issue.

(c) For purposes of determining compliance with the deadlines under subsection (b), the parties must either provide personal or hand delivery or deposit the materials in the United States mail or with a private carrier three (3) days before the deadline in accordance with the provisions of 52 IAC 2-3-1. If a party uses a private carrier that guarantees next day delivery, the materials must be sent one (1) day before the specified deadline.

(d) The board or the presiding administrative law judge may waive the deadlines under subsection (b) for any materials that had been:

(1) submitted; or
(2) made part of the record;

at a PTABOA hearing, a department hearing, or other proceeding from which the appeal arises.

(e) Copies of all materials provided to other parties under subsection (b) will become part of the administrative record only if admitted into evidence by the board or administrative law judge.

(f) Failure to comply with subsection (b) may serve as grounds to exclude the evidence or testimony at issue.

(g) 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 unless submitted to the board. Evidentiary materials proffered but not admitted into evidence will be so identified in the record.

(h) The board and its administrative law judges may specify the manner in which exhibits are to be labeled and organized.

(i) The board shall consider only the following:

(1) Evidence, exhibits, and briefs submitted to it.
(2) Other documents made part of the record.
(3) Matters of which the board expressly takes official notice under section 4 of this rule.

SECTION 16. 52 IAC 2-8-1 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-8-1 Continuance of proceedings
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 1. (a) Continuances and extensions of time may be granted only if:
(1) the request is made prior to the hearing or other deadline;
(2) good cause is shown; and
(3) the request is served on all parties.

(b) 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.

(b) (c) A continuance or extension granted prior to the hearing shall:
(1) be considered a delay reasonably caused by the party requesting the continuance or extension; and shall
(2) automatically extend the time during which the hearing must be held.
SECTION 17. 52 IAC 2-8-4 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-8-4 Subpoena
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 4. (a) Any party may request that the board issue a subpoena or subpoena duces tecum by filing a request with the board at least ten (10) business days before the date on which the hearing commences or the deposition is scheduled. The request shall state the following information:

1. The name of the witness.
2. The address, including street address, city, and county, where the witness can be served.
3. The date, time, and location the witness is expected to appear.
4. The matter in which the witness is expected to testify.
5. If a subpoena duces tecum, the material, listed in detail, to be brought by the witness to the hearing or deposition.

(b) A request for a subpoena or subpoena duces tecum shall not be granted by the board if filed fewer than ten (10) business days before the date on which the:

1. hearing commences; or
2. deposition is scheduled;
except by approval of the board upon a showing of good cause.

(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 and subpoena on all other parties.

(d) (e) Except as provided in subsection (b), upon receipt of a properly filed request, the appropriate subpoena shall be issued by:

1. any member of the board; or
2. an employee authorized by the board to issue such subpoena.

(e) (f) Any fees for service by the sheriff are the responsibility of the party requesting the subpoena.

(f) Subpoenas:

1. may be served in any manner specified by the Indiana Rules of Trial Procedure; and
2. shall be enforced in a court of competent jurisdiction as provided for by law.

SECTION 18. 52 IAC 2-8-5 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-8-5 Motions
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 5. (a) A party may file motions with the board or the designated administrative law judge. Except motions made during the hearing, all motions must:

1. be in writing;
2. state the basis for the motion;
3. set forth the relief or order sought;
(4) be properly captioned with the:
   (A) petition number;
   (B) parcel number; and
   (C) taxpayer's name, address, and telephone number;
(5) be signed by the party or authorized representative; and
(6) include verification or proof of service to all parties.

(b) The failure to serve all parties may result in a denial of the motion.

(c) Any response to a motion must be filed within thirty (30) days after the date of service unless otherwise specified by the board or the administrative law judge.

(d) A motion filed by a party may:
   (1) be considered a delay reasonably caused by the party filing the motion; and
   (2) extend the time during which the hearing must be held.

(Indiana Board of Tax Review; 52 IAC 2-8-5; filed Jan 26, 2004, 11:30 a.m.: 27 IR 1784; filed Nov 14, 2007, 11:11 a.m.: 20071212-IR-052060571FRA)

SECTION 19. 52 IAC 2-8-6 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-8-6 Briefs
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 6. (a) Parties may file, or the board may request, briefs in support of a party's position on any issue relevant to the appeal.

(b) Briefs shall be filed within the time limits set by the administrative law judge or board. An extension of time may be requested. If a party fails to timely file a brief, the board may exclude the brief from consideration.

(c) An original and two (2) copies of a brief submitted under this section must be filed with the board at the central office. A copy of the brief shall also be served on each party.

(d) A brief submitted under this section must not exceed thirty (30) pages (excluding exhibits) without prior written permission of the board or administrative law judge.

(e) Notwithstanding a submission deadline, a party may supplement a previously filed brief with subsequently decided cases, but without further argument.

(f) Briefs amicus curiae may be filed with leave of the board and must be filed in accordance with the briefing schedule established for the parties or by order of the board or the designated administrative law judge.

(Indiana Board of Tax Review; 52 IAC 2-8-6; filed Jan 26, 2004, 11:30 a.m.: 27 IR 1784)

SECTION 20. 52 IAC 2-9-4 IS AMENDED TO READ AS FOLLOWS:

52 IAC 2-9-4 Settlement; stipulation of value
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15-4

Sec. 4. (a) All stipulations submitted by the parties concerning the value or status of the property must be approved by the board.
(b) If the board does not approve a stipulation, the appeal shall proceed according to IC 6-1.1-15-4 and this article:

(a) 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.

(b) This section is not intended to prevent a petitioner from withdrawing its appeal once an agreement is reached between the parties.

(c) This section shall not apply to the stipulation or settlement of matters remanded to the board from the Indiana tax court.

(SECTION 21. 52 IAC 2-10-1 is amended to read as follows:)

52 IAC 2-10-1 Failure to appear
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 1. (a) The failure of a party or a party's representative to appear at a hearing, after proper notice has been given, may constitute the basis for a default or dismissal of the appeal petition.

(b) Within ten (10) 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. This objection must contain supportive facts stating why the party did not appear.

(c) The board may vacate and set aside an entry of a dismissal or default order.

(d) If an order of default or dismissal is vacated and set aside, the board will schedule another hearing on the appeal petition. At least thirty (30) days notice will be given for the hearing unless waived by agreement of all parties. The time period within which the board must issue a final determination on the appeal petition will be calculated from the date of the hearing on the merits.

(e) A tax representative that fails to appear at a hearing after proper notice may be reported to the department for revocation of certification under 50 IAC 15-5-8(a).

(SECTION 22. 52 IAC 2-11-1.5 is added to read as follows:)

52 IAC 2-11-1.5 Voluntary resolution
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15-1; IC 6-1.5-3-4

Sec. 1.5. (a) "Voluntary resolution" or "facilitation" means an informal process in which an administrative law judge acts to encourage and assist in the resolution of a property tax appeal.

(b) The voluntary resolution program requires an agreement to participate by both the county and the taxpayer.
(c) A facilitation session may only occur after a taxpayer has filed a written notice for review with the county under IC 6-1.1-15-1(c). Moreover, the parties are encouraged to undertake the informal conference procedures under IC 6-1.1-15-1(h)(2) prior to requesting a facilitation session with an administrative law judge.

(d) The parties may request a facilitation session after the county board’s hearing on the matter under IC 6-1.1-15-1(k). However, the facilitation must be conducted prior to the county board’s issuance of a decision under IC 6-1.1-15-1(n).

(e) All parties, or their attorneys or representatives with settlement authority, shall be present at the facilitation.

(f) Voluntary resolution proceedings shall be considered settlement negotiations as governed by Ind. Evidence Rule 408.

(g) Facilitation sessions are not open to the public unless all parties agree.

(h) A taxpayer’s participation in a facilitation program does not preclude or delay the taxpayer’s right to appeal to the board under IC 6-1.1-15-1(o) in the event that the county board does not timely act to hold a hearing under IC 6-1.1-15-1(k) or issue its order under IC 6-1.1-15-1(n).

(i) Any administrative law judge that participates in a facilitation session between a county and a taxpayer may not thereafter preside over an appeal to the board of the same matter.

(j) Nothing in this rule shall be construed as requiring participation in a voluntary resolution program in order for the parties to settle a property tax matter between them.

(k) A voluntary resolution session is not a proceeding before the board under 52 IAC 1-1-4 or 52 IAC 2-2-16 and does not require any record keeping by the board, including the records required under 52 IAC 2-3-3(b).

(Indiana Board of Tax Review; 52 IAC 2-11-1.5)

SECTION 23. 52 IAC 3-1-2 IS AMENDED TO READ AS FOLLOWS:

52 IAC 3-1-2 Property subject to the small claims procedure

Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 2. (a) Unless a party elects to transfer out under 52 IAC 2-5-1(e)(6) or section 3 of this rule, an appeal petition shall be subject to the small claims procedure if the property under appeal is:
   (1) an unimproved parcel of land with an assessed value not in excess of one million dollars ($1,000,000);
   (2) a parcel of land, as improved, with an assessed value for land and improvements not in excess of one million dollars ($1,000,000); or
   (3) personal property not in excess of one million dollars ($1,000,000).

(b) By accepting the small claims procedure, the parties agree that:
   (1) the issues contained in the appeal petition are substantially the same as those presented to the PTABOA; and agree that
   (2) no new issues will be raised before the board.

(c) The small claims appeal petition may not be amended except to conform the issues raised in the appeal petition to those issues raised at the PTABOA hearing from which the appeal arises.
(d) A party to any appeal concerning a property that does not meet the criteria described in subsection (a) may elect to have the petition heard under the small claims procedure by:
   (1) requesting so upon filing the appeal petition or by notifying the board, in writing, within thirty (30) days of filing his or her petition; and
   (2) obtaining the written consent to such election from the other parties to the proceeding. 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.

(Indiana Board of Tax Review; 52 IAC 3-1-2; filed Jan 26, 2004, 11:30 a.m.: 27 IR 1787; errata filed Mar 4, 2004, 9:45 a.m.: 27 IR 2284)

SECTION 24. 52 IAC 3-1-5 IS AMENDED TO READ AS FOLLOWS:

52 IAC 3-1-5 Procedures
Authority: IC 6-1.5-6-2
Affected: IC 6-1.1-15

Sec. 5. (a) Small claims procedures:
   (1) shall be structured with the sole objective of hearing the petition in an expeditious and just manner according to the rules of substantive law; and
   (2) are not bound by the rules of trial practice, procedure, or evidence except provisions relating to privileged communications and offers of settlement.

This relaxation of evidentiary rules is not a relaxation of the burden of proof.

   (b) Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. If the hearsay evidence is not objected to, the evidence may form the basis for a determination. However, if the evidence:
      (1) is properly objected to; and
      (2) does not fall within a recognized exception to the hearsay rule;
the resulting determination may not be based solely upon the hearsay evidence.

   (c) Except as provided in subsection (d), there shall be no prehearing discovery in small claims.

   (d) If requested not later than ten (10) business days prior to hearing by any party, the parties shall provide to all other parties copies of any documentary evidence and the names and addresses of all witnesses intended to be presented at the hearing at least five (5) business days before the small claims hearing.

   (e) At the commencement of the small claims hearing, the parties shall provide to the presiding administrative law judge a copy of all documentary evidence provided to the other parties.

   (f) Failure to comply with subsection (d) may serve as grounds to exclude evidence or testimony that has not been timely provided.

(Indiana Board of Tax Review; 52 IAC 3-1-5; filed Jan 26, 2004, 11:30 a.m.: 27 IR 1788; filed Nov 14, 2007, 11:11 a.m.: 20071212-IR-052060571FRA)

SECTION 25. 52 IAC 2-12-1 IS REPEALED.

Notice of Public Hearing

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To Collect Sales Tax or Not: Indiana's Ecommerce Conundrum—
Determining the State's Lost Sales Tax Revenue and Weighing the Amazon Tax Policy

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Dagney Faulk, Director of Research, Ball State University Center for Business and Economic Research

November 2011
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To Collect Sales Tax or Not: Indiana’s Ecommerce Conundrum—
Determining the State’s Lost Sales Tax Revenue and Weighing the Amazon Tax Policy

Introduction

Black Friday traditionally is the biggest shopping day for many brick-and-mortar retailers across Indiana, which means a big sales-tax haul for the state, too. In recent years Cyber Monday has become the online equivalent of Black Friday, a day when shoppers must be drawn to computer that they showed the day after Thanksgiving. But Cyber Monday doesn’t produce nearly the same sales-tax revenue for Indiana, and there is the rub. Many of those transactions don’t include Indiana’s seven percent sales tax. Federal law has exempted online retailers from the responsibility of collecting and remitting state sales taxes unless they have a physical presence (or nexus) in that state. This has touched off a policy debate that rings from the Statehouse to the U.S. Capitol and, recently, back to the county courthouse. Local retailers claim their online competitors that don’t collect sales tax enjoy a price advantage while politicians weigh whether the cost of lost sales tax revenue is worth the additional jobs provided by Amazon.com and others that ship goods from Indiana warehouses after conducting their business in virtual stores. Even as the tax equity question is debated between retailers, another tussle rages over the proper venue for any new tax laws—Congress or state legislatures.

This is not an esoteric discussion in Indiana, which is why the Indiana Fiscal Policy Institute and Ball State University’s Center for Business and Economic Research have teamed up to produce this report. In it we attempt to determine how much sales tax the state loses through online sales and other forms of commerce. The report also determines the effect of the so-called Amazon Tax, which would require online firms with operations in the state to collect sales tax from Hoosiers.

Estimates of Indiana’s sales tax revenue lost to online sales widely vary, from as little as $33 million a year to as much as $398 million. Using existing data and new methods for analyzing the data, this report shows Indiana loses between $40 million and $114 million in sales tax revenue from online sales with a similar amount likely lost to traditional mail-order sales.

The recent lawsuit filed by Indianapolis-based Simon Property Group highlights the tensions between traditional retailers and their online counterparts. Simon, the nation’s largest mall developer and owner, sued Indiana, demanding that the state require online retailers to collect and remit sales taxes on transactions. Amazon has long argued it should be exempt from collecting state sales taxes, and Indiana has agreed, which Amazon has acknowledged played a role in its decision to locate four warehouses in the state. This study, however, determines that there is no apparent connection between enforcement of state sales tax collections and location decisions.

The sales tax is a relatively simple concept, but technology and circumstance have complicated its enforcement. By determining more precisely how much sales tax revenue the state is losing and by debunking the notion that the exemption for online retailers is what causes them to locate operations in Indiana, it is hoped that policy makers will be able to address questions of tax equity and neutrality more effectively.

Background

Estimates of ecommerce sales by the United States Census reveal a startling growth of sales over the past decade. These sales comprise such staples as business-to-business transactions, food, medicine, and consumer goods such as clothing, sporting equipment and consumer electronics. See Figure 1 (page 2).

Importantly for our purposes, ecommerce transactions are often not subject to state-level sales and use taxes. This was decided in the Quill v. North Dakota case in 1992, which determined, in effect, that firms with no physical nexus in a state cannot be subject to that state’s tax laws. As a consequence, the sale of an item purchased through the internet, or a mail order catalog from a state in which the firm does not have a physical presence, cannot be taxed. The growth in ecommerce has accompanied an erosion of sales tax collections across the country. Over the past several years a number of important studies have focused attention on the foregone tax revenues due to ecommerce. The best of these studies are reports and peer-reviewed work from several authors at the University of Tennessee’s Center for Business and Economic Research. These are frequently updated and provide a basis for analyzing the costs associated with the current tax system in terms of state tax revenues foregone. We will review them in more detail later in the study.

The expansion of ecommerce in recent years has led many mail order or ecommerce-related firms to deploy warehousing, distribution and customer service facilities in a number of states. This is done to reduce transportation costs, access available workers and to place resources closer to larger population centers where customers reside. Such familiar companies as Amazon.com, Barnes and Noble and others have then expanded their physical nexus significantly in recent years. This has raised important taxing issues for states who both wish to see these firms locate within their state and also want to receive the tax revenues from all sales by that firm to in-state residents. Several states have also changed the legal definition of nexus to include firms that facilitate trade (such as distribution facilities, marketing and internet providers). These are often referred to as Amazon Taxes because Amazon.com is the largest ecommerce firm without a physical retail presence.

The interaction of declining tax revenues and uncertain interpretation of nexus, along with pressure from non-internet retailers (brick...
and mortar locations) have begun a significant push for aggressive state action and perhaps federal legislation mandating the collection of interstate taxes.

In the absence of federal legislation, state policy makers are faced with a difficult balance of the desire to attract more employers and the need to prevent the continued erosion of the sales tax base. This policy dilemma, in part, motivates our analysis. We are also concerned with larger issues of equity in taxation, which are defined as treating like economic activities similarly in the tax structure. Likewise we are concerned with the neutrality of the tax code. A non-neutral tax code impels behavior that is unrelated to the revenue goals of the tax. For example, the choice to not locate a distribution center within a large state because that would result in all ecommerce and mail order transactions in that state being taxed is non-neutral. Finally, we worry about the tax base. A prime hallmark of an effective public finance system is a broad base and low rate. Exemption of mail order or ecommerce-related sales from taxation requires that higher tax rates be placed on a narrower set of economic activity to provide for the public goods and services in Indiana.

Earlier Studies Relevant to Ecommerce Taxation

The problem of defining the point of sales and firm nexus for tax and regulatory purposes has a long pedigree. Gregory (1904) outlines more than three decades of case law on the Collect On Delivery (C.O.D.) sale of regulated goods. At the time, the interaction of our public mail service and the growth of C.O.D. methods gave rise to significant legal concerns. The most critical of these reported by Gregory were in the sale of alcoholic beverages and butterine (margarine), which were items regulated by state and county governments for whom the definition of 'point of sale' determined criminal and taxation issues (Gregory 514).

A direct examination of the role of federal and state taxation was offered by Boyle (1915). This early treatment of the growing connectedness of tax administration argued that increases in interstate commerce led to important taxation issues. He noted:

In Chicago there are certain great mail order houses whose sales run up into the millions, probably hundreds of millions of dollars a year. These houses do business in every state in the Union and in foreign countries as well. In reality this

An gigantic business is interstate. But in actual practice, under our uncoordinated systems of state and federal taxation, this business is assessable only at its domicile in the state of Illinois (Boyle 60).

Boyle's recommendation included a significant degree of tax rate harmonization across jurisdictions, which later research argued is inappropriate in a federal system. However, many of his arguments regarding the administrative considerations of cross-border taxation echo the current debate:

Cooperation in assessment and collection of taxes, as outlined in the preceding pages, will lead to a division of the field of taxation, a division based on administrative experience, not on preconceived theory. It will also lead, it is hoped, to a business-like coordination of the federal administrative machinery itself. . . . (Boyle 60).

Between the world wars, tax administration at the state and federal level grew significantly as demands for public services grew. Writing in 1941, Carlson described the growth of sales and use taxes as a response to this demand for services. He described the concern about interstate tax rate differentials and how states dealt with differing state sales tax rates. His analysis on the magnitude of this matter is stunningly modern: "[j]ust how extensive the alleged loss in sales tax revenues may be is difficult if not impossible to ascertain." and "[e]ven if attention be focused upon those purchases made out of state for the primary purpose of avoiding sales tax, it is virtually impossible to ascertain their volume" (Carlson 223-224).

More recent studies have extended this work to include the ever expanding sales tax levels and evolving case law (Hellerstein 1986). However, it is likely that the postwar expansion of retail goods consumption and the growth of both the sales tax base and total collections diverted attention away from lost sales tax revenues from mail order and cross-border sales.

The economic debate over interstate sales tax issues again became important as the Internet Age introduced a new competitive class of firms into retail trade: e-commerce firms. In 1997, Fox and Murray described the issue, arguing for destination-based tax collections for retail sales (which, they note, requires federal action). Mikesell (2000) argued against harmonization of sales tax rates (an issue raised by Boyle in 1915, which had long been settled against the notion of harmonization). However, Mikesell argued at the time that a form of federal registration for vendors would substantially mitigate the lost revenue for most states.

From their first study in 1997 to work pending formal publication, the most extensive analysis of the e-commerce question has emerged from researchers at the University of Tennessee's Center for Business and Economic Research. These studies clarified emerging issues of the effect of e-commerce on sales tax bases, the importance of pursuing tax policies that were neutral with respect to the type of business engaging in commerce, how taxes affected electronic commerce at the state level, and several studies of the effects of internet sales on state sales tax collections. This research provides an important framework for the entire issue. However, the element most germane to our study is the estimate of state sales tax losses due to the growth of e-commerce. Because we shall describe their methodology as a part of our overall empirical analysis, we will defer the discussion to later. We next turn our attention to the economic effects of ecommerce sales tax issues with a focus on Indiana.

Understanding the Economic Effects of the Ecommerce Sales Tax Issue

In the following sections we provide two separate analyses of the ecommerce issue. First, we provide a review of estimates of the lost sales tax attributable to ecommerce in Indiana, along with new analysis designed to bridge the methodological gaps between existing estimates. This should provide a reconciliation of total sales tax losses in Indiana attributable to ecommerce. Second, we estimate the effect of changes to sales and use tax legislation in states which have implemented or debated an Amazon Tax designed to expand the rules of nexus. We begin with sales tax losses due to ecommerce in Indiana.

Estimating lost sales and use taxes due to ecommerce in Indiana

As Carlson noted in his 1941 study, estimating uncollected taxes due to consumer or business behavior presents several challenges. However, two methods have emerged to better understand the magnitude and changes to tax losses due to ecommerce. As with any such estimate, both approaches have some limitations, which are acknowledged by the authors. These studies offer differing estimates of sales tax losses for which some effort at reconciliation is warranted. So, a unique contribution of this study is the reporting of a supplementary estimation technique that helps reconcile the estimates from the aforementioned studies. We begin with the University of Tennessee studies.

For more than a decade, a research team at the University of Tennessee has provided yearly estimates and forecasts of lost sales tax revenue due to ecommerce. They have employed two similar approaches to estimate these losses. The early method involved using data on online sales from Forrester Research, Inc., a private marketing

2. Michael Hicks, a co-author of this study, was a visiting research assistant professor at this research center in 1998-1999, but did not participate directly in the ecommerce studies.

3. Also see: Fox and Murray (1997), Fox and Luna (2000), Bruce and Fox (2000), Bruce and Fox (2001), Bruce, Fox and Murray (2003), and Bruce, Fox and Luna (2002).
firm. The more recent method involves using Census data on national e-commerce as the basis for a forecast. From this forecast they applied state laws on those sectors which are taxable in each state, and then excluded estimates of non-taxable business-to-business sales. The study team also estimated the level of compliance with out-of-state sales and use taxes. These compliance estimates of ecommerce-related annual sales tax losses in Indiana from 2010 through 2012 were $170.1 million, $194.1 million and $216.9 million respectively.

A frequently cited figure of $398 million in lost sales tax collections in Indiana includes sales tax losses from traditional mail order and telephonic orders, as well as ecommerce-related losses. Taxation of mail order and telephone sales is a related issue because federal legislation would likely affect all types of nexus taxing issues, not merely ecommerce. We confine our estimates to ecommerce losses.

Indiana's Office of Management and Budget (OMB) performed a study to estimate sales tax payments by firms engaged in ecommerce. This analysis included several efforts. The first of these was to measure compliance from administrative data. These included sales taxes reported through the Streamlined Sales Tax project (SST), estimates of out-of-state sales tax payments made directly by retailers (not participating in the SST) and use-tax collections provided by Hoosiers on their annual income tax forms. A fourth approach estimates the share of ecommerce-related sales taxes paid by firms with a nexus in Indiana (e.g., Wal-Mart, Sears, etc.). Together, OMB estimates that Indiana collects $186 million in ecommerce-related sales taxes. Though OMB does not provide a comprehensive estimate of uncollected taxes, the office reports that the share of Indiana sales taxes not collected from Amazon.com is in the $25 million range. However, if we apply the compliance estimate reported by the University of Tennessee studies to the very careful analysis of collected sales tax on ecommerce by OMB, it suggests that roughly $91 million from Amazon and other ecommerce-related retailers were uncollected in 2010.

The University of Tennessee and Indiana OMB studies provide estimates of lost sales tax revenue that range from a high of roughly $216 million to a low of just over $25 million. To this widespread range we offer yet another method of estimating taxes.

In order to estimate uncollected sales taxes attributable to ecommerce, we develop a method that accounts for this missing tax revenue directly from observed sales tax data in the state. To do this, we construct a statistical (econometric) model. This model then estimates the share of Indiana personal income paid in sales taxes as a function of the sales tax rate, personal income, a trend variable and a statistical measure of the persistence of sales tax share of income that aids in the accounting for such things as broad changes in consumption patterns or recessions. This model explained much of the variation in sales tax collections, and was broadly consistent with economic theory and historic sales tax collections in the U.S. However, this model specification does not answer a question about ecommerce sales tax losses. To do so we include two variables that represent the advent and growth of broadband access in Indiana. The first of these is simply a variable that recognizes 1996 as the first year of broadband deployment in the U.S. (the date at which the Federal Communications Commission began collecting data). The second variable is the logarithm of the number of broadband subscribers in Indiana, which approximates a voice of growth of broadband usage. In adding these variables to our model and re-estimating the relationship, we find that both the presence and the growth of broadband subscribers reduced the sales tax share of personal income in Indiana. The relationship was statistically strong, and permitted us to then calculate the total lost taxes as a consequence of the presence of broadband. These estimates range from $35 million to $77 million in the most recent years available.

Before providing a comparison of estimates, two issues must be acknowledged. First, all these studies have ranges of estimates that are plausible. The differences between study findings could result from statistical error inherent in forecasting or surveying, different patterns of ecommerce use by Indiana consumers (as compared to the national sample) or statistical error inherent in our own study. These sorts of differences necessarily exist among studies that seek to estimate, in different ways, the same question. The application of what, in common vernacular, is known as 'margin of error' to these provides a range of estimates for which each is subject to error of plus or minus tens of millions of dollars. In other words, given the methodological issues of estimating the lost sales taxes, differences are inevitable. However, the different estimates among these studies are, when compared to the overall sales tax receipts of more than $6 billion, remarkably small.

Second, we do not know how much sales tax collections have been influenced by existing sales order purchases not involving ecommerce. Hence, we do not know the change in mail order purchases caused by the advent of ecommerce. These factors combine to make the total lost sales tax from ecommerce an elusive figure, but one that can be known if federal legislation required payment of sales and use outside the current nexus requirements. A comparison of these estimates appears in Table 1.

All three of these methods offer credible tools for estimating ecommerce sales tax losses. The actual value cannot be known yet, but as a representational figure, we offer a range from $39.6 million to $114.3 million (which is $77 million, plus or minus $37 million) this fiscal year in lost ecommerce-related sales taxes alone. The University of Tennessee studies also estimated another $181 million in lost sales

5. (Sales Tax) / (Personal Income) = 6 + 81 * Log (Personal Income) + 82 (Sales Tax Rate) + 83 * T, + 84 * t, + 85 * T, * t,
Table 1: Estimates of Lost Sales Tax Due to Ecommerce

<table>
<thead>
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<th>Study</th>
<th>2012 Estimate</th>
<th>Comments</th>
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<tr>
<td>The University of Tennessee</td>
<td>$219.6 million</td>
<td>Potential high estimate of base, low compliance estimate</td>
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<tr>
<td>Hybrid Estimate</td>
<td>$991 million</td>
<td>Inferred from UT compliance estimates, and Indiana Office of Management and Budget collections data</td>
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<tr>
<td>Indiana Fiscal Policy Institute &amp; Ball State University (this study)</td>
<td>$77 million</td>
<td>Statistical estimate with a range of +/- $37 million</td>
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Table 2: Summary Statistics

<table>
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<tr>
<th>Study</th>
<th>Employment in NAICS 4541</th>
<th>Establishments in NAICS 4541</th>
<th>Broadband Subscription</th>
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<td>Mean</td>
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<td>Median</td>
<td>3,657</td>
<td>189</td>
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<td>Maximum</td>
<td>32,971</td>
<td>2,493</td>
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<td>Minimum</td>
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<tr>
<td>Cross sections</td>
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Concerns over the appropriate considerations for collection of sales taxes on mail-order houses and ecommerce have a long history. The introduction of a tax, simply because it seemed likely to pass. In one such model we found evidence of fewer mail order establishments as a consequence of a debate on an Amazon Tax. However, this variable did not affect employment, and given that it occurred in only one of several statistical estimates, it cannot be viewed as reliably different than a ‘no effect finding.’

We also subjected our model to a battery of statistical tests, and overall the model performed well in predicting the location and size of a mail order or ecommerce industry within a state. Notably absent in these results was a strong connection between an Amazon Tax and the size of that industry in a state. Our goal was to craft a very detailed description of the effect of these taxes on firms in each state from 1997 through the most recent available data.

The model accounted for the Amazon Tax, number of broadband subscribers, recessions, trend effects, variables that measure persistence across time, and variables that account for aspects of each state which are unchanged over the observed period.6

We computed a number of relationships, including growth rates of firms, levels, population-adjusted levels and alternative depictions of broadband penetration. In none of these tests did the Amazon Tax affect employment in these sectors in any state. We also included a variable that measured the timing of the ‘debate’ over the Amazon Tax. We reasoned that it was possible that firms would relocate prior to the imposition of a tax, simply because it seemed likely to pass. In one such model we found evidence of fewer mail order establishments as a consequence of a debate on an Amazon Tax. However, this variable did not affect employment, and given that it occurred in only one of several statistical estimates, it cannot be viewed as reliably different than a ‘no effect finding.’

Summary and Conclusions

Concerns over the appropriate considerations for collection of sales taxes on mail-order houses and ecommerce have a long history. The
recent growth in e-commerce and the receding sales tax base in most states points to an expanding public policy concern. Any resulting change to public policy will affect the level of equity and neutrality of our tax system. To address these concerns we have provided two new empirical estimates directly bearing on the problem in Indiana. First, we attempt to reconcile the many estimates of lost sales tax collections due to e-commerce in the state. Second, we estimate the impact of state-level measures to extend nexus rules on e-commerce firms.

Beginning with the latter, our estimates suggest there is no connection between the Amazon Tax and firm location decisions. While the Amazon Tax is a newer tax, and so the effects have not yet had an opportunity to mature, there is nothing in our analysis to suggest it will result in fewer or more e-commerce firms locating in a state.

Our analysis of lost sales taxes focus on reconciling and understanding the many estimates of the tax. Credible studies point to the range of impacts from $33 million to $216 million per year in e-commerce sales alone. At least one estimate concludes that traditional mail order sales may lead to another $181 million in lost tax collections in the state; though, as we noted, our professional judgment leads us to doubt the size of this estimate.

We believe that the actual lost sales taxes figure most likely to lie in the $40 million to $114 million range for e-commerce, with a similar or lower amount lost due to traditional mail-order sales. Placed in context to the overall state budget, this is a small share of collections. However, under even the smallest estimates provided here, it is clear that a strong public policy dimension to the issue exists. The current system lacks equity and neutrality, treating very similar retailers differently, and potentially altering the behavior of consumers and businesses with respect to fundamental decisions on consumption and production.

References


Fiscal Policy Matters: The 2012 Indy Bar
State & Local Tax Update

Exhibit No. 4
INDIANA BUDGET UPDATE
REASON FOR OPTIMISM

By: John Ketzenberger, President
Indiana Fiscal Policy Institute

April 14, 2011
Acknowledgment
The author appreciates the assistance of those who provided information for this report and those who took the time to review this report before publication.

About the Author
John Ketzenberger is president of the Indiana Fiscal Policy Institute. Previously he was a reporter and editor for several Indiana newspapers.
Executive Summary
Indiana is poised to work its way out of the worst economic crisis to hit the state since the recession of 1981-82 hammered the manufacturing sector. As Legislators consider a new two-year budget there is reason to be cautiously optimistic about the state’s fiscal health for the first time since 2008.

One reason for optimism is the recent trend in Indiana’s revenue reports. The state’s revenue from taxes exceeded revised expectations for the fifth straight month in March. Better yet, growth of the three major categories in the year-over-year comparison is strong. Sales taxes are up 5 percent over last year while individual income tax collections are up 16 percent and corporate income taxes are up 41 percent.

The General Assembly’s sober approach to the new two-year budget also is another reason for optimism. The House of Representatives sent the Senate a budget that held the line on spending and did not increase taxes. The House budget would eliminate the state’s structural deficit and is expected to produce about $600 million in surplus funds by the end of FY 2013.

Still, there are reasons to be wary. The economy remains unsettled. Fuel prices are climbing and natural disasters shake confidence. Meanwhile the budget battles in Congress may produce new unfunded mandates for states, especially in Medicaid.

Another problem looming for Indiana: unfunded liability for a couple of prominent scholarship programs started when times were better in the economy. One estimate pegs the liability in seven years at $450 million for the 21st Century Scholars Program and the Children of Disable Veterans Fund. Meanwhile, general education spending remains flat.

The April 15 revenue forecast will guide budget consideration as it moves through the Senate and then the conference committee process. If the economy continues its modest recovery and the General Assembly’s final budget resembles current proposals, then Indiana will be in the black by the time lawmakers reconvene in 2013 to consider the state’s next budget.

How We Got Here
For many people spring is an optimistic season, though pessimism has reigned in recent years, at least among legislators charged with making Indiana’s state budget and those who administer it. Recession ravaged revenue since the last budget was signed into law, essentially resetting the state’s revenue to the level of 2005. State agency budgets were cut across the board. State payments for primary education were reduced by 3 percent, or $300 million, while secondary education funding was trimmed 6.5 percent, or $150 million. Federal funds helped soften the blow, especially in the categories of education and Medicaid, but those dollars have dried up. By the time the fiscal year ends on June 30,
Indiana's $1.6 billion in reserve likely will be about $650 million. It's accurate to note Indiana's Office of Management and Budget and legislative fiscal leaders have scrambled to make ends meet during this most pernicious recession.

So it is with guarded optimism, then, that they await the April 15 revenue forecast. December's forecast predicted revenue growth in fiscal years 2012-13 despite lingering high unemployment rates. The December forecast anticipated a 3.5 percent overall increase in tax revenue for 2012 compared with 2011, including strong gains in the personal income (6.1 percent) and sales tax (3.3 percent) segments. For 2013, the forecast projects an overall increase of 4.1 percent, again with personal income (6 percent) and sales (4.5 percent) taxes leading the way.

### FY 2011 Revenue vs. December 15 Forecast

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<th></th>
<th>October</th>
<th>November</th>
<th>December</th>
<th>January</th>
<th>February</th>
<th>March</th>
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<td></td>
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<tr>
<td>Actual</td>
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<td>$505.2</td>
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<td>Target</td>
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<td>$491.8</td>
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<td>$595.1</td>
<td>$470.4</td>
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<td>Difference</td>
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<td>$9.5</td>
<td>$11.6</td>
<td>$17.3</td>
<td>$4.5</td>
<td>$23.3</td>
</tr>
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| **Individual Income** |         |          |          |         |          |       |            |
| Actual               | $316.9  | $354.9   | $325.8   | $509.7  | $144.5   | $333.6| $2,993.1   |
| Target               | $319.3  | $304.4   | $324.5   | $496.8  | $143.6   | $299.8| $2,906.1   |
| Difference           | -$2.5   | $50.6    | $1.3     | $12.9   | $1.0     | $33.8 | $87.1      |

| **Corporate Income** |         |          |          |         |          |       |            |
| Actual               | $23.7   | -$13.6   | $145.5   | -$0.3   | -$7.0   | $39.3 | $349.6     |
| Target               | $35.2   | $4.0     | $114.7   | -$5.2   | -$4.4   | $35.2 | $341.2     |
| Difference           | -$11.5  | -$17.6   | $30.8    | $5.0    | -$2.6   | $4.1  | $8.5       |

| **Total GF**         | $958.9  | $917.4   | $1,125.2 | $1,276.9| $715.5   | $977.2| $8,987.7   |
| Actual               | $985.8  | $879.5   | $1,082.7 | $1,236.2| $710.2   | $945.4| $8,872.9   |
| Difference           | -$27.0  | $37.9    | $42.5    | $40.8   | $5.2     | $31.8 | $114.9     |
Indiana's tax collections since late last year also give rise to the notion that the recovery is starting to take hold and that may affect the new revenue forecast.

### FY 2011 Monthly Revenue Year-Over-Year

#### March 31

<table>
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<th></th>
<th>October</th>
<th>November</th>
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<th>January</th>
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<tr>
<td>FY2010</td>
<td>$492.4</td>
<td>$466.6</td>
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<td>$572.7</td>
<td>$449.4</td>
<td>$460.3</td>
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<td>FY2011</td>
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<td>$493.5</td>
<td>$505.2</td>
<td>$606.7</td>
<td>$487.7</td>
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<td>% change</td>
<td>0.2%</td>
<td>5.8%</td>
<td>7.0%</td>
<td>5.9%</td>
<td>8.5%</td>
<td>5.1%</td>
<td>5.0%</td>
</tr>
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</table>

| **Individual Income** |         |          |          |         |          |       |            |
| FY2010   | $271.5  | $289.2   | $300.0   | $442.7  | $110.2   | $285.4| $2,580.6   |
| FY2011   | $316.9  | $354.9   | $325.8   | $509.7  | $144.5   | $333.6| $2,993.1   |
| % change | 16.7%   | 22.7%    | 8.6%     | 15.1%   | 31.1%    | 16.0% | 16.0%      |

| **Corporate Income** |         |          |          |         |          |       |            |
| FY2010   | $68.2   | ($16.7)  | $83.6    | ($37.3) | ($18.8) | $37.3  | $247.7     |
| FY2011   | $23.7   | ($13.6)  | $145.5   | ($0.3)  | ($7.0)  | $39.3  | $349.6     |
| % change | -65.3%  | 18.5%    | 74.0%    | 99.3%   | 63.1%    | 5.5%  | 41.2%      |

| **Total GF** |         |          |          |         |          |       |            |
| FY2010   | $965.1  | $811.2   | $988.7   | $1,147.5| $637.4   | $908.4| $8,264.3   |
| FY2011   | $958.9  | $917.4   | $1,125.2 | $1,276.9| $715.5   | $977.2| $8,987.7   |
| % change | 13.1%   | 13.8%    | 11.3%    | 12.3%   | 7.6%     | 8.8%  |            |

Source: State Budget Agency

Any optimism, however, is tempered by the fact that revenue still does not match the targets upon which the current budget was built.
This is why the budget introduced by Gov. Mitch Daniels and modified by the House of Representatives does not include major new spending, and why it is unlikely the Senate’s version will either. The new revenue forecast likely will show growth in the state’s tax take, but there are so many uncertainties in the economy that legislators are not about to embark on a spending spree. Past crises, whether man-made like the banking meltdown, natural like the earthquake/tsunami in Japan or the ongoing credit crunch plaguing the European Union, have made an impression on members of Indiana’s General Assembly. Add uncertainty about how federal spending policies will affect Indiana and you’ve got the recipe for a flat line budget intended to rebuild reserves without raising taxes.

Steady Momentum for the Future
Much has happened since the Indiana Fiscal Policy Institute estimated in September 2010 that the state faced a structural deficit of $1.3 billion in the next biennium. The state has continued to cut costs and draw down reserves. It also has benefitted from improving tax revenue. The task facing the General Assembly, therefore, is less daunting. Though it’s difficult to estimate the deficit mid-year, revised estimates peg the current structural deficit, or the amount of spending over available revenue, at about $650 million. All budget proposals contemplate reaching structural surplus, or the point at which revenue exceeds expenditures, by the end of FY 2013.
Gov. Daniels’ administration released its budget proposal Jan. 13. It anticipated spending $27.5 billion in general fund revenue between July 1, 2011 and June 30, 2013. The governor’s budget projected a $270 million spending gap at the end of FY 2012, but estimated revenue would exceed spending by $55.5 million at the end of FY 2013, based on the December 2010 revenue forecast. The proposed budget also showed an overall balance of funds at $725 million, or about half of the amount Gov. Daniels said he would like to have in reserve.

Described as a “flat-line” budget, the governor’s proposal did not restore $300 million in cuts to primary education or general government. The basis for funding public schools, then, is $300 million less than it was in the current fiscal year. The proposed budget also trimmed higher education spending, which was cut last year by $150 million, or 6.5 percent, another 3 percent. The budget did, however, increase maintenance funds for buildings on Indiana’s public college campuses.

The administration’s budget sought to control Medicaid costs by reducing some optional services while injecting $135 million of new state funding into the system to help offset $300 million lost when federal dollars from the American Recovery and Reinvestment Act expired. The proposal also increased the state’s contribution to its pension funds by $117 million to $952 million.

On February 18 the House Ways and Means Committee approved a proposal made by Chairman Jeff Espich, R-Uniondale, that differed slightly from the governor’s budget. The budget cleared the House March 30. It spends about $60 million more over the biennium than the governor’s proposal and ended the term with about $590 million in reserves.

There were several differences in revenue between the budgets. The House version did not include any revenue from the Public Depositories Insurance Fund; the governor intended to shift $200 million from the fund to the state’s general fund. The House proposal also changed the 15 percent distribution to horse racing from racino slot machine proceeds. The change would shift $33.5 million over the biennium from horse racing purses, breed development funds and horsemen’s association to the state’s general fund and the 21st Century Research and Technology Fund. The proposal also would shift $53.6 million in cigarette tax proceeds from the State Retiree Health Benefit Trust to the general fund and $15.5 million in sales tax proceeds from the Public Mass Transportation Fund to the general fund.

On the expenditure side, the initial House proposal installed a formula for allocating primary school funding, which accounts for 47 percent of the state’s expenditures. The proposed formula reduced the basic grant per student, changed enrollment factors and some grants for special needs that would shift funding away from schools with declining enrollments to those that are growing. (House Bill 1003, which also would affect school funding, is discussed in a later section) The House budget also restored the 3 percent cut that the governor proposed for higher education, but it did so by not including any money for building
maintenance. It also proposed a tuition cap that would be set by the Indiana Commission for Higher Education and reviewed by the State Budget Committee and the State Budget Director. The House plan restored the administration's cuts to Medicaid services and increased spending 5 percent. The budget also freezes state agency budgets and postpones pay raises for legislators, judges and state elected officials.

Both proposals included provisions to refund reserves in excess of 10 percent of appropriations to taxpayers. The budget proposals anticipate reserves between 3 percent and 5 percent at the end of the FY 2012-13 biennium.

Key Legislative Proposals Have Fiscal Impact
Several Bills in the General Assembly would affect the state's fiscal outlook. They include:

House Bill 1450, which makes changes the state's Unemployment Insurance Compensation Fund. It was signed by Gov. Daniels on Feb. 24 and takes effect May 1.

The new law enacts a surcharge of 13 percent of the contribution rate an employer pays to raise an estimated $90 million a year. The money will be used to pay the interest on a federal loan of nearly $2 billion that was required to pay benefits. The new law also reduces the amount employers paid into the fund based on a 2009 law. Finally, the new law restricts eligibility and lowers the basis for figuring benefits.

All of the changes are expected to make the fund solvent again in 2020.

House Bill 1003 increases the tax credit available for contributions to certified scholarship granting organizations from 50 percent currently to 80 percent in 2014. The bill also creates a system that would allow up to 7,500 students with household incomes of up to 150 percent of the amount to qualify for free or reduced lunches to transfer with a state scholarship (or voucher) to another accredited public or private school. The total would be 15,000 the second year.

The scholarship of $4,500 would be paid for out of the state tuition grant to the district the student is leaving. The grant would be limited to the difference between state grants to districts if the student remains in a public school, and the remainder would be placed in the state's overall school funding formula. The remainder, however, could be affected if the formula includes minimum guarantees per student or additional grants to districts with declining enrollments (de-ghosters).

At this point we are unable to determine the impact of this program on the school funding formula.
Senate Bill 577 is a bill to place eligibility requirements on students who receive currently receive free tuition at state universities through a program for children of disabled veteran. There is growing interest in this program and the 21st Century Scholarship program as they increase in popularity. There is concern that the state may have difficulty funding the programs. There is one estimate that the programs could have an unfunded liability of $450 million in the next seven years unless changes are made to them.

Senate Bill 589 includes a reduction of the state's corporate adjusted gross income tax rate from 8.5 percent to 6.5 percent, among other provisions. This would reduce the revenue from corporate income taxes by an estimated $76.3 million in FY 2013, according to the Legislative Services Agency.

The bill also eliminates the exclusion of interest income from state and local bonds issued outside of Indiana, however, from both individual and corporate income taxes. This would result in a revenue gain of $65.9 million to the state, according to the LSA.

Finally, the bill eliminates a number of tax credits that would save the state $3.1 million.

The net effect of the changes, according to the LSA, would reduce the state's tax revenue by $7.3 million a year beginning in FY 2013.

Clarity in No Tax Hike

Neither budget proposal increases state revenue by raising tax rates. It is unlikely the Senate budget proposal will increase state tax rates either. The Senate Appropriations Committee conducted budget hearings in anticipation of receiving House Bill 1001. The committee has scheduled a final hearing on HB 1001 for April 18 and the full Senate is expected to consider the budget later that week.

Attempts by Democrats to eliminate the governor's discretion to spend less than the Legislature appropriates were rebuffed in the House and likely will be in the Senate, too.

Finally, legislative leaders have indicated a preference to move House Bill 1001 independently of the bill(s) that will reappoint the General Assembly's 150 districts. The budget in 2001, the last time redistricting occurred, did not include the legislative maps, which were in House Bill 1776 that year. However the bills did move in concert by agreement of leadership. In 1991, however, the new legislative maps were included in the budget bill, so recent history does not offer a clear indication of how matters will progress this year. It is likely the budget this year will be affected by the redistricting bill, we just don't know how and to what extent it will affect passage.
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