

# 1993 DEVELOPMENTS IN INDIANA TAXATION

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## INTRODUCTION

Although 1993 was a relatively quiet year for Indiana tax developments, several important changes in procedural law occurred. The most significant change is the legislature's enactment of a direct appeal to the Indiana Tax Court from Letters of Findings issued by the Department of Revenue. This Article highlights the enactment of the direct appeal and other key procedural developments.

### I. INDIANA TAX COURT

#### A. *Expanded Jurisdiction*

The Indiana Tax Court's jurisdiction over most final determinations rendered by the Department of Revenue has been settled since the court's inception. Original tax appeals involving denials of claims for refunds of the listed taxes of Section 6-8.1-1-1 of the Indiana Code, which includes more than twenty-five different taxes such as the gross retail and use taxes, go to the Indiana Tax Court. This is clear because Indiana Code Section 6-8.1-9-1(c), which formerly directed such appeals to county courts, was amended with the creation of the Indiana Tax Court to provide that such appeals must be filed with the Indiana Tax Court.<sup>1</sup>

What had not been clear was whether taxpayers could appeal to the Indiana Tax Court from a "Letter of Findings" issued by the Department. A Letter of Findings is issued after a taxpayer protests a Department assessment.<sup>2</sup> However, appeals to the Indiana Tax Court only lie from "final determinations" of the Department of the State Board of Tax Commissioners.<sup>3</sup> Until 1993, it was

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1. Compare IND. CODE § 6-8.1-9-1(c) (1982) (appeals from denials of refund claims go to circuit or superior courts) with IND. CODE § 6-8.1-9-1(c) (Supp. 1985) (such appeals must go to the Indiana Tax Court).

2. IND. CODE § 6-8.1-5-1(c), (e) (1993).

3. IND. CODE § 33-3-5-2(a) (1993).

unknown whether a Letter of Findings constituted a final determination of the Department for jurisdiction in the Indiana Tax Court.

In 1991, the authors of this Article addressed this issue at length, noting that no decision or statute speaks directly to the topic.<sup>4</sup> The authors concluded that although the question of jurisdiction remained unanswered at that time, on balance the "proper answer, though unfortunate, might be that the Indiana Tax Court does not have jurisdiction in this setting."<sup>5</sup> To remedy this deficiency, the authors proposed specific legislation to allow for appeals from Letters of Findings.<sup>6</sup>

In 1993, the legislature responded by enacting H.B. 1573.<sup>7</sup> P.L. 71-1993 amends Section 6-8.1-5-1 of the Indiana Code, and allows taxpayers to appeal to the Indiana Tax Court within 180 days after a Letter of Findings is issued.<sup>8</sup>

Appeal from a Letter of Findings is a welcome improvement to the Indiana tax system, for it allows taxpayers to appeal an assessment without first paying the contested listed tax and filing a claim for refund. The Department is not precluded, however, from seeking to collect the tax after issuance of a Letter of Findings. Taxpayers who wish to litigate without the threat of collection action must either persuade the Department to refrain from collection, or petition for and obtain an injunction from the Indiana Tax Court pending the original tax appeal.<sup>9</sup>

### B. *Expert Witnesses and Contingency Fees*

In *Wirth v. State Board of Tax Commissioners*,<sup>10</sup> the Indiana Tax Court held that a taxpayer may compensate an expert witness in an Indiana tax dispute on a contingency basis.<sup>11</sup> The issue arose in a taxpayer's appeal of his real property tax assessment.<sup>12</sup> To support his case, the taxpayer hired a property tax consultant whose fee was contingent on the outcome of the appeal.

Although the State Board did not raise the issue, Judge Fisher addressed the matter *sua sponte*, noting that "the question of the propriety of the witness's testimony exists."<sup>13</sup> In addressing this question of first impression in Indiana, Judge Fisher observed the "prevailing general rule that it is inappropriate to pay

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4. Lawrence A. Jegen, III & John R. Maley, *Developments in Indiana Tax Law: Further Refinements of the Indiana Tax Court's Jurisdiction, and the Attack on Indiana's Property Tax System*, 24 IND. L. REV. 1125, 1126-32 (1991).

5. *Id.* at 1129, 1131-32.

6. *Id.* at 1132.

7. P.L. 71-1993 (signed by Governor Bayh and effective on May 12, 1993) (Found in 6 West's Indiana Legislative Service 1993 Acts 1857 (1993)).

8. IND. CODE § 6-8.1-5-1(g) (1993).

9. IND. CODE § 33-3-5-11(b), (c) (1993).

10. 613 N.E.2d 874 (Ind. T.C. 1993).

11. *Id.* at 877.

12. *Id.* at 875.

13. *Id.* at 876.

an expert witness a contingent fee.”<sup>14</sup> He also cited to the Comment to Rule 3.4(b) of the Indiana Rules of Professional Conduct, which states that the “common law rule in most jurisdictions is that it is improper . . . to pay an expert witness a contingent fee.”<sup>15</sup>

Nonetheless, Judge Fisher held that “the testimony of contingently paid experts is not subject to exclusion in tax court cases solely on the basis of the expert's contingent fee.”<sup>16</sup> Instead, the contingent fee goes to the weight of the testimony rather than admissibility because the potential for abuse is less in the Indiana Tax Court where all cases are tried without juries.<sup>17</sup>

Although *Wirth* allows experts to be paid by contingent fees in Indiana tax cases, practitioners should avoid such an arrangement for two reasons. First, the expert's credibility is naturally suspect when payment depends on success on the merits. Second, the Indiana Supreme Court has not yet addressed this issue, and if it ever does, it could reach a contrary conclusion. Thus, contingent fee agreements are advisable in Indiana tax cases only when an expert is necessary but cannot be afforded on a standard hourly basis.

## II. PROPERTY TAXES

### A. *Improved Appeal Procedures*

Legislative amendments during 1993 expand the time period for appealing property tax assessments and streamline the process for reopening an assessment after it has been fixed. Under prior law, taxpayers desiring to appeal changes in their assessments had to file an appeal within thirty days of the notice of changed assessment.<sup>18</sup> In addition, if taxpayers wished to reopen an assessment on their own, it was generally necessary to file a Form 134 Petition for Reassessment by March 31 of the assessment year.

House Bill 1842 amends prior law by allowing taxpayers to appeal changed assessments by filing the appeal form within forty-five days after the notice or by May 10 of the assessment year, whichever is later.<sup>19</sup> If the taxpayer misses the filing deadline, the appeal is still effective for the next assessment date.<sup>20</sup>

House Bill 1842 also amends prior law by allowing taxpayers to reopen their assessment in any year by filing an appeal directly with the county auditor for

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14. *Id.*

15. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.4(b) (1987).

16. 613 N.E.2d at 877.

17. *Id.*

18. IND. CODE § 6-1.1-15-1(a) (1992).

19. IND. CODE § 6-1.1-15-1(b) (1993).

20. IND. CODE § 6-1.1-15-1(c) (1993).



review by the county board of review.<sup>21</sup> These new procedures took effect January 1, 1994.<sup>22</sup>

### B. Further Notice Developments

Last year's tax survey discussed three key decisions in Indiana addressing the requirements for notice to owners in property tax sales.<sup>23</sup> One of those decisions, *Elizondo v. Read*,<sup>24</sup> holds that county auditors are charged with knowledge of any address for the taxpayer that is within their records if the alternate listing links the taxpayer to the subject property.<sup>25</sup> Auditors are not, however, required to search records unconnected with the subject property to give notice of tax sales.<sup>26</sup>

During 1993, the Indiana Tax Court applied *Elizondo* to the State Board of Tax Commissioners.<sup>27</sup> As Judge Fisher explained in *Mynsberge v. State Board of Tax Commissioners*:

The constitutional concerns underlying *Elizondo* are equally valid when the public authority in question is the State Board as when it is a county auditor. Regardless of which government entity is providing notice of action taken or to be taken, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties . . . and afford them an opportunity to present their objections."<sup>28</sup>

Applying *Elizondo* to the facts of *Mynsberge*, Judge Fisher ruled that the State Board failed to provide due process. In *Mynsberge* the taxpayer filed a Form 131 for review of assessment on a building he owned in Elkhart County. The petition contained both the taxpayer's separate business address and the subject building's mailing address. Thereafter, the taxpayer moved his business but failed to inform the Board of his new address.<sup>29</sup>

In July of 1992, the State Board entered its final determination on the subject building and mailed notice to the taxpayer's previous business address.

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21. IND. CODE § 6-1.1-15-1(d) (1993).

22. P.L. 41-1993, § 56 (declaring an emergency for H.B. 1842, thus making it effective on its date of approval, May 6, 1993) (found in 5 West's Indiana Legislative Service 1993 Acts 1615 (1993)).

23. Lawrence A. Jegen, III & John R. Maley, *1992 Developments in Indiana Taxation*, 26 IND. L. REV. 1145, 1154-57 (1993).

24. 588 N.E.2d 501 (Ind. 1992).

25. *Id.* at 504.

26. *Id.*

27. 612 N.E.2d 1129 (Ind. T.C. 1993).

28. 612 N.E.2d at 1131.

29. 612 N.E.2d at 1130.

The post office returned the notice undelivered. The State Board put the notice in the file without taking further action.

Thereafter, the Elkhart County Treasurer sent the taxpayer the tax statement for the subject property by mailing it directly to that location, where the taxpayer received it. The taxpayer then filed an original tax appeal from the State Board's July 1992 final determination. The appeal was not filed, however, within the required forty-five days from the Board's ruling.<sup>30</sup> Thus, unless the State Board's notice were inadequate, the Tax Court would have lacked jurisdiction due to an untimely appeal.

Judge Fisher found the notice inadequate because the State Board could have ascertained from its own records that an alternate address was available for the subject building. Indeed, the building's mailing address was on file for the taxpayer. The court explained:

[W]hen the postal service returns a final determination undelivered, the State Board is required to ascertain from its records whether any alternate address linking the subject property to the taxpayer or the taxpayer's representative exists. If there is such an address, the State Board must then attempt to deliver the final determination to that alternate address.

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Even though there was nothing to link the subject property to Mynsberge at his new office address, the State Board nonetheless had an alternate address available. On a single sheet of paper, [the taxpayer's] petition for review contained not only his old office address, but the mailing address of the subject property, as well. It goes without saying that here was an alternate address intimately and inherently linked to the subject property. When the final determination was returned undelivered to [the] old office address, the State Board should then have used the address of the subject property to send the final determination to [the taxpayer] a second time.<sup>31</sup>

Because the notice was inadequate the taxpayer's original tax appeal was deemed timely.

All is not lost for the State Board, however, for the duty to find alternate addresses is not boundless. As Judge Fisher explained, "In accord with *Elizondo*, however, the State Board need not engage in speculation, as would be required if there were nothing to link the alternate address to the subject property."<sup>32</sup> "Moreover," the court wrote, "the State Board is not required to search or inquire outside its office to find an alternate address."<sup>33</sup>

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30. IND. CODE § 6-1.1-15-5(d) (1993).

31. 612 N.E.2d at 1132.

32. *Id.*

33. *Id.*

The practical lesson for tax practitioners is to ensure that taxpayers' current mailing addresses are kept up to date with all necessary governmental officials. Furthermore, when timely notice has not been issued to a client, practitioners should inquire further to determine whether the applicable agency might have breached its duty to discover an alternate address on file linking the subject property to the taxpayer.

### III. LISTED TAXES — RECORD KEEPING

The legislature amended IND. CODE § 6-8.1-5-4 which addresses records that must be kept for listed taxes. Under this provision, every person subject to a listed tax must keep "books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records."<sup>34</sup> Copies of any state or federal tax returns must also be retained.<sup>35</sup> The amendment expands these burdens by requiring taxpayers to retain "all source documents necessary to determine the taxes, including invoices, register tapes, receipts, and canceled checks."<sup>36</sup>

These records, returns, and source documents must be maintained for at least three years after the date the final payment of the particular tax liability was due unless, after an audit, the Department consents to earlier destruction.<sup>37</sup> Where the taxpayer fails to file a return or receives notice from the Department that the taxpayer has filed a suspected fraudulent, unsigned, or substantially blank return, the records must be retained permanently.<sup>38</sup>

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34. IND. CODE § 6-8.1-5-4(a) (1993).

35. IND. CODE § 6-8.1-5-4(b) (1993).

36. IND. CODE § 6-8.1-5-4(a) (1993).

37. *Id.*

38. *Id.*