

## RECENT DEVELOPMENTS IN INDIANA TAXATION SURVEY 2012

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### INTRODUCTION: SOME REFERENCES USED IN THIS ARTICLE

This Article highlights the major tax developments that occurred during the calendar year of 2012. Whenever the term “GA” is used in this Article, the term refers only to the 117th Indiana General Assembly. Whenever the term “Tax Court” is referred to, such term refers only to the Indiana Tax Court. Whenever the term “Court of Appeals” is referred to, the term refers only to the Indiana Court of Appeals. Whenever the term “Supreme Court” is referred to, the term refers only to the Indiana Supreme Court. Whenever the term “DLGF” is used, the term refers only to the Indiana Department of Local Government Finance. Whenever the term “IBTR” is used, the term refers only to the Indiana Board of Tax Review. Whenever the terms “Department” or “DOR” are used, these terms refer only to the Indiana Department of State Revenue. Whenever the terms “IC” or “Indiana Code” are used in the Article, these terms refer only to the Indiana Code in effect at the time of the publication of this Article, unless otherwise explicitly stated. Whenever the term “ERA” is used, the term refers only to an Indiana Economic Revitalization Area. Whenever the term “CAGIT” is used, the term refers only to the Indiana County Adjusted Gross Income Tax. Whenever the term “COIT” is used, the term refers only to the Indiana County Option Income Tax. Whenever the term “LOIT” is used, the term refers only to the Local Option Income Tax. Whenever the term “IEDC” is used, the term refers only to the Indiana Economic Development Corporation. Whenever the term “CEDIT” is used, the term refers only to the Indiana County Economic Development Income Taxes. Whenever the terms “IRC” or “Code” are used, these terms refer only to the Internal Revenue Code in effect at the time of the publication of this Article. Whenever the term “Section” is used in this Article, the term only refers to a section of the Indiana Code, unless it is a reference to the Internal Revenue Code. Whenever the term “Public Law” is used, the term only refers to legislation passed by the Indiana General Assembly and assigned a Public Law number. Whenever the term “PTABOA” is used, the term refers only to a Property Tax Assessment Board of Appeals.

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## I. INDIANA GENERAL ASSEMBLY LEGISLATION

The 117th General Assembly passed several pieces of legislation affecting various areas of state and local taxation. The most significant changes were in the area of inheritance taxes. This section highlights the majority of the GA's changes from 2012 in the areas of property taxes, tax procedure, sales and use taxes, income taxes, utility receipts taxes, and other miscellaneous provisions.

*A. Inheritance Taxes*

The most important change in the tax laws made by the GA this year was the gradual abolition of the inheritance tax. Under the law, the inheritance tax will no longer apply to any person who dies after December 31, 2012.<sup>1</sup> In the interim, there are several areas of change in the law.

The first is the payment of inheritance tax by beneficiaries and the disbursement by the Department to local government units until the tax is abolished. For the next ten years, the effective inheritance tax liability for a liable beneficiary is reduced by an average of 9.1% annually. This is done by giving the beneficiary payor a credit, the amount of which increases annually. For the twelve-month period between July 1, 2012 and June 30, 2013, a beneficiary payee will receive a credit for 9% of her net inheritance tax liability.<sup>2</sup> This credit increases to 91% for the twelve-month period between July 1, 2021 and June 30, 2022.<sup>3</sup> Conversely, local governments will have their disbursements from inheritance tax funds reduced by approximately 9.1% annually. For the twelve-month period between July 1, 2012 and June 30, 2013, a beneficiary payee county will receive a 91% of their net inheritance tax disbursements versus the twelve-month period between July 1, 2011 and June 30, 2012.<sup>4</sup> This disbursement decreases to 9% for the twelve-month period between July 1, 2021 and June 30, 2022.<sup>5</sup>

The other significant changes in the inheritance tax law are the reclassification of certain beneficiaries and increases in the amounts exempt from inheritance tax. Beneficiaries in Indiana are grouped into three classes—A, B, and C transferees—based on how closely related they are, if at all, to the decedent.<sup>6</sup> Class A beneficiaries are lineal descendants and ancestors of the decedent.<sup>7</sup> This also includes stepchildren of the decedent and their lineal descendants, regardless of whether the stepchild was legally adopted by the decedent.<sup>8</sup> Class B beneficiaries are siblings of the decedent transferor or their

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1. IND. CODE § 6-4.1-1-0.5 (2013).

2. Pub. L. 157-2012, § 11(a).

3. *Id.*

4. Pub. L. 157-2012, § 11(d).

5. *Id.*

6. IND. CODE § 6-4.1-1-3 (2013).

7. *Id.* § 6-4.1-1-3(a).

8. *Id.*

lineal descendants.<sup>9</sup> Class C beneficiaries are anyone else who receives a death transfer.<sup>10</sup>

In 2012, the GA expanded the definition of Class A beneficiaries so that the “spouse, widow, or widower of a child [or stepchild] of the [decedent] transferor” is a Class A beneficiary for “the estate of an individual who dies after December 31, 2011.”<sup>11</sup> Each of these groups was previously under the Class B classification. This amendment greatly reduces the inheritance tax liability of those beneficiaries. Under Indiana Code section 6-4.1-1-3, as it was written before January 1, 2012, a Class A beneficiary was able to exempt the first \$100,000 in qualifying transfers from the inheritance tax, while a Class B beneficiary was only allowed to exempt \$500 in qualifying transfers.<sup>12</sup>

The GA also increased the exemption amounts for each class of transferees. For Class A beneficiaries, the exempt amount increased from \$100,000 to \$250,000 for any transferor dying on or after December 31, 2011.<sup>13</sup>

The GA made one additional minor change to the inheritance tax laws. It changed Indiana Code section 6-4.1-2-8 so that if a transferor makes an inheritance taxable transfer to an entity, then a part-owner in the entity is considered a partial transferee and is liable for inheritance tax to the extent of her *pro rata* share.<sup>14</sup>

### B. Property Taxes

The GA made several important changes in the area of property taxes. The GA added Section 6-1.1-4-4.2 as a new section to the Indiana Code, which provides that, “before July 1, 2013, and before July 1 of every fourth year thereafter,” county assessors of each county are required to “prepare and submit to the [DLGF] a reassessment plan for the county[,]” which “is subject to approval by the [DLGF].”<sup>15</sup> The reassessment plan must divide all real property parcels in the county into four separate groups.<sup>16</sup> Further, “[e]ach group of parcels must contain approximately [25%] of the parcels within each class of real property in the county.”<sup>17</sup> Also, the GA amended Section 8-18-8-5 to allow counties to use property taxes deposited in the county’s general fund for the maintenance of county highways.<sup>18</sup> Previously, counties were only permitted to use property taxes for highway maintenance in emergency situations and only

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9. *Id.* § 6-4.1-1-3(b).

10. *Id.* § 6-4.1-1-3(c).

11. *Id.* § 6-4.1-1-3(a)(5)-(6).

12. IND. CODE § 6-4.1-3-10 TO -11 (2011). *See also* TRANSFERS—INHERITANCE AND ESTATE TAXES—QUALIFICATIONS, 2012 Ind. Legis. Serv. P.L. 157-2012 (S.E.A. 293) (West).

13. IND. CODE § 6-4.1-3-10 (2013).

14. *Id.* § 6-4.1-2-8.

15. *Id.* § 6-1.1-4-4.2(a).

16. *Id.* § 6-1.1-4-4.2(a)(3).

17. *Id.*

18. *Id.* § 8-18-8-5.

with a unanimous vote by the county's fiscal body.<sup>19</sup>

The GA also amended Section 6-1.1-24-1.2 to allow the county auditor to remove real property from a "tax sale if the county treasurer and the taxpayer agree to a mutually satisfactory arrangement for the payment of the delinquent taxes."<sup>20</sup> This arrangement must be in writing, must be signed by the taxpayer, and must require the taxpayer to pay all delinquent taxes no "later than the last business day before July 1 of the year after the date the agreement is signed."<sup>21</sup> Previously, this authority only applied in Lake County but has been amended to apply statewide.<sup>22</sup>

The GA also amended Section 6-1.1-4-39, qualifying that "[i]f a taxpayer wishes to have the income capitalization method or the gross rent multiplier method used in the initial formulation of the assessment of the taxpayer's property, the taxpayer must submit the necessary information to the assessor not later than the March 1 assessment date."<sup>23</sup>

### *C. Tax Procedure*

The GA made several important changes in tax procedure. Retail vendors may no longer file a combined return for collected sales tax and withholding taxes for their employees.<sup>24</sup> Rather, each return must be filed separately.<sup>25</sup> The GA also made other changes to employers' withholding requirements. Previously, an employer was required to remit withholding taxes to the Department on an annual, semi-annual, quarterly, or monthly basis, depending on the amount due to the Department.<sup>26</sup> The GA abolished the semi-annual and quarterly filing requirements.<sup>27</sup> Now, if an employer owes more than \$1000 in withholding taxes annually, he or she must remit the taxes monthly.<sup>28</sup> If the employer owes less, he or she may pay on an annual basis.<sup>29</sup> All withholding returns must now be filed electronically.<sup>30</sup> Electronic filing is also required for individual income tax returns for any taxpayer that receives more than twenty-five of the following IRS forms in a given year: (1) W-2G; (2) 1099-R; or (3)

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19. IND. CODE § 8-18-8-5(b) (2011).

20. IND. CODE § 6-1.1-24-1.2(c) (2013).

21. *Id.* § 6-1.1-24-1.2(d). *See also* TAXATION—EXEMPTIONS—PROPERTY TAXATION, 2012 Ind. Legis. Serv. P.L. 137-2012 (H.E.A. 1072) (West).

22. IND. CODE § 6-1.1-24-1.2 (2011).

23. *Id.* § 6-1.1-4-39(d).

24. *Id.* § 6-2.5-6-1.

25. *Id.*

26. IND. CODE § 6-3-4-8 (2011).

27. TAXATION—EXEMPTIONS—PROPERTY TAXATION, 2012 Ind. Legis. Serv. P.L. 137-2012 (H.E.A. 1072) (West).

28. IND. CODE § 6-3-4-8 (2013).

29. *Id.*

30. *Id.* § 6-3-4-8.1.

WH-18.<sup>31</sup>

Along with the new filing requirements are new deadlines for certain withholding reports to be submitted to the Department by pass-through entities. For partnerships, the deadline for notifying the Department of the amount of withholding for nonresident partners was extended from December 31 of the tax year to March 15 of the following year.<sup>32</sup> Also, the payment deadline has been extended from January 31 of the following year to April 15.<sup>33</sup> The deadline for remitting withholding tax for shareholders in an Indiana S Corporation has been extended from March 15 to April 15 of the following year.<sup>34</sup>

There were several important changes to the ability of and requirements for counties imposing county-specific income taxes. If a county elects to adopt a new County Adjusted Gross Income Tax (“CAGIT”), the county auditor has ten days from the adoption to notify the Department, the Commissioner of the Budget Agency, and the Commissioner of the DLGF that the county has adopted the CAGIT.<sup>35</sup> If a county elects to adopt a new County Option Income Tax (“COIT”), it must follow the same procedure.<sup>36</sup> Additionally, the Department must distribute revenue from the CAGIT to the respective counties on a monthly, rather than semi-annual, basis.<sup>37</sup> If a county has a County Economic Development Income Tax (“CEDIT”), disbursements now must be made on an annual basis.<sup>38</sup>

The GA passed several measures affecting the Department’s procedures. The Department is now required to suspend the retail merchant’s license for one year of any retailer found to have sold a synthetic drug in its ordinary course of business.<sup>39</sup> The GA also amended Indiana Code section 6-8.1-9-1 to allow direct appeal by a taxpayer to the Tax Court if the Department does not adhere to its three-year deadline to issue a decision on a refund claim or its eighteen-month deadline to mail utility refund checks.<sup>40</sup> Previously, no direct appeal was allowed. Finally, satellite Department offices are not required to deposit funds with the central office in Indianapolis until and unless their receipts on hand are \$500 or more.<sup>41</sup>

#### *D. Sales and Use Taxes*

The GA passed several important changes to the laws for sales and use tax as they apply to recycling and environmental concerns. Any tangible personal

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31. *Id.* § 6-3-4-16.5.

32. *Id.* § 6-3-4-12.

33. *Id.*

34. *Id.* § 6-3-4-13.

35. *Id.* § 6-3.5-1.1-2.

36. *Id.* § 6-3.5-6-1.5.

37. *Id.* § 6-3.5-1.1-10.

38. *Id.* § 6-3.5-7.16.

39. *Id.* § 6-2.5-8-7.

40. *Id.* § 6-8.1-9-1.

41. *Id.* § 5-13-6-1.

property purchased while engaged in the business of recycling is now exempt from the state gross retail tax (the sales or use tax, where applicable).<sup>42</sup> The GA added the new Section 6-2.5-5-45.8 dealing with the gross retail tax as it applies to manufacturing. Specifically, the section defines what activities qualify for the “double direct” exemption from gross retail tax.<sup>43</sup> A purchase of tangible personal property will not be subject to gross retail tax if it the acquired property is used in “direct consumption as a material to be consumed in the direct production of other tangible personal property in [the acquirer’s business].”<sup>44</sup> The GA defined recycling as “the processing of recycling materials and other tangible personal property into a product for sale if the product is predominantly composed of recycling materials.”<sup>45</sup> “Transactions involving machinery, tools, and equipment are exempt from the gross retail tax if: (1) the person acquiring that property acquires it for direct use in the direct processing of recycling materials; and (2) the person acquiring that property is occupationally engaged in recycling.”<sup>46</sup> Additionally:

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 are exempt from the state gross retail tax if:

- (1) the person acquiring that property acquires it for direct use in the direct processing of recycling materials; and  
(2) the person acquiring that property is occupationally engaged in recycling.<sup>47</sup>

In essence, the double direct exemption has been extended to recycling. Also, wrapping materials and nonreturnable containers are exempt from sales and use tax if they are to be used in shipping tangible personal property that belongs to someone else, is processed for the receiving owner, and will be sold by the owner either as a finished product or as part of the owner’s tangible personal property.<sup>48</sup>

In addition to the double direct test for tangible personal property, Indiana Code section 6-2.5-4-5(c)(3) exempts certain entities from sales and use tax for purchases of electricity or natural gas if the purchases are “an essential and integral part of an integrated process that produces tangible personal property and those sales are separately metered for the excepted uses listed in this subdivision, or if those sales are not separately metered but are predominately used by the purchaser for the excepted uses.”<sup>49</sup> This predominant use exemption is similar to the double direct exemption; it aims to prevent tax pyramiding. Under the

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42. *Id.* § 6-2.5-5-30.

43. *Id.* § 6-2.5-5-5.1(b).

44. *Id.*

45. *Id.* § 6-2.5-5-45.8(a).

46. *Id.* § 6-2.5-5-45.8.

47. *Id.*

48. *Id.* § 6-2.5-5-9.

49. IND. CODE § 6-2.5-4-5(c)(3) (2012).

statutory modification, a power company or an entity acting as a public utility is not acting as a retail merchant when it sells power to entities engaged in processing, refining, recycling, floriculture, and arboriculture.<sup>50</sup>

There were additional changes to the gross retail tax as it relates to energy purchases. Vendors of E85 ethanol<sup>51</sup> may no longer use an eighteen-cent per gallon deduction for the amount of E85 ethanol they sell at retail.<sup>52</sup> Previously, the credit was to extend until June 30, 2020.<sup>53</sup> Families who participate in the Low Income Home Energy Assistance Program (“LIHEAP”) are no longer eligible for a retail tax exemption on purchases of electricity or natural gas,<sup>54</sup> and utility companies providing services under the LIHEAP must now collect and remit retail taxes from their participating customers.<sup>55</sup>

Aircraft servicers and manufacturers were subject to several changes in the gross retail tax. Manufacturers doing completion work for aircraft to be located outside of Indiana are not subject to use tax on their purchases of tangible personal property used in the completion work,<sup>56</sup> nor is the completion work itself subject to use tax under certain circumstances.<sup>57</sup> Completion work is defined as

the addition of tangible personal property to or reconfiguration of the interior of an aircraft, if the work requires the issuance of an airworthiness certificate from the:

(A) Federal Aviation Administration; or

(B) equivalent foreign regulatory authority;

due to the change in the type certification basis of the aircraft resulting from the addition to or reconfiguration of the interior of the aircraft.<sup>58</sup>

In essence, this clarifies that manufacturers doing completion work are akin to manufacturers refurbishing, repairing, and remanufacturing aircraft that would be located outside Indiana, whose purchases were already exempt from use tax.<sup>59</sup> This is consistent with the legislative intent, which was to clarify that completion work should be treated like refurbishing, repairing, and remanufacturing, rather than to create a new category of exempt activities.<sup>60</sup> Like those exempt activities, the aircraft must be delivered to Indiana solely for completion work and must be

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50. *Id.*

51. A partial gasoline substitute that is 85% ethanol, 15% gasoline.

52. IND. CODE § 6-2.5-7-5 (2013). *See also* AGRICULTURE—ANIMALS—RULES AND REGULATIONS, 2012 Ind. Legis. Serv. P.L. 98-2012 (H.E.A. 1128) (West).

53. IND. CODE § 6-2.5-7-5 (2011).

54. APPROPRIATIONS—MORTGAGES—FUNDS, 2012 Ind. Legis. Serv. P.L. 58-2012 (H.E.A. 1141) (West).

55. IND. CODE § 6-2.5-4-5 (2013).

56. *Id.* § 6-2.5-3-2.

57. *Id.* § 6-2.5-5-42.

58. *Id.* § 6-2.5-3-2.

59. *Id.*

60. *Id.*

transported from Indiana as soon as the work is completed.<sup>61</sup> The GA also clarified that “delivery means the physical delivery of the aircraft regardless of who holds title.”<sup>62</sup> It further clarified the thirty-day grace period for aircraft to include “accepting delivery . . . of the aircraft following completion work or a prepurchase evaluation.”<sup>63</sup> This shelter rule applies to any aircraft owned by a nonresident, kept in Indiana for thirty days or less, and will be registered outside the state.<sup>64</sup> Finally, tangible personal property “used, consumed, or installed, in furtherance of, or in, the repair, maintenance, refurbishment, remodeling, or remanufacturing of an aircraft or an avionics systems of an aircraft” is now exempt from gross retail tax.<sup>65</sup> This applies to any aircraft with a landing weight of at least 5000 pounds or that has a “turboprop or turbojet power plant.”<sup>66</sup>

The GA exempted from retail tax any purchase of tangible personal property by a vendor required to affix excise stamps under Indiana Code title 6, article 7 (Tobacco Taxes) for the purpose of complying with that section.<sup>67</sup> Finally:

- (b) Transactions involving tangible personal property are exempt from the state gross retail tax, if the tangible personal property:
  - (1) is leased, owned, or operated by a company that is engaged in offering a competitive racing experience during a competitive racing event; and
  - (2) comprises any part of a two-seater Indianapolis 500 style race car, excluding tires and accessories.<sup>68</sup>

#### *E. Income Tax*

Indiana state and county income taxes “piggyback” off the federal definitions of key terms (e.g., gross income and adjusted gross income). Therefore, the GA had to change several provisions to ensure compliance with the federal income tax. Several typographical errors were corrected<sup>69</sup> and several definitions were changed to comply with the Internal Revenue Code (“IRC”).<sup>70</sup> The one substantive change is that trusts with income of less than \$600 are not required to file an Indiana state income tax return since the Internal Revenue Service no longer requires those trusts to file a federal fiduciary income tax return.<sup>71</sup> The GA also extended three important tax credits that were set to expire at the end of

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61. *Id.*

62. *Id.* (internal quotation marks omitted).

63. *Id.* § 6-2.5-5-42.

64. *Id.*

65. *Id.* § 6-2.5-5-46.

66. *Id.*

67. *Id.* § 6-2.5-3-2. *See also id.* § 6-2.5-5-45.

68. *Id.* § 6-2.5-5-37.

69. *Id.* § 6-3-1-11.

70. *Id.* § 6-3-1-3.5.

71. *Id.* § 6-3-4-1.



2014. The Capital Investment Tax Credit,<sup>72</sup> Hoosier Investment Tax Credit,<sup>73</sup> and New Employer Tax Credit<sup>74</sup> have been extended through the end of 2016.

There are new restrictions and authorizations for certain counties to impose and use county-level income taxes. Generally, funds distributed to counties from a County Option Income Tax (“COIT”) for purposes of property tax relief may only be spent for a combination of uses set out in subsection (f) of Indiana Code section 6-3.5-6-32.<sup>75</sup> Once this combination is settled on, it can only be changed with legislative approval.<sup>76</sup> Miami County, which adopted a COIT for the purposes of property tax relief, was given authorization for calendar year 2012 only to select a different combination of uses under subsection (f).<sup>77</sup> Starke County is now authorized to impose a CEDIT of sixty-five one-hundredths of 1% to build a new county jail,<sup>78</sup> and the authority for Tippecanoe County to impose a CEDIT has been rescinded.<sup>79</sup> The deadline for imposing a CEDIT or CAGIT for the calendar year has been extended from March 31 to October 1 of that year.<sup>80</sup>

There were several sections of the Indiana Code modified as they relate to gross retail tax procedure. The deadline for filing a gross retail tax refund claim for purchases of “electrical energy, natural or artificial gas, water, steam, or steam heat”<sup>81</sup> has been extended from eighteen to thirty-six months.<sup>82</sup>

Finally, the provisions of Indiana Code sections 6-3.1-30.5 and 20-51 relating to the School Scholarship Tax Credit have been made severable to the fullest extent of the law,<sup>83</sup> and the corporate capital investment tax credit expires at the end of 2016.<sup>84</sup> However, corporations may carry over any unused tax credits through the end of 2019.<sup>85</sup>

#### *F. Utility Receipts Taxes*

There is only one change for the utility receipts tax. “Gross receipts are exempt from the utility receipts tax if the gross receipts are received by a taxpayer from an electricity supplier . . . as payment of severance damages or other

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72. *Id.* § 6-3.1-24-9.

73. *Id.* § 6-3.1-26-26.

74. *Id.* § 6-3.1-31.9-23.

75. *Id.* § 6-3.5-6-32.

76. *Id.*

77. *Id.* § 6-3.5-6-1.5.

78. *Id.* § 6-3.5-7-16.

79. *Id.*

80. *Id.* § 6-3.5-7-5.

81. *Id.* § 6-2.5-5-5.1.

82. *Id.*

83. *Id.* § 6-3.1-30.5-0.5.

84. *Id.* § 6-3.1-1-3.

85. *Id.*

compensation resulting from a change in assigned service area boundaries.”<sup>86</sup>

*G. Miscellaneous Provisions*

The GA enacted several provisions relating to revenue disbursement and analysis, concerning the Office of Management and Budget (“OMB”) and the State Tax and Financing Policy Committee (“STFPC”). The STFPC must study and review all tax credits during the post-legislative sessions of the 2012 and 2013 calendar years (known as “the interims”).<sup>87</sup> The STFPC is also to study whether the sales tax exemptions for remodeling, repairing, refurbishing, and completion work on larger aircraft<sup>88</sup> “should apply to all aircraft and avionic devices.”<sup>89</sup> The STFPC was to report to the General Assembly by November 1, 2012.<sup>90</sup>

The Office of Management and Budget (“OMB”) is now required to calculate the state reserves on a biennial, rather than annual, basis.<sup>91</sup> These calculations now must be completed by July 31 of each odd-numbered year.<sup>92</sup> The threshold for disbursement of excess state reserves has been increased from 10% of general revenue appropriations to 12.5%.<sup>93</sup> This determination must be made and presented to the state budget committee by September 30 of every odd-numbered year.<sup>94</sup> If the reserves total less than \$50,000,000 on June 30, the governor is not to disburse any funds and, instead, should carry over the reserves to a subsequent year.<sup>95</sup> If the reserves exceeded \$50,000,000 by June 30, 2012, the governor was to transfer 50% of the reserves to the newly-established pension stabilization fund.<sup>96</sup> The purpose of the fund is for

the pension plans for the state police, conservation officers, judges, and prosecuting attorneys to increase the funded amount of each of these plans to eighty percent. . . . [I]f the amount of money available for transfer is less than the amount needed to increase all these plans' funded amount to eighty percent (80%), the transfers shall be made in the priority of each plan's unfunded liability so that the funded amount of the plan with the least unfunded liability is raised to eighty percent (80%)

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86. *Id.* § 6-2.3-4-7.

87. TAXATION—EXEMPTIONS—PROPERTY TAXATION, 2012 Ind. Legis. P.L. 137-2012 § 130 (H.E.A. 1072) (West).

88. *See supra* notes 69-74, 81 and accompanying text.

89. SALES AND USE TAX—EXEMPTIONS—AIRCRAFT, 2012 Ind. Legis. Serv. P.L. 153-2012 § 6 (H.E.A. 1325) (West).

90. *Id.*

91. IND. CODE § 4-10-22-1 (2013).

92. *Id.*

93. *Id.* § 4-10-22-2.

94. *Id.*

95. *Id.* § 4-10-22-3(1).

96. *Id.* § 4-10-22-3(2).

first.<sup>97</sup>

For fiscal years 2013 and later, 50% of any surplus will be disbursed to the pension stabilization fund and 50% will go to the taxpayers as part of an automatic tax refund.<sup>98</sup> To be eligible for the refund, the taxpayer must have had Indiana AGIT liability and filed a return in the year that the state had reserves in excess of \$50,000,000.<sup>99</sup> In a major change from the previous tax refund section, it is no longer distributed *pro rata* based on the amount of AGIT paid, but is instead divided equally among taxpayers that qualify for a refund.<sup>100</sup> The refund functions as a credit first applied “against adjusted gross income tax liability in the taxpayer’s taxable year in which a refund is provided. . . . The credit may not be carried forward.”<sup>101</sup> However, the GA also added that “[a]ny remaining unused credit shall be refunded to the taxpayer.”<sup>102</sup> This change from the previous refund scheme, combined with the equal, rather than *pro rata*, distribution of unused surplus funds, means that a taxpayer could theoretically have a net negative income tax liability in a year when a disbursement is made.

## II. INDIANA TAX COURT DECISIONS

The Tax Court rendered a variety of opinions from January 1, 2012 to December 31, 2012. Specifically, the Tax Court issued nine published opinions and decisions: four concerned the Indiana real property tax, one concerned the Indiana inheritance tax, three concerned the Indiana sales and use tax, and one concerned the Indiana corporate income tax. The Tax Court also issued two unpublished opinions: one concerned the Indiana sales and use tax, and one concerned the Indiana personal income tax. A summary of each opinion and decision appears below.

The Indiana Supreme Court rendered several opinions reviewing the Tax Court’s final determinations. Specifically, the Supreme Court issued five published opinions and decisions: two concerned the Indiana sales and use tax, and three concerned the Indiana corporate income tax. A summary of each opinion and decision appears below.

### A. Real Property Tax

1. *Tipton County Health Care Foundation, Inc. v. Tipton County Assessor.*<sup>103</sup>—Tipton County Health Care Foundation, Inc. (“Foundation”) is the owner of Autumnwood Village (“Autumnwood”), which is an assisted living

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97. *Id.* § 4-10-22-3.

98. *Id.* § 4-10-22-3(2)(B).

99. *Id.* § 4-10-22-4.

100. *Id.*

101. *Id.*

102. *Id.*

103. 961 N.E.2d 1048 (Ind. T.C. 2012).

facility.<sup>104</sup> In January 2008, the Foundation leased Autumnwood to Miller's Health Systems, Inc. ("Miller's") "for five years pursuant to a triple net lease."<sup>105</sup> The Lease required Miller's to continue to operate Autumnwood as an assisted living facility, pay the Foundation an annual base rent, and pay all utilities and property taxes.<sup>106</sup> The Foundation, in turn, delivered Miller's exclusive possession of Autumnwood.<sup>107</sup> After executing the Lease, the Foundation applied to the Tipton County PTABOA "requesting a charitable purposes exemption" under Indiana Code section 6-1.1-10-16 for the 2008 and 2009 tax years.<sup>108</sup> The PTABOA denied both requests.<sup>109</sup> The Foundation then filed an appeal with the IBTR.<sup>110</sup> After an administrative hearing, the IBTR determined "the Foundation did not make a *prima facie* case that Autumnwood was entitled to a charitable purposes exemption."<sup>111</sup> The Foundation initiated an appeal with the Tax Court.<sup>112</sup>

Indiana Code section 6-1.1-10-16 provides that "[a]ll or part of a building is exempt from property taxation if it is owned, occupied, and used by a person for . . . charitable purposes."<sup>113</sup> The Tax Court explained that "[w]hen a unity of ownership, occupancy, and use are lacking, like in this case, both entities must provide evidence of their own charitable purposes."<sup>114</sup> Therefore, to meet the requirements of Indiana Code section 6-1.1-10-16, evidence must show that both the Foundation and Miller's had a charitable purpose with respect to Autumnwood.<sup>115</sup> On appeal, the Tax Court addressed only Miller's charitable purpose, and not the Foundation's, since the IBTR's decision "focused solely on whether Miller's had a charitable purpose."<sup>116</sup>

To determine whether Miller's had a charitable purpose with respect to Autumnwood, the Tax Court looked to Miller's mission statement and the provisions of the lease.<sup>117</sup> Accordingly, the Tax Court determined that "[w]hile the mission statement indicate[d] that Miller's is in the business of providing for the needs of the elderly, it does not indicate that public benevolence is its reason

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104. *Id.* at 1049.

105. *Id.*

106. *Id.* at 1049-50.

107. *Id.* at 1049.

108. *Id.* at 1050.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. IND. CODE § 6-1.1-10-16(a) (2013).

114. *Tipton Cnty. Health Care Found., Inc.*, 961 N.E.2d at 1052 (citing *Hamilton Cnty. Prop. Tax Assessment Bd. of Appeals v. Oaken Bucket Partners, LLC*, 938 N.E.2d 654, 657, 659 (Ind. 2010); *Sangrlea Boys Fund, Inc. v. State Bd. of Tax Comm'rs*, 686 N.E.2d 954, 955, 959 (Ind. T.C. 1997)).

115. *Id.*

116. *Id.* at 1052 & n.5.

117. *Id.* at 1052.

for operating.”<sup>118</sup> Furthermore, the provisions of the lease did not indicate that Miller’s overall goal was charitable.<sup>119</sup> The Tax Court explained that “Miller’s operation of Autumnwood as an assisted living facility does not mean that it did so to accomplish a charitable purpose.”<sup>120</sup> Ultimately, the Tax Court agreed with the IBTR that the Foundation did not present sufficient evidence to demonstrate whether Miller’s had a charitable purpose or a profit motive with respect to Autumnwood.<sup>121</sup> Therefore, the Tax Court affirmed the IBTR’s determination.<sup>122</sup>

2. *Bosamias v. Marion County Assessor*.<sup>123</sup>—On August 24, 2011, the Bosamias appealed their final determination from the IBTR to the Tax Court, “challenging their 2007 and 2008 real property tax assessments.”<sup>124</sup> In initiating their original tax appeal, the Bosamias requested that the IBTR prepare a certified copy of the agency record, which the IBTR did.<sup>125</sup> Accordingly, the IBTR mailed an invoice to the Bosamias, which indicated “the record was prepared and that the balance of \$161.00 was due.”<sup>126</sup> The invoice further stated, **“This invoice also triggers your obligation under Tax Court Rule 3(E) to file the Administrative Record with the Tax Court within thirty (30) days of receipt of this notice.”**<sup>127</sup> Therefore, the Bosamias had until October 11 to file the record with the court, which they failed to do.<sup>128</sup> On November 7, the Assessor moved to dismiss the case for failure to timely file pursuant to Tax Court Rule 3(E).<sup>129</sup>

The Bosamias conceded that they missed the deadline required under Tax Court Rule 3(E).<sup>130</sup> Nevertheless, the Bosamias provided two alternative arguments as to why the motion to dismiss should be denied.<sup>131</sup> First, they argued the IBTR’s “invoice was inadequate notification . . . to trigger their thirty[-]day filing period.”<sup>132</sup> In relying on the Indiana Supreme Court decision in *Wayne County Property Tax Assessment Board of Appeals v. United Ancient Order of Druids-Grove*,<sup>133</sup> the Bosamias contended the invoice was inadequate notice because “it did not include the completed record or provide a specific date on which to pick up the record.”<sup>134</sup> The Tax Court disagreed: “The statement in the

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118. *Id.*

119. *Id.* at 1053.

120. *Id.*

121. *Id.*

122. *Id.* at 1053-54.

123. 969 N.E.2d 635 (Ind. T.C. 2012).

124. *Id.* at 636.

125. *Id.*

126. *Id.*

127. *Id.* at 637.

128. *Id.* at 636.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 637 (citing 847 N.E.2d 924 (Ind. 2006)).

134. *Id.*

Bosamias' invoice that the record 'has been prepared' would by itself be sufficient notice under *Druids* to trigger the thirty-day filing period.<sup>135</sup> The Tax Court pointed out that the invoice provided further notice by indicating that it "triggered their thirty days to file the record."<sup>136</sup> Therefore, the invoice provided sufficient notice under Tax Court Rule 3(E).<sup>137</sup>

In the alternative, the Bosamias contended that their failure to timely file should be excused under Trial Rule 6(B)(2) because it "was the result of 'excusable neglect.'"<sup>138</sup> The Bosamias argued that they failed to timely file because on October 2, Harsukh Bosamia learned his mother was gravely ill and had to travel to England to visit her.<sup>139</sup> While the Tax Court sympathized with the unfortunate circumstances, it failed to see the failure to file as "excusable neglect"—largely because the Bosamias had received the invoice three weeks before Harsukh learned of his mother's sickness.<sup>140</sup> Therefore, the Tax Court granted the Assessor's motion to dismiss.<sup>141</sup>

3. *Millennium Real Estate Investment, LLC v. Assessor, Benton County*.<sup>142</sup>—Millennium Real Estate Investment, LLC owns three parcels of land in Boswell, Indiana.<sup>143</sup> For the 2008 tax year, the Benton County Assessor valued the property at \$639,800, which included both the land value and value of improvements.<sup>144</sup> Millennium believed this assessment was too high.<sup>145</sup> Accordingly, it filed for review first with the Benton County PTABOA and then with the IBTR.<sup>146</sup> At the IBTR hearing, to combat the Assessor's property valuation, Millennium presented an appraisal estimate valuing the property at \$325,000 as of March 1, 2008.<sup>147</sup> Millennium also indicated the property was sold in December 2003 for \$182,000.<sup>148</sup> Further, Millennium demonstrated that it purchased the property for \$193,817 on June 30, 2008.<sup>149</sup> Conversely, the Assessor presented an appraisal valuing the property at \$640,000 as of January 10, 2007.<sup>150</sup> Both appraisals complied with the Uniform Standards of Professional Appraisal Practice.<sup>151</sup> The IBTR issued a final determination

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135. *Id.* (citing *Druids*, 847 N.E.2d at 929).

136. *Id.*

137. *Id.*

138. *Id.* at 637-38 (quoting IND. T.R. 6).

139. *Id.* at 636-38.

140. *Id.* at 638.

141. *Id.* at 638-39.

142. 979 N.E.2d 192 (Ind. T.C. 2012), *trans. denied*, 989 N.E.2d 338 (Ind. 2013).

143. *Id.* at 193.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 193-94.

151. *Id.* at 193.

upholding Millennium's real property assessments for the 2008 tax year.<sup>152</sup> Millennium appealed to the Tax Court.<sup>153</sup>

On appeal, Millennium asserted the IBTR "simply ignored its December 2003 sales evidence and improperly discounted its June 2008 sales evidence."<sup>154</sup> With respect to the December 2003 evidence, the Tax Court disagreed for three reasons.<sup>155</sup> First, the evidence provided that the property in question and another property, in conjunction, sold for \$182,000, which provided no true value of either property.<sup>156</sup> Second, Millennium gave no explanation on how "the December 2003 sales price relate[d] to the effective valuation date for a 2008 assessment."<sup>157</sup> Finally, the Tax Court found the evidence questionable because at least two parties to the transaction were related.<sup>158</sup> Similarly, the Tax Court determined the June 2008 sales evidence lacked probative value because the sale was an arm's length transaction at below market rates.<sup>159</sup>

Next, Millennium asserted the IBTR "erred in assigning greater weight to the Assessor's Appraisal" for three reasons.<sup>160</sup> First, Millennium claimed the Assessor used the wrong standard in estimating the property value because it used a "fair market value" instead of "value in-use," which is the value used in Indiana.<sup>161</sup> Therefore, because the wrong standard was used, Millennium argued that the Assessor's appraisal should be rejected.<sup>162</sup> The Tax Court disagreed, indicating that value-in-use and market value can coincide.<sup>163</sup> The Court determined that, in this case, the two values coincided because the industrial use of Millennium's property was "consistent with its highest and best use as improved."<sup>164</sup> Accordingly, the Tax Court determined the Assessor did not use "an improper assessment standard."<sup>165</sup>

Furthermore, Millennium asserted the Assessor's appraisal was probably overstated because it "was procured so that the owners could obtain financing."<sup>166</sup> The Tax Court noted that appraisals prepared for financing purposes might

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152. *Id.* at 194.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 195.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 195-96.

162. *Id.* at 195.

163. *Id.* at 196 (citing IND. CODE § 6-1.1-31-6(c) (2008)). "For instance, when a property's current use is consistent with its highest and best use, and there are regular exchanges within its market so that ask and offer prices converge, a property's market value-in-use will equal its market value because the sales price fully captures the property's utility." *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

provide inaccurate estimations when an appraiser applies the income approach and deducts property taxes and an expense.<sup>167</sup> However, in the instant case, the Assessor's income approach "accounted for property taxes in the development of potential gross income; it did not deduct property taxes as an expense."<sup>168</sup> Conversely, "Millennium's income approach deducted property taxes as an expense and, therefore, likely distorted the value of subject property."<sup>169</sup> Therefore, the Tax Court determined the IBTR did not err in giving the Assessor's appraisal greater weight.<sup>170</sup>

Finally, Millennium claimed the Assessor's appraisal should not be given greater weight because it improperly rated the improvements as "average," when "poor" was more appropriate.<sup>171</sup> The Tax Court dismissed this argument by indicating that property valuation "is a formulation of an opinion, not an exact science."<sup>172</sup> The Court asserted that Millennium's claims invite the Tax Court to reweigh the evidence, which would be an abuse of discretion.<sup>173</sup> Therefore, the Tax Court affirmed the IBTR's determination.<sup>174</sup>

4. *Shelbyville MHPI, LLC v. Thurston*.<sup>175</sup>—Shelbyville MHPI, LLC ("MHPI") purchased a mobile home park in December 2004 for \$4,266,400.<sup>176</sup> Before the purchase, MHPI's lender commissioned an appraisal, which valued a portion of the park at \$4.2 million.<sup>177</sup> "For the 2006 tax year, the Shelby County Assessor assessed MHPI's property at \$4,983,300."<sup>178</sup> MHPI appealed the assessment to the Shelby County PTABOA, and the assessment was reduced to \$4,263,800.<sup>179</sup> MHPI claimed the assessment was still too high and appealed to the IBTR.<sup>180</sup> During the hearing, the IBTR heard appraisals from both MHPI and the Assessor's office.<sup>181</sup> "MHPI's [a]ppraisal estimated that the market value-in-use of its mobile home park was \$2.9 million as of January 1, 2005."<sup>182</sup> The Assessor presented the \$4.9 million appraisal that was sought before the purchase of the park and relied on MHPI's purchase of "the park for just over \$4.2 million in December 2004 [to] support[] the assessment."<sup>183</sup> The IBTR found the

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167. *Id.* at 196-97 (citing *In re Senpike Mall Co.*, 525 N.Y.S.2d 104 (N.Y. App. Div. 1988)).

168. *Id.* at 197.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* (citing *Stinson v. Trimas Fasteners, Inc.*, 923 N.E.2d 496, 502 (Ind. T.C. 2010)).

173. *Id.* at 198.

174. *Id.*

175. 978 N.E.2d 527 (Ind. T.C. 2012).

176. *Id.* at 528.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* (footnote omitted).

183. *Id.*



Assessor's evidence to be more persuasive and upheld MHPI's real property assessment.<sup>184</sup> MHPI subsequently filed an appeal with the Tax Court.<sup>185</sup>

On appeal, MHPI asserted the IBTR's determination must be reversed because the IBTR's "final determination is contrary to law because it utilized an improper framework in reviewing its property tax appeal."<sup>186</sup> MHPI contended the IBTR used an improper framework "because it did not determine whether MHPI made a *prima facie* case or whether the Assessor rebutted its *prima facie* case."<sup>187</sup> The Tax Court disagreed, stating that although the IBTRs did not explicitly use the "prima facie" language in its determination, it "implicitly indicate[d] that it reached those conclusions."<sup>188</sup>

MHPI also asserted the IBTR should have rejected or discounted the December 2004 appraisal because MHPI demonstrated it "never would have paid over \$4.2 million for the property had it known that Indiana's re-trending process would cause the property taxes to 'sky rocket.'"<sup>189</sup> The Tax Court disagreed, acknowledging the robust demand of mobile homes in 2004 and agreeing that MHPI made an assumption that the "assessment and associated property tax liability would remain relatively constant."<sup>190</sup> The Tax Court further explained that such an incorrect assumption "cannot dispel the record evidence . . . [and] do[es] not require the complete rejection or substantial discounting of the December 2004 sales evidence."<sup>191</sup> Therefore, the Tax Court affirmed the IBTR's final determination.<sup>192</sup>

*B. Inheritance Tax: Indiana Department of State Revenue v.  
Estate of Schoenenberger*<sup>193</sup>

In February 2003, John A. Schoenenberger died testate.<sup>194</sup> In November 2003, his Estate submitted an estimated inheritance tax payment of \$1.8 million to the Lake County Treasurer.<sup>195</sup> In April 2007, after the Internal Revenue Service completed its audit of the Estate, the Estate sent its completed return and letter to the Department, reflecting the total inheritance tax due of \$1,056,534.04.<sup>196</sup> The Department responded with a notice "explaining that the Estate's inheritance tax

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184. *Id.*

185. *Id.*

186. *Id.* at 529.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 530.

191. *Id.*

192. *Id.* at 530-31.

193. 976 N.E.2d 148 (Ind. T.C. 2012), *rev. denied*, 980 N.E.2d 541 (Ind. 2013).

194. *Id.* at 149.

195. *Id.*

196. *Id.*

liability was \$1,113,549.”<sup>197</sup> With the notice, the Department also “explained that the Estate must file with the probate court a copy of its return and an order determining inheritance tax due.”<sup>198</sup> In February 2008, the Estate filed its return with the probate court, which “issued an order determining that the Estate’s inheritance tax liability was \$1,113,549.”<sup>199</sup> The order did not account for the statutory discount for early payment of the tax, which reduced the Estate’s tax liability to \$1,057,871.55.<sup>200</sup> In April 2008, the Estate filed a refund claim with the Department for \$688,451 of overpaid inheritance tax.<sup>201</sup> The Department issued a refund check for \$742,128.45, taking into account the statutory discount, which was the difference between the initial payment to the Department and the final estate tax liability.<sup>202</sup> Subsequently, “the Estate filed another refund claim . . . , asserting that it should have received interest on the \$742,128.45 refund.”<sup>203</sup> The Department denied the Estate’s claim, and the Estate timely filed a complaint with the probate court.<sup>204</sup> In June 2010, the probate court granted summary judgment for the Estate.<sup>205</sup> The Department filed a motion to correct error with the probate court, which was denied.<sup>206</sup> The Department appealed to the Tax Court.<sup>207</sup>

The only question on appeal was whether the 1980 or the 2007 version of Indiana Code section 6-4.1-10-1 applied for purposes of computing interest on the Estate’s inheritance tax refund claim.<sup>208</sup> The 1980 version accounted for interest from the date the tax was paid, but the 2007 version accounted for interest from the date the refund claim is filed.<sup>209</sup> Accordingly, the Department maintained that, because the 2007 version was in effect in April 2008 when the Estate filed its refund claim, the probate court erroneously applied the 1980 version.<sup>210</sup> The Tax Court agreed, finding that the Estate’s inheritance tax liability was not finally determined until April 2008.<sup>211</sup> Therefore, the Estate was not entitled to its refund until such refund was filed, after a final determination on tax liability.<sup>212</sup> Because the tax was not finally determined until April 8, 2008, and the refund claim was filed six days later, the 2007 version of the statute

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197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 150.

207. *Id.*

208. *Id.* at 151.

209. *Id.* at 150 (citing IND. CODE § 6-4.1-10-1(a) (1980); IND. CODE § 6-4.1-10-1(a) (2007)).

210. *Id.* at 151.

211. *Id.* at 152.

212. *Id.*

should have been applied.<sup>213</sup> Accordingly, the Tax Court determined the probate court erred in granting the Estate interest on its refund.<sup>214</sup>

### *C. Sales and Use Tax*

*I. Utilimaster Corporation v. Indiana Department of State Revenue.*<sup>215</sup>—In February 2010, Utilimaster filed a refund claim with the Department of \$17,943.65 for Indiana sales and use tax it submitted on purchases of natural gas between June 2008 and December 2009.<sup>216</sup> Utilimaster asserted that its natural gas purchases were not subject to taxation “pursuant to the ‘predominate use exclusion’ contained in Indiana Code section 6-2.5-4-5.”<sup>217</sup> In June 2010, the Department granted Utilimaster’s refund for a reduced amount of \$2,951.69.<sup>218</sup> Accordingly, Utilimaster filed an appeal with the Tax Court, stating that “it had conducted a utility study calculating the ‘ratio of heated square footage where manufacturing takes place to overall building square footage.’”<sup>219</sup> This utility study, Utilimaster argued, demonstrated that its facility was “predominately used in production and that its purchases of natural gas therefore qualified for Indiana Code section 6-2.5-4-5’s sales tax exclusion.”<sup>220</sup>

Robert A. Romack and Dan Dunbar, president and vice-president, respectively, of ROAR Consulting LLC, entered their appearances as Utilimaster’s counsel.<sup>221</sup> ROAR was the consulting firm Utilimaster used in its utility study at question in this case.<sup>222</sup> In October 2011, after discovery had closed, the Department filed a motion to reopen discovery because three days earlier, “Romack and Dunbar admitted that [the utility study had been] conducted by ROAR.”<sup>223</sup> Therefore, the Department argued that discovery should be reopened so that it could depose Romack and Dunbar as ROAR consultants.<sup>224</sup> The next day, “before the [Tax] Court could rule on the motion to reopen discovery, the Department filed a motion to disqualify Romack and Dunbar as Utilimaster’s attorneys” under Indiana Professional Conduct Rule 3.7.<sup>225</sup> The disqualification was sought on the basis that Romack and Dunbar would be necessary witnesses at trial.<sup>226</sup>

Indiana Professional Conduct Rule 3.7 provides that a lawyer shall not act as

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213. *Id.*

214. *Id.*

215. 967 N.E.2d 92 (Ind. T.C. 2012).

216. *Id.* at 94.

217. *Id.* (citing IND. CODE § 6-2.5-4-5 (2013)).

218. *Id.*

219. *Id.*

220. *Id.* (citing IND. CODE § 6-2.5-4-5 (2013)).

221. *Id.* at 94-95.

222. *Id.* at 94.

223. *Id.* at 95 (alteration in original).

224. *Id.*

225. *Id.* (citing IND. PROF’L CONDUCT R. 3.7(a) (2013)).

226. *Id.*

an advocate at a trial in which he is likely to be a necessary witness.<sup>227</sup> In order to prove that Utilimaster's attorneys were likely to be "necessary" witnesses, the Tax Court determined the Department must show: (1) "that the testimony it [sought] to elicit from Utilimaster's attorneys [was] more than marginally relevant to the issue or issues being litigated;" and (2) that "their testimony [would] result in evidence that [could not] be obtained elsewhere."<sup>228</sup> Because the relevant issues in this case dealt with objective numbers, the Tax Court determined that Utilimaster's "attorneys [were] not necessary witnesses" because such numbers could be obtained from other knowledgeable employees.<sup>229</sup> Therefore, the Tax Court denied the Department's motion to disqualify.<sup>230</sup>

2. *Fresenius USA Marketing, Inc. v. Indiana Department of State Revenue*.<sup>231</sup>—Between January 1, 2004 and October 31, 2007, Fresenius USA Marketing, Inc. sold equipment used in the treatment of patients with End Stage Renal Disease.<sup>232</sup> Fresenius collected sales tax from its customers, and subsequently filed a refund claim with the Department, "maintaining that the sales were relieved from taxation pursuant to the durable medical equipment exemption and, as a result, it erroneously collected sales tax from its customers."<sup>233</sup> Fresenius specified that once it received the refund, it would return the proper amounts to its customers.<sup>234</sup> The Department denied Fresenius's claim and Fresenius filed an appeal with the Tax Court.<sup>235</sup>

The Department filed a motion to dismiss Fresenius's appeal.<sup>236</sup> In its motion, the Department maintained three arguments in favor of dismissal: (1) the Court lack subject matter jurisdiction; (2) Fresenius lacks standing; and (3) Fresenius has failed to certify its appeal as a class action lawsuit.<sup>237</sup> The Department argued the Tax Court lacked subject matter jurisdiction because "Fresenius failed to obtain a properly executed power of attorney form from its customers authorizing it to represent them at the administrative level as required by Indiana Code section 6-8.1-3-8."<sup>238</sup> The Tax Court disagreed, arguing that the Department "improperly focuse[d] on Fresenius's customers rather than on Fresenius itself."<sup>239</sup> Ultimately, the Tax Court determined that subject matter jurisdiction existed because Fresenius met both statutory requirements required

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227. *Id.* (citing IND. PROF'L CONDUCT R. 3.7(a) (2013)).

228. *Id.* at 96.

229. *Id.* at 97.

230. *Id.* at 98.

231. 970 N.E.2d 801 (Ind. T.C.), *rev. dismissed*, 975 N.E.2d 361 (Ind. 2012).

232. *Id.* at 802.

233. *Id.* (footnote omitted).

234. *Id.*

235. *Id.* at 803.

236. *Id.*

237. *Id.*

238. *Id.* at 803-04 (citing IND. CODE § 6-8.1-3-8 (2013)).

239. *Id.* at 804.

under Indiana Code section 33-26-3-1.<sup>240</sup> Fresenius's case (1) arose under Indiana's tax laws and (2) Fresenius had received a final determination from the Department.<sup>241</sup>

In its motion, the Department also argued that Fresenius lacked standing because it failed to satisfy the requirements of Indiana Code section 6-2.5-6-14.1.<sup>242</sup> "That statute provides that 'a retail merchant is not entitled to a refund of state gross retail or use taxes unless the retail merchant refunds those taxes to the person from whom they were collected.'"<sup>243</sup> Therefore, the Department argued that Fresenius could not "seek [the] refund *until* it refund[ed] the money to its customers."<sup>244</sup> The Tax Court disagreed, specifically addressing the difference between the words "unless," as appears in the statute, and "until."<sup>245</sup> The Court also indicated that Indiana Code section 6-8.1-9-1 and section 6-8.1-9-2 are the proper statutes that address whether a retail merchant is able to seek a sales tax refund, and not Section 6-2.5-6-14.1 as the Department asserted in its motion.<sup>246</sup> Therefore, the Court determined, under the plain meaning of Section 6-2.5-6-14.1, Fresenius could receive the refund only if it subsequently returns the money to its customers.<sup>247</sup> Finally, the Tax Court held that Fresenius had "a statutory right" to bring its appeal without seeking class certification under Trial Rule 23(C)(1).<sup>248</sup> Therefore, the Department's motion to dismiss was denied.<sup>249</sup>

3. *Wendt LLP v. Indiana Department of State Revenue*.<sup>250</sup>—Wendt LLP is in the business of intrastate, interstate, and international relocation of oversized factory machinery.<sup>251</sup> "In October 2004, the Department conducted a sales tax audit of Wendt for the 2002 [to] 2004 tax years."<sup>252</sup> During the audit, Wendt filed two refund claims to recover sales and use tax submitted between the 2001 and 2004 tax years, pursuant to Indiana's public transportation sales and use tax exemption to purchases of a licensed common carrier.<sup>253</sup> The audit determined "that some of Wendt's purchases were completely exempt, but others were either partially or fully taxable."<sup>254</sup> Accordingly, the Department denied Wendt's refund

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240. *Id.* at 803 (citing IND. CODE § 6-8.1-3-1 (2013)).

241. *Id.* at 804.

242. *Id.* (citing IND. CODE § 6-2.5-6-14.1 (2013)).

243. *Id.* at 805 (quoting IND. CODE § 6-2.5-6-14.1 (2013)) (internal quotation marks omitted).

244. *Id.* at 804.

245. *Id.* (citing IND. CODE § 6-2.5-6-14-1 (2004)).

246. *Id.* (citing IND. CODE §§ 6-8.1-9-1, 6-8.1-9-2 (2013)). "The General Assembly placed the general framework by which a retail merchant is able to seek a sales tax refund in Indiana Code [section] 6-8.1-9-1 and [section] 6-8.1-9-2." *Id.*

247. *Id.*

248. *Id.* at 805-06.

249. *Id.* at 806.

250. 977 N.E.2d 480 (Ind. T.C. 2012).

251. *Id.* at 481.

252. *Id.* at 482.

253. *Id.* at 482-84 (citing IND. CODE § 6-2.5-5-27 (2013)).

254. *Id.* at 482-83.

claims “and issued proposed assessments.”<sup>255</sup> Wendt challenged the refund claim denials and the assessments, but the Department denied both.<sup>256</sup> Wendt appealed to the Tax Court.<sup>257</sup>

On appeal, the sole issue was whether Wendt’s purchases were predominantly used “in providing public transportation[,]” making them exempt under the public transportation exemption.<sup>258</sup> The Tax Court described Wendt’s services “in four operational phases”: project planning, pre-transport preparations, transportation, and reassembly.<sup>259</sup> “Wendt also provided several optional services such as warehouse storage.”<sup>260</sup> The Tax Court explained that, to be exempt, the tangible personal property purchased must be (1) directly used as a part of the transportation; (2) “used within a taxpayer’s continuous process of furnishing public transportation”; or (3) predominantly used in public transportation.<sup>261</sup> Wendt claimed the tangible personal property was exempt because it was predominantly used in public transportation, but the Department asserted that none of the property is exempt because it was not directly used to furnish public transportation.<sup>262</sup> To determine whether the personal property was exempt, the Tax Court addressed each of Wendt’s operational phases separately.<sup>263</sup>

In the project-planning phase, Wendt prepared estimates for potential customers, planned transportation routes, and obtained travel permits.<sup>264</sup> The Tax Court found that preparing estimates is not an integral part of Wendt’s public transportation and, therefore, property used to prepare estimates was not exempt.<sup>265</sup> However, planning transportation routes and obtaining travel permits were determined to be necessary and integral to Wendt’s public transportation process.<sup>266</sup> Therefore, property used in planning routes and obtaining permits was exempt.<sup>267</sup>

In the pre-transportation preparation phase, Wendt disassembled, loaded, and secured oversized machinery onto flatbed trucks for transport.<sup>268</sup> The Tax Court found these actions to be within the scope of public transportation, and, therefore, property used in this phase was exempt from sales tax.<sup>269</sup>

In the transportation phase, “Wendt haul[ed] its customers’ machinery on the

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255. *Id.* at 483.

256. *Id.*

257. *Id.*

258. *Id.* at 483-84 (citing IND. CODE § 6-2.5-5-27 (2013)).

259. *Id.* 481-82.

260. *Id.* at 482.

261. *Id.* at 483-86.

262. *Id.* at 485.

263. *Id.*

264. *Id.* at 486.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 486-87.

269. *Id.* at 487.

highways, provide[d] escort services, and unload[ed] the machinery at the customer's destination."<sup>270</sup> The Tax Court explained this phase to be the "very essence of public transportation."<sup>271</sup> Therefore, property used to transport, escort, and secure Wendt's customers' machinery was exempt from sales tax.<sup>272</sup>

In the final phase of reassembly, Wendt reassembled the machinery inside the customer's factory location.<sup>273</sup> The Tax Court found that "Wendt's reassembly services are a convenience for its customers that are incidental to its provision of public transportation and, thus, they fall outside the ambit of public transportation."<sup>274</sup> Therefore, property used in reassembly was not exempt from sales tax.<sup>275</sup>

Wendt also offered optional services, including warehouse storage and transport-for-repair services.<sup>276</sup> The Tax Court found warehouse storage to fall within the scope of public transportation and, therefore, property used to provide this service was exempt from sales tax.<sup>277</sup> The Court also determined that property used in transport-for-repair services was also exempt because Wendt was moving property over the highways to a third party location, which is public transportation.<sup>278</sup>

After deciding which property was used for exempt and non-exempt purposes, the Tax Court considered whether Wendt demonstrated that it predominately used the property in providing public transportation.<sup>279</sup> The Tax Court determined there was enough evidence at trial to establish that Wendt used the property in providing public transportation.<sup>280</sup> Specifically, the Court gave great weight to the testimony of one of Wendt's founding partners who stated that "70[%] of the jobs Wendt performed involved the provision of public transportation."<sup>281</sup> Therefore, the Tax Court determined that "Wendt predominately used its property in providing public transportation, and the Department erred in concluding otherwise."<sup>282</sup> Ultimately, the Tax Court affirmed in part and reversed in part.<sup>283</sup> The Court affirmed the Department's "determination that the items predominately used for estimate preparations, machinery reassembly, and lawn care were not entitled to the public

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270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 488.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 488-89.

282. *Id.* at 489.

283. *Id.*

transportation exemption.”<sup>284</sup> However, the Tax Court reversed all of the Department’s remaining determinations.<sup>285</sup>

4. *Miller Pipeline Corporation v. Indiana Department of State Revenue*.<sup>286</sup>—Between June and July 2008, Miller Pipeline Corporation (“MPC”) filed three refund claims with the Department for sales and use tax paid between 2005 and 2007.<sup>287</sup> In 2008, the Department audited MPC and subsequently issued an audit report denying, in part, each of the three refund claims.<sup>288</sup> Further, the Department found that MPC owed additional sales and use tax for the 2006 and 2007 years and issued proposed assessments totaling \$84,647.96.<sup>289</sup> MPC paid the assessments and subsequently filed an appeal with the Tax Court (hereinafter “*Miller Pipeline 1*”), which challenged the denial of a portion of the 2007 refund claim.<sup>290</sup> In July 2010, MPC and the Department reached a settlement on *Miller Pipeline 1*; therefore, the Court dismissed the case with prejudice.<sup>291</sup> In March 2010, while *Miller Pipeline 1* was pending, MPC filed its fourth refund claim for \$104,318.39 in sales and use tax paid from 2005 to 2007.<sup>292</sup> The Department denied the fourth refund claim, and MPC appealed to the Tax Court (hereinafter “*Miller Pipeline 2*”).<sup>293</sup> In its petition, MPC contested “the propriety of the statistical sample used by the Department to generate its assessments.”<sup>294</sup> The Department filed a motion to dismiss *Miller Pipeline 2* “for failure to state a claim upon which relief can be granted.”<sup>295</sup>

In its motion, the Department provided two arguments in favor of dismissal.<sup>296</sup> First, the Department maintained that MPC is precluded from litigating the case due to the doctrine of *res judicata*, which “prevents the repetitious litigation of disputes that are essentially the same.”<sup>297</sup> In the alternative, the Department asserted that the affirmative defense of accord and satisfaction defeated any claims made by MPC.<sup>298</sup> The Department maintained that *Miller Pipeline 2* must be dismissed under both claim and issue preclusion because a judgment had already been issued on the merits.<sup>299</sup>

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284. *Id.*

285. *Id.*

286. 979 N.E.2d 721 (Ind. T.C. 2012) (Table).

287. *Id.* at \*1.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* (citing IND. T.R. 12(b)(6)).

296. *Id.* at \*2.

297. *Id.* (quoting *Afolabi v. Atlantic Mortg. & Inv. Corp.*, 849 N.E.2d 1170, 1173 (Ind. Ct. App. 2006)).

298. *Id.*

299. *Id.*



With regards to claim preclusion, the only dispute was whether *Miller Pipeline 2* “was, or could have been, determined in *Miller Pipeline 1*.”<sup>300</sup> The Tax Court determined that *Miller Pipeline 2* “could not have been litigated in *Miller Pipeline 1* because, at that time, [the Tax] Court lacked subject matter jurisdiction over that claim.”<sup>301</sup> *Miller Pipeline 1* only appealed the Department’s denial of its third refund claim, not the Department’s proposed assessments.<sup>302</sup> At that time, because proposed assessments are not final determinations that may be appealed to the Tax Court, MPC could not appeal directly to the Tax Court.<sup>303</sup> When *Miller Pipeline 1* was dismissed in July 2010, the Department had not issued a final determination with regards to MPC’s fourth refund claim.<sup>304</sup> Consequently, the fourth refund claim could not have been adjudicated in *Miller Pipeline 1* due to the lack of a final determination.<sup>305</sup> Therefore, the Tax Court found that claim preclusion did not bar litigation.<sup>306</sup>

Similarly, the Department argued that if claim preclusion did not apply, issue preclusion applied because the same matters and same tax years were at issue in both cases.<sup>307</sup> The Tax Court did not find this persuasive because it recognized that *Miller Pipeline 2* concerned the “propriety of the statistical sample used by the Department to generate its proposed assessments,” whereas *Miller Pipeline 1* only dealt with the Department’s denial of the third refund claim.<sup>308</sup> Therefore, the Court determined that the “issue in *Miller Pipeline 2* cannot be precluded as it was not *actually* litigated in *Miller Pipeline 1*.”<sup>309</sup> Further, the Court determined it “would have lacked subject matter jurisdiction over the issues raised in the fourth claim for refund.”<sup>310</sup> Accordingly, the Tax Court found that issue preclusion did not bar litigation.<sup>311</sup>

Alternatively, the Department maintained that the affirmative defense of accord and satisfaction defeats MPC’s claims in *Miller Pipeline 2* because both parties signed a settlement agreement in *Miller Pipeline 1*.<sup>312</sup> The Tax Court disagreed, determining that the “settlement agreement unambiguously applie[d] to the 2007 tax year only.”<sup>313</sup> Therefore, the Court found the agreement’s language did not “reveal a meeting of the minds between the Department and MPC such that accord and satisfaction would defeat MPC’s claims found in

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300. *Id.* at \*3 (italics added).

301. *Id.* (italics added).

302. *Id.* at \*4.

303. *Id.* (citing *Etzler v. Ind. Dep’t of State Revenue*, 957 N.E.2d 706, 709 (Ind. T.C. 2011)).

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at \*5.

308. *Id.*

309. *Id.* (first and third italics added).

310. *Id.* (citing IND. CODE § 6-8.1-9-1(c) (2013)).

311. *Id.*

312. *Id.*

313. *Id.* at \*6.

*Miller Pipeline 2*.<sup>314</sup> Accordingly, the Tax Court denied the Department's motion for summary judgment.<sup>315</sup>

5. *Indiana Department of State Revenue v. AOL, LLC*.<sup>316</sup>—The issue before the Indiana Supreme Court was whether AOL, LLC (“AOL”) owed Indiana sales and use tax on the mailers it used to send promotional materials to customers.<sup>317</sup> AOL is an online service provider incorporated in Delaware.<sup>318</sup> AOL solicited customers by sending CD-ROMs containing its software, which customers could install.<sup>319</sup> In an effort to retain current customers, AOL also sent promotional mailers.<sup>320</sup> AOL did not manufacture either the CD-ROM packages or the promotional mailers.<sup>321</sup> Instead, AOL contracted with third-party vendors for production of these materials.<sup>322</sup> AOL generally supplied its vendors with the mailing materials, paper, and other raw materials, while the vendors usually supplied the ink and other finishing products.<sup>323</sup> All promotional products were manufactured outside Indiana.<sup>324</sup> The promotional materials would then be mailed across the country, including to Indiana.<sup>325</sup>

Between 2003 and 2007, AOL paid use taxes to the Department for the number of CD-ROM packages and promotional materials sent to Indiana residents.<sup>326</sup> AOL filed two refund claims for use taxes remitted, but the Department denied both.<sup>327</sup> On appeal, the Tax Court reversed the Department's determination.<sup>328</sup> The Tax Court determined that because AOL provided raw materials to the vendors, it did not purchase property in a retail transaction, but instead merely purchased services.<sup>329</sup> Therefore, the refund claims for use taxes remitted should have been granted.<sup>330</sup>

On review from the Tax Court, the Indiana Supreme Court reversed.<sup>331</sup> The Supreme Court began by noting that “the purpose of the use tax is merely to prevent evasion of the sales tax.”<sup>332</sup> The Department argued AOL purchased

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314. *Id.*

315. *Id.*

316. 963 N.E.2d 498 (Ind. 2012).

317. *Id.* at 499.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 499-500.

323. *Id.* at 500.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at 500-01.

330. *Id.* at 501.

331. *Id.* at 504.

332. *Id.* at 501 (citing *Ind. Dep't of State Revenue v. Belterra Resort Ind., LLC*, 935 N.E.2d

these promotional materials “in retail transactions and later used them in Indiana.”<sup>333</sup> AOL asserted it “acquired raw materials in retail transactions but did not use them in Indiana, it used the final products in Indiana but did not acquire them in any retail transactions.”<sup>334</sup> Accordingly, the issue in the case concerned the use of the phrase “that property” in Indiana Code section 6-2.5-4-1(b).<sup>335</sup> That phrase “suggests that a retail merchant must acquire tangible personal property and then transfer *that same property* to a purchaser for either the sales or use taxes to apply.”<sup>336</sup> The Supreme Court looked to subsection (c) of the same Indiana Code section for further guidance.<sup>337</sup> “For 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.”<sup>338</sup> Accordingly, the Court considered the purpose for this subsection was to prevent one from evading a retail transaction “merely because the merchant changed the form of property between acquiring it and transferring it.”<sup>339</sup> Therefore, the Court determined the transactions between AOL and its vendors were retail transactions, which triggered Indiana’s use tax once AOL used the property in Indiana.<sup>340</sup>

6. *Indiana Department of State Revenue v. Rent-A-Center East, Inc.*<sup>341</sup>—The Department appealed to the Indiana Supreme Court from a Tax Court grant of summary judgment to Rent-A-Center East, Inc. (“RAC East”).<sup>342</sup> The tax controversy originated when the Department audited RAC East for tax years 2001 through 2003.<sup>343</sup> RAC East had filed a separate return for those years.<sup>344</sup> The Department audited RAC East and, under Indiana Code section 6-3-2-2(p), reassessed RAC East’s corporate income tax liability using a combined return with Rent-A-Center Texas (“RAC Texas”) and Rent-A-Center West (“RAC West”).<sup>345</sup> This resulted in an additional \$513,272.60 in income tax liability for 2003.<sup>346</sup> RAC East timely appealed the Department’s final determination, and in cross-

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174, 177 (Ind. 2010)).

333. *Id.*

334. *Id.* at 502.

335. *Id.* at 503 (citing IND. CODE § 6-2.5-4-1(b) (2013)).

336. *Id.* (citing IND. CODE § 6-2.5-4-1(b) (2013)).

337. *Id.* at 504.

338. *Id.* at 503 (quoting IND. CODE § 6-2.5-4-1(c) (2013)).

339. *Id.* at 504.

340. *Id.*

341. 963 N.E.2d 463 (Ind. 2012).

342. *Id.* at 464.

343. *Id.*

344. In separate reporting, a company doing business in multiple states only reports the income earned by that company directly from doing business in that state. This is the default method of reporting for corporations in Indiana. *Id.* at 465 (citing *Rent-A-Center East, Inc. v. Ind. Dep’t of State Revenue*, 925 N.E.2d 384, 389 (Ind. Tax Ct. 2011); *Kohl’s Dep’t Stores, Inc. v. Ind. Dep’t of State Revenue*, 822 N.E.2d 297, 301, 301 n.2 (Ind. Tax Ct. 2005)).

345. *Id.* at 464.

346. *Id.*

motions for summary judgment, the Tax Court denied the Department's motion and granted summary judgment to RAC East.<sup>347</sup>

The Tax Court based its grant of summary judgment on its interpretation of Indiana Code section 6-3-2-2(p), the section that limits the Department's authority to require combined filing<sup>348</sup> to instances where separate reporting would not fairly or accurately reflect income—and consequent tax liability—attributable to Indiana.<sup>349</sup> If the Department concludes that separate reporting will not be sufficient, it may pursue alternate remedies, including combined reporting.<sup>350</sup> The Tax Court held that the Department had failed to meet its *prima facie* burden for avoiding summary judgment being granted to the opposing party under Indiana Trial Rule 56(C) by not “designating facts material to whether: (1) RAC East's 2003 separate return fairly reflect[ed] its income from sources in Indiana; (2) the use of a combined income tax return was reasonable and equitable in this instance; and (3) the Department complied with Indiana Code [section] 6-3-2-2(p).”<sup>351</sup>

The Supreme Court held this interpretation of how Indiana Code section 6-3-2-2(p) and Trial Rule 56(C) interact was erroneous.<sup>352</sup> Rather than being forced to designate evidence at the outset as to why separate filing was inappropriate and combined filing necessary, the Department's proposed assessment is itself the *prima facie* evidence needed to avoid summary judgment at such an early stage.<sup>353</sup> “The burden then shifts to the taxpayer to come forward with sufficient evidence demonstrating that there is, in actuality, a genuine issue of material fact with respect to the unpaid tax.”<sup>354</sup> The grant of summary judgment was reversed and the case remanded to the Tax Court.<sup>355</sup>

7. *Garwood v. Indiana Department of State Revenue*.<sup>356</sup>—In 2009, the Indiana Attorney General and the Department investigated Virginia and Kristin Garwood's (the “Garwoods”) business activities and found they were selling puppies without submitting Indiana sales and income tax.<sup>357</sup> The Department executed a warrant to search the Garwoods' residence and commercial properties to “seize certain items related to the puppy sales.”<sup>358</sup> The Department “generated

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347. *Id.*

348. *Id.* at 465 (citing IND. CODE § 6-3-2-2(p) (2013)).

349. *Id.*

350. *Id.*

351. *Id.* at 466 (quoting *Rent-A-Center East, Inc. v. Ind. Dep't of State Revenue*, 925 N.E.2d 384, 390 (Ind. T.C. 2011)).

352. *Id.* at 465.

353. *Id.* at 465-66.

354. *Id.* at 466.

355. *Id.* at 467.

356. 966 N.E.2d 1258 (Ind. 2012).

357. *Garwood v. Ind. Dep't of State Revenue*, 939 N.E.2d 1150 (Ind. T.C. 2010). This is the first of two related cases between Garwood and the Indiana Department of State Revenue. The second is discussed *infra* at notes 367-69 and accompanying text.

358. *Id.* at 1151.

... jeopardy tax assessments for the Garwoods' purported" income and sales tax liabilities, and after the Garwoods failed to immediately pay the liabilities, the Department seized approximately 240 dogs and puppies from their property and sold them to the Humane Society for a total of \$300.<sup>359</sup> The Department applied the money to the Garwoods' outstanding tax liabilities.<sup>360</sup> After filing a protest with the Department to no avail, the Garwoods initiated an appeal with the Tax Court.<sup>361</sup>

The issue on appeal was whether the Department "exceeded statutory authority" by issuing a jeopardy assessment.<sup>362</sup> The Indiana Code permits the Department to "issue a jeopardy assessment when it determines a person owing taxes intends to quickly leave the state thereby avoiding tax collection."<sup>363</sup> The Tax Court dispensed with the Department's arguments by determining the Department failed to show that (1) the Garwoods were a flight risk, (2) they intended to remove property from the state, (3) there was any evidence to indicate the Garwoods would sell all their dogs to avoid paying taxes, or (4) because the Garwoods improperly reported their taxes, an inference could be drawn that they intended not to pay their taxes at all.<sup>364</sup> The Tax Court held that it could not "reasonably be inferred that the jeopardy assessment procedure was used in this case to protect the State's fiscal interests."<sup>365</sup> Therefore, the Tax Court held the jeopardy assessments were "void as a matter of law."<sup>366</sup>

The Department filed a petition with the Supreme Court seeking review of the Tax Court's decision.<sup>367</sup> The Supreme Court granted review; however, after hearing oral arguments, the Court determined the "review was improperly granted."<sup>368</sup> Accordingly, the order granting review was vacated and the Department's petition for review was denied.<sup>369</sup>

#### *D. Personal Income Tax: Gibson v. Indiana Department of State Revenue*<sup>370</sup>

In 2011, Ms. Gibson filed her Indiana Individual Income Tax Return, Form IT-40, electronically; however, because Ms. Gibson "erroneously added back certain local property tax payments" in arriving at her adjusted gross income, her Form IT-40 was rejected.<sup>371</sup> Consequently, Ms. Gibson realized that she had committed the same error for the past twelve years and, therefore, had overpaid

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359. *Id.* at 1151-52.

360. *Id.*

361. *Id.* at 1152.

362. *Garwood v. Ind. Dep't of State Revenue*, 953 N.E.2d 682, 687 (Ind. T.C. 2011).

363. *Id.* (citing IND. CODE § 6-8.1-5-3(a) (2013)).

364. *Id.* at 687-89.

365. *Id.* at 689.

366. *Id.* at 690.

367. *Ind. Dep't of State Revenue v. Garwood*, 966 N.E.2d 1258 (Ind. 2012).

368. *Id.*

369. *Id.*

370. 978 N.E.2d 761 (Ind. T.C. 2012) (Table).

371. *Id.* at \*1.

her income tax liability.<sup>372</sup> Ms. Gibson contacted the Department “to inquire about a refund and was told that [she] could file an appeal going back three years.”<sup>373</sup> Accordingly, on April 26, 2011, Ms. Gibson filed three refund claims by filing amended returns for the 2007 through 2009 tax years.<sup>374</sup> The Department granted Ms. Gibson’s refund claims with respect to the 2008 and 2009 tax years but denied her claim for the 2007 tax year.<sup>375</sup> Ms. Gibson challenged the denial and, after conducting a hearing, the Department issued a final order denying Ms. Gibson’s 2007 refund claim “because it was untimely filed.”<sup>376</sup> On April 10, 2012, Ms. Gibson appealed to the Tax Court.<sup>377</sup> The Department subsequently filed a motion for summary judgment.<sup>378</sup>

The Department asserted its motion for summary judgment should be granted because Ms. Gibson’s 2007 refund claim was “untimely filed pursuant to Indiana Code section 6-8.1-9-1.”<sup>379</sup> There was no dispute that Ms. Gibson’s 2007 IT-40 was filed eleven days late.<sup>380</sup> However, Ms. Gibson argued “principles of equity rather than the strict letter of the law” should be applied because she simply made “an honest mistake in attempting to comply with Indiana’s ever-evolving tax laws and that she should not be penalized for that mistake.”<sup>381</sup> While the court was sympathetic to Ms. Gibson’s predicament, the court stated that it “must apply the laws as they are written.”<sup>382</sup> Therefore, the court affirmed the Department’s denial of the 2007 refund claim and granted summary judgment to the Department because Ms. Gibson had “not shown that the refund claim was timely filed or that her delayed filing was excusable.”<sup>383</sup>

### *E. Corporate Income Tax*

*I.* Wireless Advocates, LLC v. Indiana Department of State Revenue.<sup>384</sup>—Wireless Advocates, LLC (“Wireless Advocates”) filed an income tax refund claim for the 2006 tax year of \$6465 with the Department, which the Department subsequently denied.<sup>385</sup> On September 26, 2011, Wireless Advocates filed a Notice of Appearance and Verified Petition for Judicial Review in the Tax Court “to which it attached a three-page letter, the Department’s order denying its refund claim, a postal receipt, a certified mail receipt, and the power of

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372. *Id.*

373. *Id.* (alteration in original) (internal quotation marks omitted).

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.* (citing IND. CODE § 6-8.1-9-1 (2013)).

380. *Id.* at \*2.

381. *Id.* at \*1.

382. *Id.* at \*2.

383. *Id.*

384. 973 N.E.2d 111 (Ind. T.C. 2012).

385. *Id.* at 111.

attorney it executed for the administrative proceedings.”<sup>386</sup> The vice-president of Wireless Advocates signed the Verified Petition and Notice of Appearance.<sup>387</sup> The Department filed a motion to dismiss for failure to state a claim upon which relief may be granted.<sup>388</sup>

Indiana does not require limited liability companies, unlike corporations, to be represented by counsel in court.<sup>389</sup> Accordingly, the Department encouraged the Tax Court to create a rule as a matter of first impression that would require a limited liability company to be represented by counsel in court.<sup>390</sup> Correspondingly, the Department asked the Tax Court to dismiss the case because Wireless Advocates, as a limited liability company, could not initiate an appeal itself.<sup>391</sup> The Tax Court refused “to invent such a rule where one does not currently exist.”<sup>392</sup> The Tax Court recognized that when a corporation represents itself pro se and its opponent contests such representation, “Indiana courts generally have given the corporation an opportunity to retain counsel, which the corporation must refuse before dismissing the action.”<sup>393</sup> Therefore, the Tax Court denied the Department’s motion to dismiss.<sup>394</sup>

2. *Indiana Department of State Revenue v. Miller Brewing Co.*<sup>395</sup>—The issue before the Indiana Supreme Court concerned Miller Brewing Company’s (“Miller”) Indiana adjusted gross income tax liability, specifically whether Miller owed tax on certain sales to Indiana customers.<sup>396</sup> Miller is a Wisconsin company that manufactures and sells malt beverages to customers throughout the country, including customers in Indiana.<sup>397</sup> Indiana distributors submitted their purchase orders to Miller’s headquarters in Milwaukee, Wisconsin, and Miller then produced and prepared the order for transport.<sup>398</sup> The distributor could then choose one of three transportation options to move the products to Indiana: it could (1) “pick up the products from the Ohio brewery and bring them back to Indiana itself,” (2) “hire a third-party common carrier to pick up the products and deliver them to it in Indiana,” or (3) “request that Miller hire a third-party common carrier to pick up the product and deliver them to it in Indiana, later reimbursing Miller for the delivery charge.”<sup>399</sup> Miller filed tax returns in Indiana,

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386. *Id.* at 111-12.

387. *Id.* at 112.

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.* (citing *State ex rel. Western Parks v. Bartholomew Cnty. Ct.*, 383 N.E.2d 290, 292-93 (1978)).

394. *Id.* at 113.

395. 975 N.E.2d 800 (Ind. 2012).

396. *Id.* at 801.

397. *Id.*

398. *Id.*

399. *Id.*

but when it calculated its adjusted gross income tax liabilities, Miller did not allocate the income it received from the third transportation option, the carrier-pickup sales to Indiana.<sup>400</sup> The Department audited Miller's tax returns and determined the income from the carrier-pickup sales should have been allocated to Indiana.<sup>401</sup> After paying the proposed assessments, Miller filed a refund claim with the Department.<sup>402</sup> The Department conducted an administrative hearing and denied Miller's claim.<sup>403</sup> Miller initiated a tax appeal with the Tax Court, which "held that Miller's carrier pick-up sales to Indiana customers were not 'Indiana sales' as defined by Indiana tax law and thus granted summary judgment in favor of Miller and against the Department."<sup>404</sup> The Department appealed the Tax Court's determination to the Indiana Supreme Court.<sup>405</sup>

Indiana Code section 6-3-2-2(e) explains that a sale "of tangible personal property take[s] place in Indiana if the property is delivered or shipped to a purchaser that is within Indiana, other than the United States government . . . [r]egardless of . . . other conditions of the sale."<sup>406</sup> The Indiana Supreme Court determined the statute was unambiguous and that, "quite clearly, the malt beverage products were taken from Miller's brewery and 'delivered or shipped' to purchasers in Indiana."<sup>407</sup> The court noted the statute "does not differentiate" between transportation methods and specifically states this rule applies "'regardless' of the particular arrangements of the sale."<sup>408</sup> Miller relied on an example that accompanied a related administrative rule to argue the carrier pick-up sales fell outside the rule's scope.<sup>409</sup> However, the Indiana Supreme Court was unconvinced: "Even if Miller's reading of Example 7 were correct and applicable, it would make no difference. The Department has unequivocally stated that examples are included in rules for illustrative purposes only, meaning that they are not themselves rules."<sup>410</sup> Therefore, the court concluded the Tax Court's determination was "clearly erroneous" and reversed the Tax Court's decision.<sup>411</sup>

3. *Indiana Department of State Revenue v. United Parcel Service, Inc.*<sup>412</sup>—The issue before the Indiana Supreme Court concerned "whether income received by a corporation's affiliated foreign reinsurance companies [fell] within

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400. *Id.* at 802.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.* (citing *Miller Brewing Co. v. Ind. Dep't of Revenue*, 955 N.E.2d 865, 872 (Ind. T.C. 2011)).

405. *Id.* at 801.

406. *Id.* at 803 (second and third alterations in original) (internal quotation marks omitted) (citing IND. CODE § 6-3-2-2(e) (2013)).

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.* at 804 (internal quotation marks omitted).

411. *Id.*

412. 969 N.E.2d 596 (Ind. 2012).



the ambit of Indiana's gross premium privilege tax statute and [was] exempt from Indiana adjusted gross income tax."<sup>413</sup> United Parcel Service, Inc. ("UPS") excluded the income of its two foreign reinsurance companies, UPINSCO, Inc. and UPS Re Ltd (hereinafter "the Affiliates"), on its consolidated Indiana corporate income tax returns.<sup>414</sup> During the years at issue, UPS contracted with primary insurers to provide worker's compensation insurance and insurance for damage to its packages.<sup>415</sup> The Affiliates then reinsured the primary insurers for their risks. Essentially, "UPS's own subsidiaries ultimately insured UPS's risks, but without the federal tax disadvantages of self-insurance."<sup>416</sup> The Department audited UPS's tax returns and disallowed UPS's exclusion of the Affiliates' income and issued a proposed assessment for underpaid taxes.<sup>417</sup> After protesting the assessment, UPS filed an appeal with the Tax Court, which issued summary judgment in UPS's favor, stating that "because UPS was 'subject to' the premium tax, it was exempt from the adjusted gross income tax."<sup>418</sup> The Department appealed the Tax Court's decision to the Indiana Supreme Court.<sup>419</sup>

In Indiana, "insurance companies are required to pay tax on earned premiums, in lieu of state corporate income tax."<sup>420</sup> The issue between the parties was whether UPS was subject to the premiums tax.<sup>421</sup> The Department asserted UPS did not meet all the statutes requirements and, therefore, was not subject to the premiums tax and did not qualify for an exemption.<sup>422</sup> Specifically, to meet the statute's requirements, UPS's Affiliates were required to be "doing business within [Indiana]," which the Department alleged UPS failed to prove.<sup>423</sup> The Indiana Supreme Court agreed there was "no evidence in the record . . . that the reinsurance transactions took place in the State of Indiana."<sup>424</sup> Therefore, "because this is a necessary condition in order to be 'subject to' the premium tax, UPS failed in its burden of establishing that it is entitled to summary judgment as a matter of law."<sup>425</sup> Accordingly, the Court reversed the Tax Court's decision.<sup>426</sup>

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413. *Id.* at 597.

414. *Id.* at 598-99.

415. *Id.* at 598.

416. *Id.*

417. *Id.* at 598-99.

418. *Id.* at 599.

419. *Id.*

420. *Id.* at 597 (citing IND. CODE §§ 6-3-2-2.8(4), 27-1-18-2(d) (2000 Supp.), 27-1-18-2(h) (2001 Supp.)).

421. *Id.* at 600.

422. *Id.*

423. *Id.* at 600-01.

424. *Id.* at 603.

425. *Id.*

426. *Id.*