TAX EXECUTIVES INSTITUTE

RECENT DEVELOPMENTS IN INDIANA TAXATION

June 28, 2017

MARK J. RICHARDS
DIRECT PHONE: (317) 236-2471
DIRECT FAX: (317) 592-4739
MARK.RICHARDS@ICEMILLER.COM

MATTHEW J. EHINGER
DIRECT PHONE: (317) 236-2183
DIRECT FAX: (317) 592-4265
MATT.EHINGER@ICEMILLER.COM

One American Square, Suite 2900
Indianapolis, IN 46282-0200
(317) 236-2100
www.icemiller.com

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I. SELECT LEGISLATIVE HIGHLIGHTS:

While there have been reports that "45" taxes and fees were increased this session, it was a relatively quiet session particularly for a budget year.

A. **No Mandatory Unitary Combined Reporting ("MUCR") Bill**: The Legislature directed the Legislative Services Agency ("LSA") to study MUCR during the summer of 2016. Following the report by LSA at a public hearing on October 5, 2016, no bill was introduced during the 2017 session. Nevertheless, this subject could return.

B. **No Changes to the Structure of the Indiana Tax Court:** The Indiana Tax Court has been under siege, and that included a bill introduced to add two Judges of the Indiana Court of Appeals to a panel with the Indiana Tax Court Judge to decide Indiana tax cases (SB 546). That bill did not pass.

C. **No Sales Tax on Services "Yet"**: The House passed House Resolution No. 3 urging the Legislative Council to assign the topic of examining whether to expand the sales and use tax base to include services to an interim study committee.

a. **Policy**: Broad base with lower rate

b. **Source of Funding**: A study by the Indiana Fiscal Policy Institute in 2009 estimated that the annual revenue from taxing all sources in Indiana at the current rates would be in excess of $6.7 Billion.

c. **Goals**: Lower rate/revenue neutrality/address move to service based economy.

d. **Problems/Issues**: Tax pyramiding (B2B)/sourcing (professional)/health care/economic competitiveness

e. **Current status**: The Legislative Council did not assign it for study. This issue will not go away.

D. **Remote Sales:** Following the lead of South Dakota (S.B. 106) anticipating that the United States Supreme Court may revisit *Quill Corp. v. North Dakota*, 504 U.S. 311 (1992), given Justice Anthony M Kennedy's

statements in his concurring opinion in *Direct Marketing Ass'n v. Brohl*, 135 S.Ct. 1124 (2015), Indiana passed legislation (Pub. L. 247-2017 (H.B. 1129) to provide that a retail merchant that does not have a physical presence in Indiana shall collect and remit sales tax on retail transactions made in Indiana, and comply with all applicable procedures and requirements of the sales tax laws as if the retail merchant has a physical presence in Indiana, if: (1) the retail merchant's gross revenue from sales of goods and services into Indiana in a calendar year exceeds $100,000; or (2) the retail merchant makes sales of goods and services into Indiana in 200 or more separate transactions. Also allows the Department to seek a declaratory judgment in circuit or superior court to establish a person has a collection obligation and that the obligation is valid under state and federal law. May not be applied retroactively. Legislative reasoning part of the law that was enacted.

E. Alternative Apportionment: SB 440 requires the party seeking to deviate from the statutory allocation and apportionment provisions for adjusted gross income tax to bear the burden of proof that the standard allocation and apportionment provisions do not fairly represent the taxpayer's income derived from sources within Indiana and that the proposed alternative method to the standard allocation and apportionment provisions is reasonable. SB 440 also requires the Department to adopt certain mailing procedures, and specifies that the notices must state the deadline for the taxpayer to act or respond and a statement of the consequences for failing to do so. Also requires a study of the Department’s records retention and report to the legislative council and interim study committee on fiscal policy who shall hold at least one public hearing.

F. Gas Tax Increase: In order to fund infrastructure, HB 1002 provides various changes and increases to Indiana's fuel taxes. Increases to tobacco taxes were considered, but not enacted, as the Legislature may be saving that as a subsequent funding source.

G. Phase-out of Add-back of RWT on Casinos: Under current law, casinos must add-back riverboat wagering tax in determining its Indiana adjusted gross income. This amounts to a tax on “out-go” not “income.” HB 1350 will phase out the add-back of wagering taxes beginning with 2019 and through the year 2025.

H. **RV Relief:** SB 172 provides that, for transactions after June 30, 2017 and before June 30, 2019 that are not exempt from sales tax and involve a cargo trailer or recreational vehicle that (a) is purchased by a nonresident; (b) intended to be transported and titled or registered outside of Indiana

within 30 days; and (c) will not be titled or registered in Indiana, the Department shall charge a sales tax rate equal to the rate of the other state or country in which the vehicle/trailer will be titled or registered (as certified by affidavit). SB 172 also allows the State to enter into reciprocal agreements with other states and to report on such agreements to the interim study committee on fiscal policy.

I. Department's Bill: SB 515 defines "industrial processing" for sales tax purposes and codifies the exemption for industrial processing. Exempts certain agricultural material handling equipment and drainage water management system components. Provides an income tax deduction for certain amounts a taxpayer included as an item of income in a prior tax year. Specifies that, in determining an Indiana net operating loss deduction, certain modifications to adjusted gross income are not to be applied. Provides that certain professional sports team members or race team members are subject to the local income tax. Adds exemptions related to an NBA All-Star Game. Provides that a return under the financial institutions tax is due one month after the taxpayer's federal tax return is due. Creates a three month window during which an owner of an aircraft that is located in another state may register in Indiana without paying the difference in the sales tax paid to that state at its rate and the Indiana use tax rate. Requires LSA to study the correlation between employment growth and statutory tax relief realized by C corporations during 2011-2016.

J. Fair Tax: HR No. 7 urged the legislative council to assign the topic of a "Fair Tax" (consumption tax) to a study committee.

K. Property Tax Exemption Filings (Senate Bill 386): Amends Ind. Code § 6-1.1-11-3 to allow a taxpayer seeking an exemption to file an application up to three years following the deadline if: (1) the property on which the person is seeking an exemption was exempt from taxation for the tax year immediately before the deadline; and (2) the person would have been eligible for the exemption on the deadline.

L. Property Tax Appeals (Senate Bill 386): Establishes Ind. Code § 6-1.1-15-1.1, which provides that taxpayer may appeal an assessment of a taxpayer's tangible property by filing a notice in writing with the assessor and in such appeal, appeal the following items:

(1) The assessed value of the property.
(2) The assessment was against the wrong person.
(3) The approval, denial, or omission of a deduction, credit, exemption, abatement, or tax cap.

(4) A clerical, mathematical, or typographical mistake.
(5) The description of the real property.
(6) The legality or constitutionality of a property tax or assessment.

Additionally, details that for assessments after Dec. 31, 2018, an appeal regarding the assessed value must be filed the earlier of:

(1) June 15 of the assessment year, if the notice of assessment is mailed by the county before May 1 of the assessment year; or
(2) June 15 of the year in which the tax statement is mailed by the county treasurer, if the notice of assessment is mailed by the county on or after May 1 of the assessment year.

Finally, provides that an appeal of an error in the assessment for all the other reasons (outside of the assessed value of the property) detailed above, must be filed no later than three (3) years after the taxes were first due.

M. Property Tax Refunds (Senate Bill 386): Enacts Ind. Code § 6-1.1-26-4.1, which addresses refunds prior to January 1, 2020. Specifically, it allows an auditor in a County, in lieu of providing a refund to a taxpayer as a result of an appeal of one hundred thousand dollars ($100,000) or more, may elect to apply credits in equal installments to future property tax installments for the property over a period of not more than five (5) years. If the claimant no longer owns the property, it allows the auditor to refund the money over a five year period.

N. Market Segmentation and Various Property Tax Matters (House Bill 1450): Provides that the department of local government finance can adopt a rule after June 30, 2016, and before Sept. 1, 2017 regarding market segmentation for assessment years 2018 and thereafter.

Also allows a county treasurer and the county auditor to implement a policy to waive, negotiate, or settle penalties that have accrued on delinquent property taxes, if the fiscal body of the county approves the policy.

Allows certain nonprofit entities that failed to comply with the exemption filing deadlines to claim the property tax exemptions that the nonprofit entities were otherwise entitled to claim.

II. THE TAX COURT: SUBSTANTIAL RULE CHANGES COMING: PROPOSALS UNDER CONSIDERATION:

A. Eliminate the automatic extension of time to respond to a Petition

B. Automatic Briefing Schedule in Property Tax Cases

C. Department of Revenue Cases:

1. Automatic Production of Department's files
2. Automatic Disclosure of Preliminary lists of witnesses, exhibits, and contentions
3. Discovery limits: Interrogatories limited to 25, with good cause exceptions.
4. Informal process for resolving discovery disputes.
5. Stipulations required.
6. Oral Arguments: Time limits (generally, 30 minutes each).
7. Expedited Case Management Plan
    a. Dispositive motions within six months.
    b. Trials within one year.
    c. Decision within 18 months.

III. ADMINISTRATIVE DEVELOPMENTS

A. Personnel Changes:

1. New Commissioner.
2. New General Counsel.
3. New Director of Tax Policy.
3. New Director of Enforcement.

B. Initiatives:

1. New Appeals Process.
2. Modernization.

IV. JUDICIAL DEVELOPMENTS IN INDIANA

A. Adjusted Gross Income Tax ("AGIT")

1. ***The University of Phoenix, Inc. v. Indiana Department of State Revenue***, 64 N.E.3d 1271 (Ind. Tax Ct. 2016).

   The University of Phoenix, Inc. appealed the Department's assessment of AGIT on the basis that the Department wrongfully sourced the University's revenues from online tuition from Indiana students to Indiana, given that Indiana is a "cost of performance" state under IC § 6-3-2-2. The University sought to depose former Commissioner Alley on the Department's "position and interpretation" of Indiana's cost of performance regime, and related matters. The Department sought a protective order so that Mr. Alley did not have to be deposed.

   The Court held that the University was seeking information not provided by other witnesses and that the request was not vexatious, and denied the motion for protective order.

2. ***The University of Phoenix, Inc. v. Indiana Department of State Revenue***, 70 N.E.3d 464 (Ind. Tax Ct. 2017).

   The University moved to compel the Department to produce documents regarding a certain House Bill (H.B. 1349), the Department's report on the 2014 Indiana Tax Summit, and a presentation on the report, as well as to designate a proper Rule 30(b)(6) witness (a witness knowledgeable as to the foregoing, as the witnesses previously produced were not).

   The Court held that information regarding the House Bill and the Report, being that they were each after the years in issue, were unlikely to reveal admissible evidence, but after admonishing the parties for a lack of cooperation in discovery, granted the motion as to previously withheld documentation regarding H.B. 1349, and otherwise denied the University's motion to compel.

3. ***The University of Phoenix, Inc. v. Indiana Department of State Revenue***, 70 N.E.3d 464 (Ind. Tax Ct. 2017).

The Taxpayers appealed the Department's assessment of AGIT and interest arguing it ran afoul of the sourcing provisions for service revenue under Indiana Code § 6-3-2-2. Specifically, Taxpayer argued that the Department erred in computing its alleged tax liability by sourcing some of its online tuition service revenue to Indiana based on a market or customer-based test despite the fact that Indiana Code § 6-3-2-2 required that the revenue be sourced based on the costs of performance test. Taxpayer and Department both requested expenses as a result of pursuing and resisting discovery, respectively.

The Taxpayer and the Department were each awarded certain limited expenses for successfully pursuing and resisting, respectively, attempts at discovery when the Court determined: (1) the Department's attempts to preclude a second deposition for its former Commissioner lacked substantial justification; and (2) the Taxpayer's attempt to compel the Department to produce documentation based on the Court's previous narrow ruling on a specific discovery issue lacked substantial justification.

4. ***Thor Industries, Inc. and Subsidiaries v. Indiana Department of State Revenue***, 60 N.E.3d 308 (Ind. Tax Ct. 2016).

During settlement negotiations, the Department filed its First Request for Admissions (essentially requesting that Taxpayer repudiate claims), and Taxpayer failed to respond within 30 days. Four days after the lapse, the Department filed Motion for Summary Judgment and designated, as evidence, the First Request for Admissions. Taxpayer filed a blanket Motion to Withdraw Admissions. The Court analyzed to determine whether the withdrawal would subserve the presentation of the merits of the case and whether the withdrawal would prejudice the Department.

The Court granted Taxpayer's request for withdrawal, holding that the use of trial Rule 36(B) here contravenes the Rule's important purpose of more quickly and efficiently reaching a

resolution based on the actual facts. The Department was not prejudiced by the withdrawal, and the Court noted that the rule is not intended as a "windfall" to litigants nor is it to be used as a "gotcha device."

5. ***John and Sylvia Von Erdmannsdorff v. Indiana Department of State Revenue***, 57 N.E.3d 894 (Ind. Tax Ct. 2016) (Memorandum Decision).

   The Department issued proposed assessments of AGIT on the Taxpayers using best information available assessments (because the Taxpayers had not filed returns nor provided inventory from 2000-2009) by taking a comparable store's sales ratio as an estimate of the Taxpayers' cost of goods sold. As described in more detail below, the Department filed a motion for summary judgment based on its BIA Assessments, and The Taxpayers filed a counter-motion for partial summary judgment asserting that the Department's BIA Assessments used an improper method to calculate adjusted gross income.

   The Taxpayers filed a Motion to Strike certain statements and evidence presented by the Department.

   The Court granted the motion to strike in part. The Court denied the motion to strike the use of two deposition transcripts on the basis that they were not first published by the Department, as the Court held that filing the transcripts constituted publication. The Taxpayer claimed that the statements regarding their failure to timely file tax returns was not relevant, and the Court agreed. The Court denied the Taxpayers' motion as to the Department's statements about inventory request (on the basis that it was simply the Department's characterization of the evidence) and denied their motion as to the Department's reference to "BizStats".

6. ***John and Sylvia Von Erdmannsdorff v. Indiana Department of State Revenue***, 53 N.E.3d 621 (Ind. Tax Ct. 2016).

   Mr. Von Erdmannsdorff operated two stores, known as "Von's Shops," one of which sold comic books and rented VHS movies, and the other sold books, movies, music, and a variety

of other items, and also rented real estate. The Department issued proposed assessments of AGIT on the Taxpayers using best information available assessments (because the Taxpayers had not filed returns nor provided inventory from 2000-2009) by taking a comparable store's sales ratio as an estimate of Taxpayers' cost of goods sold. The Taxpayers filed a protest providing copies of their 2000 through 2009 state and federal returns, inventories, and credit card statements showing that they did not owe the tax assessed. Following the denial of the protest and the filing in Tax Court, the Department filed a motion for summary judgment based on its BIA Assessments, and the Taxpayers filed a counter-motion for partial summary judgment asserting that the Department's BIA Assessments used an improper method to calculate adjusted gross income. The Department claimed that the Taxpayers' late returns were "estimates" and only "guesses originating from decade-old memories" and did not rebut the presumption that the assessments were correct.

The Court held that there remains a genuine issue of material fact as to the credibility of the evidence presented by both parties on the proper calculation of the Taxpayers' income, and denied the Department's motion. The Court then granted the Taxpayers' partial motion, based on the Department's failure to take into account substantiated expenses, as the Department agreed that was true.

7. ***Vinup v. Joe's Construction, LLC,*** 64 N.E.3d 885 (Ind. Ct. App. 2016).

   A worker was injured, and filed a lawsuit against his "employer." Employer's Commercial General Liability Policy carrier filed for a declaratory judgment that it had no duty to defend, and the cases were consolidated. The policy excluded injuries to "employees." The trial court found him to be an employee, and the injuries arose out of and in the course of his employment, with his remedy being under the Worker's Compensation Act.

The Court of Appeals applied the ten factor analysis contained in *Moberly v. Day*, 757 N.E.2d 1007, 1010 (Ind. 2001), and found the individual to be an employee.

While not a tax case, this case illustrates the multi-faceted nature of worker classification with different tests within a state under different laws, and the complexity is exacerbated when multi-state and federal analyses are also considered.

B. SALES/USE TAX

1. ***Brandenburg Industrial Service Company v. Indiana Department of State Revenue***, 60 N.E.3d 300 (Ind. Tax Ct. 2016).

The Taxpayer processed scrap steel and sought a refund of Indiana sales/use tax based on the exemptions for equipment and consumables used in the direct manufacturing of tangible personal property. The Taxpayer purchased retired assets (*e.g*., boats, machinery, or railroad scrap) or by performing services in its related businesses, such as building demolition or environmental remediation, and then engaged in a seven step process (decontamination, sorting, cutting, etc.) to convert the metal into a product it sold to its customers. The Department determined that Taxpayer was not entitled to the exemption because (1) the demolition activity was not specifically listed in the exemption statutes; and (2) Taxpayer does not create "other tangible personal property" or "distinct, marketable products," as no substantial transformation occurs (the metal has the same intrinsic value, as the metal's weight and alloy is unchanged).

The Court rejected the Department's limited view of the manufacturing exemptions. The Court restated that the activities listed in the statute are illustrative and not exhaustive, and that the Taxpayer's seven step process for extracting "obsolete, valueless, and unmarketable steel from debris and creating a marketable product qualified for the manufacturing exemptions. "[T]he measure of whether a process transforms property inputs into other tangible personal property is whether a taxpayer's integration production process yields a product that enters the marketplace."

2. ***Fresenius USA Marketing, Inc. v. Indiana Department of State Revenue***, 56 N.E.3d 734 (Ind. Tax Ct. 2016), *review den'd*, 2017 WL 363194 (Ind. Jan. 19, 2017).

The Taxpayer sold medical devices to Indiana clinics and sought a refund of sales taxes paid to the Indiana Department of State Revenue. The refund claim was based on the Indiana Durable Medical Equipment Exemption contained in Ind. Code § 6-2.5-5-18(a). The Taxpayer relied on a 1998 revenue ruling, interpreting the predecessor to the current Durable Medical Equipment Exemption, holding that the exemption applied to the sale of medical equipment made to healthcare service providers for treating patients with a prescription. More recently, the Department has issued revenue rulings changing its interpretation of the Durable Medical Equipment Exemption to exempt only sales made directly to patients with a prescription; however, the 1998 ruling was not revoked. The Indiana Department of State Revenue denied Taxpayer's exemption under the Durable Medical Equipment Exemption, claiming that the Taxpayer could not rely on the 1998 revenue ruling because (1) it was not an interpretation of a listed tax binding on the Department under Ind. Code § 6-8.1-3-3(b) (claiming that only applies to promulgation of a regulation), and (2) the ruling was not issued to the Taxpayer.

The Court rejected both arguments by the Department. The Taxpayer could rely on the 1998 revenue ruling, and was entitled to the Durable Medical Equipment Exemption. The Department petitioned for review, and Indiana Supreme Court denied review.

3. ***Merchandise Warehouse Co., Inc. v. Indiana Department of State Revenue***, 67 N.E.3d 666 (Ind. Tax Ct. 2017).

The Taxpayer, an operator of a food storage warehouse, sought a refund of sales taxes paid to the Department for the purchases of freezer equipment and electricity to operate the freezer equipment in order to freeze food products that arrived at the facility packaged and on pallets, claiming the manufacturing exemptions under Ind. Code §§ 6-2.5-5-3 and 6-2.5-5-5.1.

The Court held that the Taxpayer's "service", freezing food products owned by its customers, did not constitute "production," and therefore electricity and freezer equipment used by Taxpayer for such freezing did not qualify for either consumption or equipment exemptions to sales tax. The Taxpayer did not "produce" tangible personal property.

4. ***Miller Pipeline Corporation v. Indiana Department of State Revenue***, 52 N.E.3d 973 (Ind. Tax Ct. 2016).

The Taxpayer, an underground utility contractor, brought suit challenging the Department's denial of its claims for refund of sales and use tax (the Taxpayer filed the claims following an audit, assessment and payment). The issues, and the Court's holding, were as follows:

(1) The Taxpayer made duplicate use tax payments on certain purchases. The Department claimed that the Taxpayer had to also prove it didn't give itself a credit for such duplicate payment on subsequent returns. The Court rejected the Department's claim, noting that the burden shifted to the Department once the Taxpayer showed it paid twice.

(2) The Taxpayer provided evidence that it purchased equipment in a casual sale. The Department did not provide any evidence to the contrary, and the Court held the transaction was not taxable.

(3) The Taxpayer purchased items at silent auction conducted by a not-for-profit trade association, items which had previously been donated to the association; and the Court held the transactions were exempt.

(4) The Taxpayer produced previously missing invoices showing payment of sales tax (not found during the audit). The Court held that the Taxpayer did not owe use tax on those transactions as had been determined during the audit.

(5) The Taxpayer claimed the purchase for resale exemption on an air compressor it purchased and then sold. The Court held, however, that the Taxpayer did not prove that it purchased the air compressor for the purpose of resale.

(6) The Taxpayer claimed it paid use tax on a labor charge on an invoice, but the evidence did not substantiate the claim, so the Taxpayer's claim was rejected.

(7) The Taxpayer challenged the Department's statistical sampling methodology, claiming it did not deal with each sampled item, thereby invalidating the sampling. The Department claimed it was avoiding giving the Taxpayer a double refund on items in the sample that were in an already pending refund claim. The Court found both arguments to have merit, and remanded to the Department with instructions.

(8) The Taxpayer claimed that it did not owe tax on a transaction because the vendor owed the tax as it was a lump sum contract for an improvement to realty. However, the Taxpayer provided no proof and its claim was denied.

(9, 10) The Taxpayer claimed that it did not owe tax on certain transactions on the basis that the vendors were "primarily engaged" in providing a service and the property was minimal (less than 10%). However, the Taxpayer again provided no proof and its claim was denied.

(11) Finally, the Taxpayer did not owe tax on a freight charge as the invoice showed that the property was delivered outside of state, and that proof shifts the burden to the Department to show otherwise.

5. ***Orbitz, LLC v. Indiana Department of State Revenue,*** 66 N.E.3d 1012 (Ind. Tax Ct. 2016).

The Taxpayer is an online travel company that provides marketing, reservation services, customer services, and tax collection. The Taxpayer reserves hotels at wholesale rates, but may also charge greater than wholesale rates when facilitating pre-paid reservations. The Department issued assessments of sales and innkeeper’s taxes, arguing that the Taxpayer should have charged sales and innkeeper’s tax on the retail rate, not the wholesale rate, of hotel rooms. The Department argued that the Taxpayer was a retail merchant because its agreement with hotels conveyed the right to market and sell or rent hotel rooms

for consideration; the Department further argued that the Taxpayer should have calculated applicable taxes on the retail rate because the portion paid by the customer that was attributable to Orbitz's facilitation fee was expressly taxable as part of a unitary transaction.

The Court held that hoteliers, not the Taxpayer, deliver and transfer possession and control of hotel rooms to customers during the check-in process; as such Orbitz is not a retail merchant under Indiana law. Further, the Taxpayer's contracts with the hoteliers maintain that the Taxpayer should collect tax based on the wholesale rate of hotel rooms. Because the Taxpayer is not a retail merchant, any liability for sales or innkeeper's taxes (the difference between the wholesale and retail rates) are the liability of the hoteliers, not the Taxpayer.

6. ***RDM Sales and Service, Inc. v. Indiana Department of State Revenue***, 57 N.E.3d 901 (Ind. Tax Ct. 2016).

The Taxpayer sold food through vending machines and operated cafeterias owned by third parties. The Indiana Department of State Revenue audited Taxpayer and determined that all vending machine and cafeteria food sales should be subject to Indiana sales tax. Taxpayer appealed.

The Court held that bottled water and fruit juice sold at regular price from vending machines is subject to Indiana sales tax, but bottled water and fruit juice dispensed from vending machines for free or at a discounted rate to exempt customers was not subject to sales tax. The Court rejected the Taxpayer's claim of estoppel and reliance on a Department publication, with one of the reasons being that a fair reading of the entire publication and the documents it referenced did not support the Taxpayer's position. The Court also rejected the Taxpayer's claim that the disparate treatment of vending machine sales violated the Indiana Equal Privileges and Immunities Clause (Section 23) and the Equal Protection Clause of the United States Constitution (U.S. CONST. amend. XIV, §1), as those claims were previously rejected by the Court in *J&J Vending, Inc. v. Indiana Dep't of State Revenue*, 673 N.E.2d 1203 (Ind. Tax Ct. 1996).

Food for immediate consumption sold by the Taxpayer at or near the premises of the seller is subject to Indiana sales tax when Taxpayer operates, but does not own, the premises at which food is sold. The Court recognized that there was a question of fact precluding summary judgment as to the Taxpayer's sales of bakery goods and whether eating utensils were provided. A similar question of fact was raised as to the sale of food in which the Taxpayer combined food ingredients which required cooking.

Finally, the Court upheld the negligence penalty, finding that the Taxpayer's claimed reliance on the Department's publication was unreasonable.

7. ***SBP Petroleum, Inc. v. Indiana Department of State Revenue***, 2016 WL 5719232 (Ind. Tax Ct. Sept. 29, 2016).

SBP Petroleum, which operated a gasoline and convenience store, filed petitions with the Tax Court of Indiana asserting that the Department used the wrong methodology to determine sales and withholding tax liabilities. SBP Petroleum did not respond to repeated discovery requests, did not present witnesses for depositions, and did not obtain new counsel after withdrawal of formal counsel. The Department filed motion to dismiss for failing to diligently prosecute the matter.

The Court held that the taxpayer failed to respond to discovery requests and take action when its counsel withdrew, the Court dismissed Taxpayer's suit with prejudice.

8. ***Thermo-Cycler Industries, Inc. v. Indiana Department of State Revenue***, 2017 WL 2591432 (Ind. Tax Ct. July 15, 2017).

The Taxpayer manufactured heating equipment. The Department notified the Taxpayer that it would be conducting a compliance audit, and stating that it needed to complete the audit by the end of the month. After no further communication, the Department issued BIA proposed assessments based on the Taxpayer's federal returns. After a protest and some revisions, the Taxpayer filed in Tax Court, and the parties filed cross-motions for summary judgment, with the Taxpayer arguing that the Proposed Assessment should be void as a matter of law

because (1) the Department failed to get a subpoena and court order before completing the audit; and (2) the Department wasn't authorized to conduct a best information audit because it did not have reasonable belief at the time that Taxpayer underreported its sales/use tax liabilities. Further, Taxpayer argued that its assessment for 2010 was a violation of due process because it was never made aware such year was under audit until the Proposed Assessment.

The Tax Court held: (1) the relevant statute (Ind. Code § 6-8.1-3-12(c)) states that the Department "may" enforce subpoena powers; as such, the Department has the option but not obligation to obtain a subpoena prior to proceeding with an audit; (2) because the Department's only information available (federal tax return) led the Department to believe that Taxpayer underreported its sales and use tax, such best information audit was reasonably based; and (3) the 2010 Proposed Assessment was not a violation of due process because the Taxpayer had the opportunity to file a protest.

9. ***Zimmer, Inc. v. Indiana Department of State Revenue***, 72 N.E.3d 1031 (Ind. Tax Ct. 2017).

The Taxpayer, a seller of medical device products, frequently participates in out-of-state trade shows. It has significant assets dedicated to exhibit booth components, all of which are stored in Indiana. The Department sought to impose use tax on such items on four bases: (1) the temporary storage exception is not meant to apply to items that continuously are removed and brought back into the state; (2) the Taxpayer exercised rights of ownership in Indiana because Indiana is Taxpayer's central hub for its continuous process of inspecting and choosing future booth locations, developing goals and objectives, and updating/modifying both components; (3) "more than just decisions" occurred in Indiana, such as conducting internal meetings to determine effectiveness of future booths, insuring components, etc; and (4) repair of exhibition components constituted a taxable use.

The Tax Court held: (1) the Taxpayer's repeated in-state storage and out-of-state use of its exhibit booth components is

consistent with the statutory exclusion of temporary storage for subsequent use outside Indiana; (2) although the Taxpayer does make decisions in Indiana, such decision making activities did not subject it to tax; (3) activities of conducting meetings, inspecting, insuring, and arranging logistics of exhibition booth components were necessary but incidental to the property's in-state temporary storage and out-of-state use, and as such does not subject exhibition booth components to use tax; and (4) repairing damaged exhibition components are an exercise of ownership in Indiana unless the repairs are incidental to the storage for use outside Indiana, and in this case the Court determined that those items that were repaired are subject to Indiana use tax.

10. ***State of Indiana ex. Rel Harmeyer v. The Kroger Co. et al.,*** 1:17-cv-00538-JMS-DML (S.D. Ind. 2017).

A whistleblower complaint was filed in Marion Superior Court alleging that since 2014 Kroger and affiliated stores have sold more than 1,400 unique items and failed to collect and remit sales tax on such sales. The complaint was filed under the Indiana False Claims Act which would entitle the "whistleblower" to a percentage of the amount recovered. After the case was presented to the Indiana Attorney General and the Office of the Inspector General, who declined to intervene, the whistleblower sought to remove the case to federal court because the state refused to intervene.

The District Court for the Southern District of Indiana held that, even though the State of Indiana failed to intervene in the complaint, the State remained a real party in interest in the case, and as such the federal court did not have jurisdiction. The case was remanded to Marion Superior Court for further proceedings.

11. ***Virginia Garwood and Kristen Garwood v. State of Indiana,*** 2017 WL 2417947 (Ind. Ct. App. June 5, 2017).

The Taxpayers ran a dog breeding/selling business. Rather than following the normal audit process, the Department issued jeopardy assessments and tax warrants in conjunction with criminal prosecution for tax crimes. The Department seized

approximately 240 dogs in a "dramatically staged raid involving a large media presence" in 2009, and then sold the dogs for $300 (less than $2 each), while assessing the Taxpayers almost $300,000. Through multiple decisions of the Tax Court, the Court found the Department's jeopardy assessment actions unwarranted.

The Taxpayers filed suit against 56 defendants, alleging a number of state-law torts (conversion, defamation, intentional infliction of emotional distress) as well as federal claims of denial of due process, unlawful search and seizure, equal protection clause violation, and conspiracy to violate their civil rights. The only successful claim was against the then-Chief Counsel for Tax Litigation in the amount of $15,000 in compensatory damages, and $89,500 in attorney's fees. Both parties appealed, with the Taxpayers arguing that the defendants' actions of (1) issuing jeopardy assessments; (2) denying Taxpayers DOR hearing; and (3) targeting dog breeders were a violation of due process. The Defendant claimed absolute or qualified immunity.

In a 59 page opinion, the Court of Appeals reversed the $15,000 compensatory verdict for lack of sufficient evidence, and the award for attorneys' fees was also vacated.

V. FEDERAL DEVELOPMENTS OF INTEREST

A. *Matkovich v. CSX Transportation, Inc.*, 793 S.E.2d 888 (W. Va. 2016), *pet. for cert.* pending. CSX was assessed use tax on motor fuel by West Virginia. Court held that CSX was entitled to a credit for sales taxes CSX paid on the motor fuel to other states, including subdivisions of those states, based on *Comptroller v. Wynne*, 135 S. Ct. 1787 (2015).

B. House Bill 1393 would provide that an employee's wages are not subject to tax in a non-resident state if the employee's performs duties in that state for less than 30 days; rather, the wages are taxed in the state of the employee's residence. "Employee" excludes professional athletes and entertainers, qualified production workers, and certain public figures.

C. House Bill introduced to undermine state legislative efforts to tax remote sales, as it requires a physical presence (as defined) beyond a *de minimis* physical presence (a defined; less than 15 days, among others) in order to assess tax or require the collection of tax.

VI. PROPERTY TAX

1. ***Evansville Courier Corp. v. Vanderburgh County Assessor***, 2017 WL 2417811 (Ind. Tax. Ct. June 5, 2017)

   Facts: The Taxpayer claimed an abnormal obsolescence deduction for a printing press purchased in 1989, claiming that (1) the printing press at issue was no longer standard in the marketplace as an alternative printing press became much more desirable among the news industry and thus this press had no value in the marketplace; and (2) there has been a significant decline in the newspaper industry. The Indiana Board of Tax Review denied the deduction, determining that the printing press was still being used, and there was not an "unforeseen" event that generated the loss in the printing press value – noting that it would be expected that newer, better technology would be generated in the twenty five years since the press was originally purchased.

   Holding: The Tax Court upheld the determination by the Indiana Board of Tax Review. The Court relied on the administrative regulations for claiming abnormal obsolescence, which was defined as "…obsolescence which occurs as a result of factors over which the taxpayer has no control and is unanticipated, unexpected, and cannot reasonably be foreseen by a prudent businessman prior to the occurrence. It is of a nonrecurring nature and includes unforeseen changes in market values…" The Court focused on the fact that the decline of the print news industry was not of a non-recurring nature, such as the impact of certain industries from the September 11, 2001 terrorist attacks, but rather was a general decline of an industry based upon the overall change of the marketplace.

2. ***Monroe County Assessor v. SCP 2002 E19 LLC 6697, a/k/a CVS 6697-02***, 2017 WL 2291368 (Ind. Tax Ct. May 25, 2017)

   Facts: CVS appealed several years of its property assessments, which were heard in front of the Indiana Board of Tax Review. Both parties had appraisals that were presented to the Board, each arriving at different valuations. The Indiana Board determined that CVS's appraiser's income approach was the more reliable valuation of the property. The Assessor appealed to the Tax Court, arguing that CVS's appraiser did not properly value the property under the market value-in-use standard.

   Holding: The Tax Court upheld the assessment, and relied on a previous decision involving the same parties, in which the Court determined that in determining a valuation under the market value-in-use standard, the property should be valued as a general retail property and not specifically as a CVS property. The Court

further found that the appraiser properly made necessary adjustments in her income approach which made it reliable and therefore the Board's determination should be sustained.

3. ***6787 Steel Workers Hall, Inc. v. Snyder***, 71 N.E.3d 97 (Ind. Tax Ct. 2017)

Facts: Union Hall applied for property tax exemption arguing primarily that the activities that it provided to members – including educating its members on their applicable craft – in addition to bettering the community by providing for higher wages for its members. Additionally, the union also pointed to the fact that it allowed charitable organizations to use its facility in furtherance of their charitable purposes.

Holding: Court of Appeals judge sat by designation in this case (i.e. Tax Court Judge did not decide this case). The Tax Court determined that a union's activities were not educational or charitable in nature as required by Ind. Code 6-1.1-10-16, deciding that the activities were for the benefit of the membership which was not sufficient for property tax exemption. In coming to this decision, the Court distinguished some cases from the late 1800s determining that membership organizations qualified for property tax exemption.

4. ***Hamilton County Assessor v. Duke***, 69 N.E.3d 567 (Ind. Tax Ct. 2017)

Facts: Duke owned and operated a for-profit day care, which applied for property tax exemption asserting it was exempt both for its educational and religious activities. The Indiana Board of Tax Review approved exemption on educational grounds, but denied it on religious grounds. It was determined that the attendees spent 1.25 hours each day being instructed in various subjects, such as reading, math, science, history, language arts, and social studies, and the curriculum was Bible-based, but not governed by the tenets of a specific church or denomination. Moreover, each day also included other activities, such as approximately 15 minutes of cleaning, 30 minutes of exercise, 45 minutes of prayer and bible study, 1.75 hours of free play and recess, 2 hours for a nap period, and 2.5 hours for breakfast, lunch, and snacks.

Holding: The Tax Court focused on whether the day care activities were "predominately" educational and/or religious activities under Ind. Code 6-1.1-10-36, which requires that the property be used for exempt activities greater than 50% of the time. The Tax Court determined that the taxpayer did not provide sufficient evidence showing the property being used for an exempt purpose as compared to a non-exempt purpose.

5. ***Lake County Trust Co., Trust No. 6 v. St. Joseph County Assessor,*** 66 N.E.3d 630 (Tax Ct. 2016)

Facts: Taxpayer had appealed a determination from the Indiana Board of Tax Review. Under the Tax Court rules, the Taxpayer was obligated to file the certified administrative record with the Tax Court within thirty (30) days after

being notified by the Board that it had been prepared. Such a filing was not timely made by the Taxpayer, and the Assessor filed a motion to dismiss the case under Trial Rule 12(B)(1) for failing to follow the procedural perquisites to bring a case in Tax Court.

Holding: The Tax Court determined that the Assessor did not timely file its motion to dismiss because it failed to file its motion prior to the Taxpayer file its initial brief in the case. Since the motion could have been filed before the "merits of the case" were contested, the Court determined such a motion was not timely.

6. ***SCP 2007-C-26-002, LLC a/k/a CVS 3195-02 v. Monroe County Assessor***, 62 N.E.3d 478 (Ind. Tax Ct. 2016), *review den'd,* 2017 WL 2258767 (Ind. May 5, 2017)

Facts: The case addressed the assessed value of a CVS store in Monroe County. Both parties had submitted appraisals detailing what it believed to be over a several year period. The Indiana Board of Tax Review determined that the Taxpayer's income approach was the most accurate valuation of the property. The Assessor challenged the determination arguing that the market data did not support such a determination under both the law and the facts in the case. Specifically, the Assessor focused on the different purpose of the property as a CVS store as compared to general retail.

Holding: The Tax Court cited several previous cases in which it determined that the use of general retail stores were not a different class of properties as compared to property being used as an ongoing CVS store (or other stores such as Meijer), and therefore the Board's determination relying on the Taxpayer's income approach was appropriate.

7. ***Hamilton Square Investment, LLC v. Hamilton County Assessor***, 60 N.E.3d 313 (Ind. Tax Ct. 2016), *review den'd*, 2017 WL 1900323 (Ind. May 5, 2017).

Facts: The Taxpayer challenged the property tax rates that were being assessed on portions of an apartment building. Specifically, under Indiana Code §§ 6-1.1-20.6-4 and 6-1.1-20.6-7.5, residential rental property is capped at 2% of the assessed value while general commercial property is capped at 3%. The Taxpayer challenged that portions of the apartment complexes outside of the main footprint of the buildings were being improperly taxed at 3% instead of the 2% tax rate.

Holding: The Tax Court agreed with the Taxpayer in determining that the definition of "common area" as contained within Indiana Code § 6-1.1-20.6-4 for purposes of the residential rental definition included more than just hallways and stairways of the buildings, and in fact could include common areas outside of the building footprints. Accordingly, the Tax Court determined that more of the apartment complex that was available to the residents should be subject to the 2% tax cap as compared to the higher 3% for general commercial property.

8. ***Spencer County Assessor v. AK Steel Corporation***, 61 N.E.3d 406 (Ind. Tax Ct. 2016), *review den'd,* 2017 WL 1333595 (Ind. Apr. 4, 2017)

Facts: AK Steel operated a steel finishing facility in Spencer County (southern Indiana) and on its personal property tax return it claimed a deduction using "Pool 5" which is a special valuation method for integrated steel mills that had a "blast furnace [used to make the steel] in Indiana." The Assessor disallowed the Pool 5 deduction because, among other things, AK Steel did not have a blast furnace in Indiana – rather AK Steel's blast furnace was located in Ohio. AK Steel appealed the decision primarily arguing that the Pool 5 statute was unconstitutional as it limited the deduction to those parties that had blast furnace in Indiana – as compared to another state – therefore violating the commerce clause and equal protection clause, among other constitutional provisions.

Holding: The Tax Court determined that the Pool 5 statute was not unconstitutional, determining that under the equal protection clause, the "in Indiana" limitation for blast furnaces was rationally related to a legitimate state interest – namely to assist integrated steel mills in Northwest Indiana that were suffering significantly in part due to extreme taxes. With respect to the commerce clause contention, the Tax Court held that the "in Indiana" limitation did not distinguish between foreign and domestic corporations and in fact both foreign and domestic entities could qualify for the Pool 5 deduction. Additionally, the Court determined that AK Steel did not develop an argument that illustrated that they were diminished in the marketplace as a result of this legislation. Finally, the Court also noted that AK Steel was not prohibited for attempting to claim a deduction – rather it just was required to claim abnormal obsolesce in lieu of claiming the Pool 5 deduction.

9. ***Howard County Assessor v. Kohl's***, 57 N.E.3d 913 (Ind. Tax Ct. 2016), *review den'd*, 2017 WL 1655319 (Apr. 27, 2017)

Facts: Kohl's believing that its assessments were too high over a several year period filed appeals with the County Assessor. Upon appeal to the Indiana Board of Tax Review (after the County declined to lower the assessments), both Kohl's and the Assessor submitted appraisals primarily relying on the sales comparison approach. The primary difference between the appraisals was that Kohl's appraiser had utilized sales of big box retail stores in which there was not an active lease in place (i.e. a dark anchor). This is in comparison the Assessor's appraisal, which only utilized sales where there was an active occupant in the store. The Indiana Board determined that Kohl's appraisal was a better indication of the market value-in-use methodology.

Holding: The Indiana Tax Court upheld the IBTR's determination, noting that it had determined in several prior decisions that the market value-in-use standard contemplated, for Kohl's, the sale of general retail sales – as compared to the sales of Kohl's properties. Specifically, the Court noted that the sale of "second generation" stores reflected what the market was willing to pay for general retail

stores. The Court relied on several Tax Court cases in determining that the Indiana Board properly found in the favor of Kohl's.

10. ***Gillette v. Brown County Assessor***, 54 N.E.3d 454 (Ind. Tax Ct. 2016)

Facts: The Taxpayer filed a property tax appeal arguing that the properties assessment for the 2009 assessment year was too high. After the County declined to adjust the assessment, the Indiana Board of Tax Review determined that the County failed to substantiate its assessment, which it was required to do since the assessment increased by more than 5% over the prior year (the burden shifting statute as codified in Ind. Code § 6-1.1-10-36.5). Accordingly, the Board determined the property should be valued based upon the 2008 assessment in accordance with the burden shifting statute. In making that determination, the Board determined that the Taxpayer failed to prove that the assessment should be lowered below the 2008 assessed value.

Holding: The Tax Court upheld the Indiana Board's determination finding that two appraisals presented to the Board were not probative as their valuation dates were several years prior to the assessment and valuation date in issue. Accordingly, the Tax Court affirmed the Board's decision to lower the 2009 assessed value to the 2008 assessment since the Assessor did not carry its burden to prove the accuracy of the 2009 assessment; however, it declined the Taxpayer's request to lower the assessed value below the 2008 valuation.

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