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).

EXHIBITS

<u>Administrative burdens justified disparate treatment of taxpayers arising from forgiveness of Barrett Law assessments for some homeowners without refunding payments to similarly situated homeowners</u>.

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[2]

Gross Premium Privilege Tax

1. **Taxpayers not "doing business" in Indiana for purposes of premiums tax** (originally posted at *www.taxhatchet.com* on June 21, 2012).

   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*. On its Indiana

[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*) 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. **<u>Here we go again: Indiana Supreme Court considering apportionment of "sales factor"</u>.** *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.

<u>Gross Retail (Sales) & Use Tax</u>

1. **<u>Supreme Court reverses Tax Court's decision on taxation of promotional materials</u>.** 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."

   Truedell-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. Truedell-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 Truedell-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 t[hrough] 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. **<u>Tax Court ordered payment of Department's attorney fees in "frivolous" suit</u>.** *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*.

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

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

   It's rare to find a rule of professional conduct at the heart of a tax ruling. But that was the case when the Indiana Tax Court rejected the Department of Revenue's efforts to disqualify counsel for the taxpayer (Utilimaster) as "necessary witnesses" in a sales and use tax refund appeal. 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.

<u>*Garwood I* ruling</u>. 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.*

<u>*Garwood II* ruling</u>. 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. 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.

<u>The Court had subject matter jurisdiction over the appeal</u>. 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.

<u>Taxpayer had standing to bring the appeal</u>. 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." Slip op. at 7. The Court concluded: "Given these facts and circumstances, the Court cannot employ its discretion to enlarge the Bosamias' time to file" the agency record. *Id*.
The Court granted the motion to dismiss. *Id*.

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

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:

2006:	$1,250,000
3/2007:	$850,000
7/2007:	$975,000
8/2008:	$875,000
4/2009:	$750,000
10/2009:	$650,000
1/2010:	$595,000
9/2011:	$450,000

   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:

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

> 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. **<u>Indiana Board declines to lower property value below that requested by Taxpayer, even though appraisal supported a lower value</u>.** *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. **<u>Indiana Board grants summary judgment motion to apply "developer's discount" and agricultural base rate to vacant land</u>.** 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'rs*, 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. **<u>Taxpayer's right to challenge a property's market value-in-use on appeal exists independently of uniformity requirements</u>.** *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. **<u>Assessor's valuation of leased fee interest given "little weight" and could not support assessment increase</u>.** *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. *Id*.

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, ¶

15(h).) 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.* The International Royal Order of Jesters, Inc. (the Jesters), which was exempt from federal tax under 501(c)(3) and (c)(10), claimed a 100% exemption for an office building used as both a headquarters and museum. Counsel for the Jesters described the organization as a "domestic fraternal organization operating under a lodge system devoted entirely to religious, charitable, educational and fraternal purposes." (Page 7, ¶ 20.) The Executive Director testified that the Jesters organization was part of the Masonic fraternity and that there were "191 subordinate courts in the United States, Canada, Mexico and the Republic of Panama, with approximately 20,500 members." (Page 7, ¶¶ 20 & 21.) The Director also testified, "The purpose of the Jesters is spreading the gospel of mirth, merriment and cheerfulness, promoting fellowship and fraternity among members, and extending good cheer and assistance to the general public, which furthers the Masonic principles of brotherly love, belief and truth." (Page 7, ¶ 21.) According to the Director, "[']Mirth is king['] explains to the world the purpose of our existence." *Id*.

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

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

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

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

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

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

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

   Property tax appeals often feel like a dance between the taxpayer and assessor, and in a January 2012 decision the parties went toe-to-toe over whether a dance and gymnastics studio qualified for a 100% exemption. In *Herrick Investments, Inc. v. Marion County Assessor*, Petition No. 49-500-08-2-8-00001 (Ind. Bd. Tax Rw., Jan. 4, 2012), *see* http://1.usa.gov/yqvtPE, the parties stipulated that the dance and gymnastics school under appeal was occupied and used for an exempt charitable and educational purpose. The issue was whether the school was "owned" for an exempt purpose. William and Lynn Herrick formed and were the sole shareholders of Herrick Investments, Inc. (HII), an S-Corporation. HII was formed for the sole purposes of owning the real property and improvements associated with school. Effective January 1, 2008, HII leased the property to Artists in Motion, Inc. (AIM), an Indiana non-profit corporation. The lease required AIM to use and occupy the property exclusively as a non-profit school for dance and gymnastics education. HII had no intent to generate a profit from the lease. The payments were designed to get sufficient rent to pay the debt associated with the property. The Herricks received no compensation and took no cash distributions from HII during 2008 and 2009. But they did make significant contributions to AIM in 2008 and 2009 to assist with expenses, including payment of the rent for the school. A USPAP appraisal showed that the rent charged to AIM was a below market rate. Moreover, HII allowed other non-profits to use the property at no charge.

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

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

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

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

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

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

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

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

<u>Property Tax – Procedural & Jurisdictional Issues</u>

1. **<u>Indiana Board has authority to hear claims regarding tax credits</u>.** *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. **<u>Form 134 was a binding agreement between taxpayer and assessor, not merely a "recommendation" to PTABOA</u>.** *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. **<u>Indiana Board could not consider late-filed petition</u>.** *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).)

4. **Indiana Board rejects argument that appraisals must meet *Daubert* evidentiary standard and finds that cost of obtaining appraisals is "irrelevant" to determining case.** *Bernie's Place, LLC v. Dubois County Assessor*, Pet. Nos. 19-002-08-1-4-00122 *et al*. (Dec. 21, 2011) (March 1, 2008 assessment).

   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. **<u>Location of comparable properties goes to weight of testimony, not its admissibility</u>.** *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. **<u>Form 133 can be used to challenge removal of developer's discount</u>.** *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. **<u>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</u>.** *K L*

Presnell Companies Office Building LLC v. Johnson County Assessor, Pet. Nos. 41-026-07-1-4-40163 *et al.* (Jan. 31, 2012) (March 1, 2007 assessment date) [Small Claims Docket]. "The Petitioner objected to the 2008 realtor listing, claiming it is not relevant to the 2007 assessed value or the valuation date of January 1, 2006. This objection, however, goes more to the weight of the evidence, not its admissibility. Accordingly, this exhibit is admitted into the record." (Page 3, ¶ 10(c) n.1).

The assessor objected to testimony regarding plans or rumors about renovations to the main street making it difficult to get and keep tenants, pointing out that no city official was available for cross examination on that point. The testimony involved matters that are hearsay and matters that are not. The Indiana Board observed that some of the testimony was not sufficiently clear to distinguish one from the other. (Page 3, ¶ 11(c) n.2). But hearsay evidence may be admitted. *Id*. (citing 52 IAC 2-7-3). Moreover, the assessor did not object to Petitioner Ex. A, which 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. **<u>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</u>.** *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. **<u>Indiana Board lacked authority to hear Form 132 petitions filed more than 45 days after receipt of tax bill</u>.** 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. **<u>Board addresses "advocate as witness" rule of professional conduct</u>.** *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. **<u>Indiana Board had jurisdiction to consider proper application of property "tax caps." Homeowner could use Form 133 to challenge application of the "tax caps"</u>.** *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 is 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. **<u>Parties agreed the assessment increased by more than 5%; assessor had burden to support assessment</u>.** *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. **<u>New burden-shifting rule is "clear and unambiguous"</u>.** *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.)

<u>Additional Procedural Note</u>: 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. **<u>Assessor had the burden for 2007, but Taxpayers had the burden for 2008, where the property's value had not changed</u>.** *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. **<u>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</u>.** *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. **<u>Taxpayer had the burden to support a value lower than the prior year's assessed value</u>.** *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. **<u>Indiana Board declines to address how change of property's use impacts application of 5% rule</u>.** *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. **<u>Assessor had the burden to support the contested value, where the property's assessment had increased by more than 5%</u>.** *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.)

<u>Additional Procedural Note</u>: 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. **<u>5% burden-shifting rule applied to two contiguous parcels effectively used as one property</u>.** *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. **<u>5% burden-shifting rule did not apply after developers sold property to non-developer and lost "developer's discount"</u>** (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. **<u>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)</u>.** 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. **<u>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)</u>.** 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. **<u>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)</u>.** 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 (8^{th} 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)."

<u>Gross Retail (Sales) & Use Tax</u>

1. **<u>"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)</u>.** 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. **<u>Letter of Findings No. 04-20110504, Gross Retail Tax for Tax Year 2010 (February, 2012)</u>.** 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. **<u>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</u>** (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. **<u>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)</u>.** 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. **<u>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)</u>.** 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. **<u>Taxpayer proved that it did not pay software vender for updates, only a non-taxable service. Letter of Findings No. 04-20110472, Gross Retail Tax for Tax Years 2008-10 (April, 2012)</u>.** 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. **<u>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)</u>.** 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** (originally posted at *www.taxhatchet.com* on June 4, 2012).

"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/LgjsgS*. 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/L9EWQz*, 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 taxing 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. **<u>Department concludes that stone crusher was used in production and therefore exempt, while loaders were used outside of production and thus taxable</u>** (originally posted at *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 state 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 (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. 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.

<u>Loaders No</u>! 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. **<u>Sales Tax imposed where taxpayer presented invalid exemption certificate</u>.** 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. **<u>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)</u>.** 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. **<u>Medical Practice's contract with Imaging Company was, by its plain language, a lease of tangible personal property subject to Use Tax</u>** (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. 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**:
> ***
> **(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. **<u>Fees for e-mail generation service not subject to sales tax</u>** (originally posted at *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. 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."

<u>County Food and Beverage Tax</u>

1. **<u>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)</u>.** 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.

Legislative Changes Affecting the Administration of Taxes

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.

Legislative Changes Affecting Income Taxes[4]

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 § 6-3-8.1-2, effective February 22, 2012, applies provisions of I.C. § 6-3-8-5 (Supplemental Net Income Tax, Repealed) to imposition, collection, payment, and administration of the SNIT, and requires a taxpayer to file a SNIT return by April 15 of the following taxable year as if I.C. § 6-3-8 "had not been repealed."
- Ind. Code § 6-3-8.1-3, effective February 22, 2012, specifies a two-step formula for SNIT calculation, along with forms, procedures, and a potential automatic extension for the filing of a SNIT return.

P.L. 137-2012 – Tax Administration

- Ind. Code § 6-3.1-24-9, effective July 1, 2012, extends the Hoosier business investment tax credit through December 31, 2016.
- Ind. Code § 6-3.1-26-26, effective July 1, 2012, extends the venture capital investment tax credit through December 31, 2016.
- Ind. Code § 6-3.1-31.9-23, effective July 1, 2012, extends the alternative fuel vehicle manufacturer 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[5]

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.

[5] See also the presentation by DLGF Commissioner Brian Bailey, "New Legislation in 2012" (May 16, 2012), which can be viewed at *http://www.in.gov/dlgf/files/120516_-_Bailey_Presentation_-_Auditor_Conference.pdf* (last visited June 30, 2012).

- 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.
    - If the proceeding concerns residential property, the taxpayer or official may introduce evidence of assessments of comparable properties in same taxing district or within two (2) miles of such district's boundaries.
    - If the proceeding concerns non-residential property, the taxpayer or official may introduce evidence of assessments of any relevant, comparable properties, with preference given to comparable properties in the same taxing district or within two (2) miles of such district's boundaries.
- Ind. Code § 6-1.1-37-11, effective July 1, 2012, provides that if an assessment is decreased by the Indiana Board or the Indiana Tax Court, the taxpayer is not entitled to the greater of $500 or 20% of the interest to which the taxpayer would otherwise be entitled on excess taxes paid if substantive evidence supporting the taxpayer's position was not presented by the taxpayer to the assessor before or at the hearing of the county PTABOA.
    - Provides that an appraisal may not be required by the county board or the assessor in a proceeding before the county board or in the preliminary informal conference.
- P.L. 146-2012 §§ 8-12, effective upon passage, permit various entities to file a late property tax exemption application for previous assessment years, and provides refunds regarding these exempt properties.

P.L. 112-2012 – Property Taxes

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

P.L. 120-2012 – Local Government Matters

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

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

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

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.)

DEPARTMENT OF LOCAL GOVERNMENT FINANCE MEMOS AND PRESENTATIONS[6]

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

[6] The DLGF's memos and presentations can be viewed at *http://www.in.gov/dlgf/2444.htm* (last visited June 30, 2012).

2012 - 2013 Budget Calendar	5/25/12
50 IAC 26 Amendment (Computer Standards for a Common Property Tax Management System)	6/15/12
Assessment Appeals 101	6/22/12
Assessment Appeals Flow Chart **(attached as Exhibit 1)**	6/29/12
Tax Sales & Payment of Delinquent Property Tax, HEA 1090	6/29/12

	Title	Date
	2012 Updated Income Tax Bulletins:	
1	Fiduciary Income Tax Return	May 2012
19	Government Obligations	May 2012
28	Application of State and County Income Taxes to Residents with Out-of-State Income and Nonresidents with Indiana Source Income	May 2012
52	Wholesalers	Jan. 2012
60	Taxation of Unemployment Compensation Benefits	May 2012
72	S Corporation of Partnership Mandate to File a Composite Return on Behalf of Nonresident Shareholders and Partners	May 2012
92	Individual earned Income Tax Credit (EITC) Procedures	May 2012
95	Hoosier Business Investment Tax Credit (HBITC)	May 2012
106	New Employer Tax Credit	May 2012
	Title	**Date**
	2012 Updated Sales Tax Bulletins:	
9	Agricultural Production Exemptions	July 2012
10	Application of Sales Tax to Nonprofit Organizations	April 2012
13	Application of Sales Tax to Newspaper Publishers	Jan. 2012
28S	Sales of Motor Vehicles and Trailers	April 2012
29	Sales of Food	Feb. 2012
55	Application of Sales Tax to Sales of Utilities Used in Manufacturing, Production, Recycling, Floriculture, and Arboriculture	May 2012
67	Exemption Available to Professional Motor Racing Teams and Two-Seater Indianapolis 500-Style Race Cars	April 2012
68	Nonprofit and State Colleges and Universities	Feb. 2012
74	Sales and Use Tax Exemption for Aircraft Being Repaired or Remanufactured	May 2012
77	Sales Tax Returns Filed Monthly if the Retail Merchant Is Remitting by Electronic Funds Transfer	May 2012
80	Assessment of Retail Sales Tax Liability for Certain Sellers Registered Under the Streamlined Sales and Use Tax Agreement (SSUTA)	June 2012

[7] The Department of Revenue's bulletins can be viewed at *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* (last visited July 1, 2012).

	Commissioner's Directives:	
13	Claim for Refund Procedures	June 2012
18	Utility Receipts Tax	July 2012
39	Enhanced Prepaid Wireless Telecommunications Service Charge	June 2012
42	Indiana Tax Exemption Relating to the National Football League and Its Affiliates	Dec. 2011
43	Other Tobacco Products Tax	July 2012
44	2012 Legislative Changes to Inheritance Tax[8]	April 2012

[8] *See also* the Department's "Inheritance Tax Notes" at *http://www.in.gov/dor/reference/files/ih-tax-notes-march-2012.pdf* (last viewed July 1, 2012) (March 2012).

Indiana Board of Tax Review – 2012 Proposed Rule Changes[9]

- **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 raided 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:

[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.