

# 1995 DEVELOPMENTS IN INDIANA TAXATION

LAWRENCE A. JEGEN, III\*  
JAMES S. TRIPP\*\*

## INTRODUCTION

Both the 109th Indiana General Assembly and the Indiana Tax Court contributed to the 1995 changes and clarifications to all of the major, and to many of the minor, Indiana tax laws. This Article highlights some of the more interesting 1995 developments. The following abbreviations are frequently used in this Article: Indiana Department of State Revenue (IDSR) and Indiana State Board of Tax Commissioners (ISBTC).

### I. GENERAL ASSEMBLY LEGISLATION

While there were hundreds of 1995 legislative changes that impacted Indiana taxes, virtually none of the changes had any direct effect on a broad segment of Indiana residents. Most of the changes were attempts to fine-tune existing laws, and no significant policy changes surfaced, with two major exceptions.

First, the general assembly, as it does each year, amended the Indiana adjusted gross income tax (IAGIT) law to adopt the definition of the term "adjusted gross income," as that term is used in the federal income tax law.<sup>1</sup> The IAGIT is computed by starting with the amount of a taxpayer's federal adjusted gross income and then making adjustments to that amount in order to arrive at the Indiana Adjusted Gross Income. Because the definition of the term "adjusted gross income" for federal tax purposes did not change from 1994 to 1995, the starting point of Indiana's 1995 definition of the term "adjusted gross income" remained the same as the 1994 definition. Thus, there were no 1995 surprises for Indiana taxpayers with respect to the passing of this federal definition.

The second significant change was that the general assembly changed the Indiana tax law to provide a new schedule of excise tax rates for the Indiana Motor Vehicle Excise Tax (IMVET). The new schedule reduced the 1995 IMVET rates gradually over a period of six years.<sup>2</sup> All IMVET rates were to eventually be reduced by fifty percent, except that no rate was to be reduced below \$50. Rates that were already \$50 or lower were not to be reduced. Each year, the rates were to be reduced by the same dollar amount, across the board, within the above limitations. During 1996, the general assembly accelerated the rate reduction schedule so that all of the proposed reductions took effect during 1996.<sup>3</sup>

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\* Thomas F. Sheehan Professor of Tax Law and Policy, Indiana University School of Law—Indianapolis. B.A., Beloit College; M.B.A., J.D., University of Michigan; LL.M., New York University.

\*\* B.A., Brigham Young University; J.D., 1996, Indiana University School of Law—Indianapolis.

1. IND. CODE § 6-3-1-11(c) (Supp. 1995).

2. *Id.* § 6-6-5-5.

3. IND. CODE § 6-6-5-5 (Supp. 1996).

Three non-broad based changes that the general assembly made during 1995 are as follows. First, the Indiana Gross Income Tax (IGIT) law was amended in order to provide that receipts from gambling games on river boats are exempt from the IGIT.<sup>4</sup> Second, the general assembly amended the Indiana Property Tax (IPT) law in order to eliminate any charitable exemption for that part of a hospital which is devoted to the operation of a physician's office, unless the office provides charity care or community benefits.<sup>5</sup> Finally, with respect to the procedural rules that govern the tax court, the general assembly amended Indiana Code section 33-3-5-15 in order to require the tax court, whenever the tax court remands a case to the ISBTC under Indiana Code section 6-1.1-15-8, to specify which issues the ISBTC must address.

As a companion to the amendment of Indiana Code section 33-3-5-15, the general assembly also amended Indiana Code section 6-1.1-15-8. The amendment provides that if the tax court vacates, sets aside, or adjudges null and void a final determination of the ISBTC with respect to an assessment by the ISBTC, and the matter is remanded to the ISBTC for reassessment and further proceedings, then the ISBTC is to take action only with respect to those issues that are specified in the tax court's decision. These changes will mitigate problems that have arisen in the following types of cases: those in which an assessment was reversed and remanded for reassessment and the only instruction to the ISBTC was to conduct the reassessment "consistent with [the] opinion";<sup>6</sup> and those in which the ISBTC made determinations that went beyond the matters involved in the remand.

## II. INDIANA TAX COURT OPINIONS AND DECISIONS

The tax court published twenty-one opinions and decisions during 1995.<sup>7</sup> Of

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4. IND. CODE § 6-2.1-3-35 (Supp. 1995).

5. *Id.* § 6-1.1-10-16.

6. *See, e.g.,* *Western Select Properties, L.P. v. State Bd. of Tax Comm'rs*, 639 N.E.2d 1068, 1075 (Ind. T.C. 1994).

7. During 1995, the tax court issued the following twenty-one published opinions which are listed chronologically: *Hi-Temp, Inc. v. State Bd. of Tax Comm'rs*, 645 N.E.2d 680 (Ind. T.C. 1995); *Koufos v. Indiana Dep't of State Revenue*, 646 N.E.2d 733 (Ind. T.C. 1995); *Rott Dev. Co. v. State Bd. of Tax Comm'rs*, 647 N.E.2d 1157 (Ind. T.C. 1995); *Indiana Eby-Brown Co. v. Indiana Dep't of State Revenue*, 648 N.E.2d 401 (Ind. T.C. 1995); *Williams Indus. v. State Bd. of Tax Comm'rs*, 648 N.E.2d 713 (Ind. T.C. 1995); *Mechanics Laundry & Supply, Inc. v. Indiana Dep't of State Revenue*, 650 N.E.2d 1223 (Ind. T.C. 1995); *Bell v. State Bd. of Tax Comm'rs*, 651 N.E.2d 816 (Ind. T.C. 1995); *Indiana Dep't of State Revenue v. Estate of Baldwin*, 652 N.E.2d 124 (Ind. T.C. 1995); *Roehl Transp., Inc. v. Indiana Dep't of State Revenue*, 653 N.E.2d 539 (Ind. T.C. 1995); *Dalton Foundries, Inc. v. State Bd. of Tax Comm'rs*, 643 N.E.2d 548 (Ind. T.C. 1995); *Boaz v. State Bd. of Tax Comm'rs*, 654 N.E.2d 320 (Ind. T.C. 1995); *Two Market Square Assoc. Ltd. Partnership v. State Bd. of Tax Comm'rs*, 656 N.E.2d 308 (Ind. T.C. 1995); *Associated Ins. Co. v. Indiana Dep't of State Revenue*, 655 N.E.2d 1271 (Ind. T.C. 1995); *Kimco Leasing, Inc. v. State Bd. of Tax Comm'rs*, 656 N.E.2d 1208 (Ind. T.C. 1995); *Herb v. State Bd. of Tax Comm'rs*, 656 N.E.2d 890 (Ind. T.C. 1995); *Musgrave v. State Bd. of Tax Comm'rs*, 658 N.E.2d 135 (Ind. T.C.

those, the nine opinions discussed below present the most interesting tax issues. The 1995 cases that are not discussed in this Article are cases involving issues that have been presented to the tax court many times before, will affect very few taxpayers, or that involve facts and/or issues that are of very little interest. The opinions and decisions that are discussed in this Article are presented under an alphabetical listing of the Indiana taxes involved in each case.

#### A. *Indiana Cigarette Tax (ICT)*

In *Indiana Eby-Brown Co. v. Indiana Department of State Revenue*,<sup>8</sup> a cigarette distributor petitioned the tax court for a determination of whether the IDSR could assess the Indiana Cigarette Tax (ICT)<sup>9</sup> against the taxpayer without considering that some of the taxpayer's cigarette inventory may have been stolen and that some of the taxpayer's purchased cigarette stamps may have been mutilated. In upholding the IDSR's assessment of the ICT, the tax court stated that a cigarette distributor remains liable for the ICT even though the ICT is presumed to be imposed on the ultimate consumer, and even though the cigarettes involved are lost, stolen, or otherwise missing from the taxpayer's possession.<sup>10</sup>

#### B. *Indiana Death Taxes—Indiana Inheritance Tax (IIT)*

In *Indiana Department of State Revenue v. Estate of Nichols*,<sup>11</sup> a decedent's estate petitioned the tax court for a determination of whether a transfer of real property, which was located outside of the State of Indiana, was subject to the Indiana Death Taxes, specifically, to the Indiana Inheritance Tax (IIT).<sup>12</sup> The decedent had established a revocable trust, was trustee of the trust, and had transferred Florida real property to the trust during 1991. The decedent died on June 26, 1993, domiciled in Johnson County, Indiana. When the decedent died, the IDSR maintained that the IIT should be imposed on the value of the decedent's transfer of the Florida real property to the beneficiaries thereof. Had the real property been owned by the decedent (outside of the trust), the value of the transfer of the real property would not have been subject to the IIT.<sup>13</sup> In a nutshell, the tax court had to determine whether the interest in the Florida property, which

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1995); *Indiana Dep't of State Revenue v. Estate of Nichols*, 659 N.E.2d 694 (Ind. T.C. 1995); *The Precedent v. State Bd. of Tax Comm'rs*, 659 N.E.2d 701 (Ind. T.C. 1995); *Miles, Inc. v. Indiana Dep't of State Revenue*, 659 N.E.2d 1158 (Ind. T.C. 1995); *Dawkins v. State Bd. of Tax Comm'rs*, 659 N.E.2d 706 (Ind. T.C. 1995); *Dziacko v. State Bd. of Tax Comm'rs*, 659 N.E.2d 1165 (Ind. T.C. 1995).

8. 648 N.E.2d 401 (Ind. T.C. 1995).

9. IND. CODE §§ 6-7-1-1 to -36 (1993 & Supp. 1995). The ICT is an excise tax on cigarettes that the state precollects from cigarette distributors; the distributors place cigarette stamps on individual cigarette packages to evidence that the tax has been paid. *Id.*

10. *Indiana Eby-Brown Co.*, 648 N.E.2d at 404-06.

11. 659 N.E.2d 694 (Ind. T.C. 1995).

12. IND. CODE §§ 6-4.1-1 to -12 (1993 & Supp. 1995).

13. See IND. CODE § 6-4.1-2-2(b) (1993).

was held in trust, was an interest in real property or an interest in intangible personal property.

In holding that the value of the Florida real property was subject to the IIT, the tax court stated that a trust interest has the character of real property under Indiana Code section 30-4-2-7(c) only if the trust agreement contains a requirement that the trustee distribute the real property, at some time, to a beneficiary.<sup>14</sup> However, the tax court determined that the beneficiaries' interest under the decedent's trust was an interest in intangible personal property, and therefore, was subject to the IIT for the following reasons: (1) the trust agreement was silent as to whether a distribution of trust property had to be in kind or in cash; (2) the trust agreement granted the trustee broad discretionary powers to deal with and administer the trust principal, including, but not limited to, the explicit power to make distributions whether in kind or in cash; and (3) the trustee's discretion to distribute property in cash or in kind was not restricted by the beneficiaries' wishes, that is, the beneficiaries could not require the trustee to distribute property in kind.<sup>15</sup>

Ironically, Indiana Code section 6-4.1-2-2 was amended, effective July 1, 1993, to provide that the IIT would not apply to a real property interest transfer if the interest transferred was in: (1) real property that was located outside of the State of Indiana, regardless of whether the real property was held in a trust or whether the trustee was required to distribute the real property in-kind; or (2) real property that was transferred to an irrevocable trust during the decedent's life, and the transfer to the trust was not made in contemplation of the transferor's death, and the decedent did not retain an interest in the trust.<sup>16</sup> The amendment provided that the IIT did apply to a property interest transfer if the interest transferred was in real property that was located inside of the State of Indiana, regardless of whether the real property was held in a trust or whether the trustee was required to distribute the real property in-kind. However, the IIT did not apply if the real property was transferred to an irrevocable trust during the decedent's life, and the transfer to the trust was not made in contemplation of the transferor's death, and the decedent did not retain an interest in the trust.<sup>17</sup>

### C. *Indiana Income Taxes—Adjusted Gross Income Tax (IAGIT)*

In *Koufos v. Indiana Department of State Revenue*,<sup>18</sup> the taxpayer petitioned the tax court for a determination of whether the IDSR could disallow the taxpayer's interest payments as being deductible under the Indiana Adjusted Gross Income Tax (IAGIT).<sup>19</sup> The taxpayer paid the interest with respect to a mortgage debt that the taxpayer had incurred in order to develop some rental property. After

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14. *Estate of Nichols*, 659 N.E.2d at 697.

15. *Id.* at 699-701.

16. IND. CODE § 6-4.1-2-2 (1993). This provision does not apply to individuals who died before July 1, 1993.

17. *Id.*

18. 646 N.E.2d 733 (Ind. T.C. 1995).

19. IND. CODE § 6-3-1-3.5 (1993).

the property was developed, the taxpayer sold the property and continued to make interest payments on the debt. Apparently, both the pre-sale and the post-sale interest payments were qualified as investment interest payments under section 163 of the Internal Revenue Code of 1986.<sup>20</sup> Therefore, they were deductible, with certain limitations, for federal income tax purposes.

If the pre-sale interest payments were deductible investment interest payments for federal income tax purposes under section 163, then such pre-sale interest payments would have been deductible in arriving at the taxpayer's federal adjusted gross income under section 62(a)(4) of the Internal Revenue Code of 1986, as expenses that were "attributable to property held for the production of rents or royalties."<sup>21</sup> However, the general issue involved in the case was whether the post-sale interest payments were deductible in arriving at the taxpayer's adjusted gross income for federal income tax purposes. This determination was important for IAGIT purposes, because, as stated above, the IAGIT is computed by starting with the amount of a taxpayer's federal adjusted gross income, and then, making adjustments to that amount in order to arrive at the IAGIT.

To summarize and restate the issues, the tax court in *Koufos* had to determine whether the taxpayer's post-sale interest payments continued to be expenses that were attributable to property held for the production of rents or royalties. Clearly, the post-sale interest payments could continue to be deductible investment interest payments under such section 163, but such post-sale interest payments would not, thereby, automatically continue as payments that were attributable to property held for the production of rents or royalties. If such post-sale interest payments were not within this latter category, then such post-sale interest payments would not have been deductible in arriving at the taxpayer's federal adjusted gross income. Therefore, they would not have been deductible in computing the IAGIT. With all of this in mind, the tax court denied a deduction to the taxpayer for the post-sale interest payments for IAGIT purposes on the theory that such post-sale interest payments were being made with respect to debt that was no longer attributable to the production of rents or royalties.<sup>22</sup>

#### D. Indiana Income Taxes—Gross Income Tax (IGIT)

In *Associated Insurance Co. v. Indiana Department of State Revenue*,<sup>23</sup> the tax court held that because the spirit and intent of the Indiana Gross Income Tax (IGIT) consolidated filing statute<sup>24</sup> was to treat an affiliated group as a single taxpayer, a member of the Indiana Comprehensive Health Insurance Association (ICHIA) may apply its credit against the full amount of ICHIA's liability for the IGIT.

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20. I.R.C. § 163 (1994).

21. I.R.C. § 62(a)(4) (1994).

22. *Koufos*, 646 N.E.2d at 737-38.

23. 655 N.E.2d 539 (Ind. T.C. 1995).

24. IND. CODE § 6-2.1-5-5(b) (1993).

*E. Indiana Carrier Fuel Taxes—Motor Carrier Fuel Tax and Motor Carrier Surcharge Tax (Collectively, IMCFT)*

In *Roehl Transport, Inc. v. Indiana Department of State Revenue*,<sup>25</sup> the taxpayer, a commercial motor carrier, petitioned the tax court to determine whether the Indiana Motor Carrier Fuel Tax and the Motor Carrier Fuel Surcharge Tax (collectively, IMCFT) should be imposed on certain fuel that was purchased by the taxpayer for use in the taxpayer's motor vehicles. The two issues before the tax court were: (1) whether a motor carrier was liable for the IMCFT on fuel that was consumed by the taxpayer's motor vehicles while such motor vehicles were idling off the highway; and (2) whether the inclusion of the fuel (which was consumed by the taxpayer's motor vehicles while the motor vehicles were idling off the highway) in the formula used to calculate the IMCFT was constitutional.

After analyzing the applicable statutes and regulations thereunder, the tax court agreed with the taxpayer that not all fuel consumed by a commercial motor vehicle was subject to the IMCFT.<sup>26</sup> The tax court observed that the general assembly had exempted some fuel from the IMCFT if the fuel was consumed for the purpose of operating auxiliary equipment that was installed on the motor vehicles, even if the motor vehicles had a common fuel reservoir for both the locomotion of the motor vehicles and for the operation of such auxiliary equipment.<sup>27</sup> The tax court further stated that there was a presumption that all fuel placed in a supply tank of a commercial motor vehicle was to be consumed "on the highways," unless the motor carrier could show that it used a portion of the fuel to operate the motor carrier's vehicle's auxiliary equipment.<sup>28</sup> The tax court concluded that all fuel consumed by a commercial motor vehicle, not otherwise exempt from the IMCFT, was to be included in the formula for calculating the IMCFT, regardless of where and how the fuel was consumed, including, but not limited to, fuel that was consumed by a motor vehicle when the motor vehicle was idling off the highway for long periods of time.<sup>29</sup> Further, the tax court concluded that the applicable statutory provisions were constitutional.<sup>30</sup>

*F. Indiana Procedures for Tax Administration—Indiana State Board of Tax Commissioners (ISBTC)*

In *Bell v. State Board of Tax Commissioners*,<sup>31</sup> the tax court was requested to determine, among other things, whether Indiana Code section 21-5-12-7 required the ISBTC to inquire into the propriety of actions taken by school corporations. The tax court found that Indiana Code section 21-5-12-7 authorized the ISBTC to determine whether a lease rental agreement between a lessor corporation and a

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25. 653 N.E.2d 539 (Ind. T.C. 1995).

26. *Id.* at 543.

27. *See* IND. CODE §§ 6-6-4.1-4(d), -4.5(d) (Supp. 1995).

28. *Roehl Transp., Inc.*, 653 N.E.2d at 543.

29. *Id.* at 544.

30. *Id.* at 546-58.

31. 651 N.E.2d 816 (Ind. T.C. 1995).

school corporation was necessary and whether the rental payments were fair and reasonable. In addition to these findings, the tax court also found that section 21-5-12-7 did not authorize the ISBTC to determine whether a school construction project was necessary from an educational standpoint.<sup>32</sup>

In arriving at these conclusions, the tax court built the following road: an administrative agency has only those powers conferred on the agency by the general assembly; powers not in the agency's legislative grant cannot be assumed by the agency nor implied to exist in the agency's powers; the ISBTC is Indiana's property tax specialist, but the ISBTC has no expertise in educational matters; and, Indiana Code section 21-5-12-7 did not make the ISBTC a guarantor that school corporations, the Indiana Department of Education, and/or the State Board of Education would follow their own rules and regulations.<sup>33</sup>

### *G. Indiana Procedures for Tax Administration—Indiana Counties and County Officials*

In *Musgrave v. State Board of Tax Commissioners*,<sup>34</sup> an Indiana county assessor and an Indiana township assessor filed a complaint for an original tax appeal. The tax court was required to determine: (1) whether the tax court had subject matter jurisdiction with respect to the matter presented; (2) whether the assessors had standing to bring the matter to the tax court; and (3) whether the assessors' complaint stated a cause of action with respect to which the tax court could grant relief.

In *Musgrave*, PPG was an Evansville, Indiana manufacturing corporation that was licensed to do business in the State of Indiana. During 1994, PPG challenged the assessment of PPG's business personal property for the tax years 1990, 1991, 1992, and 1993 by filing four Petitions for the Correction of Errors (Forms 133). After considering PPG's Forms 133, the Scott Township Assessor, the Vanderburgh County Auditor, and the Vanderburgh County Treasurer determined that PPG was not entitled to relief and forwarded PPG's Forms 133 to the Vanderburgh County Board of Review. The Vanderburgh County Board of Review then considered PPG's Forms 133 and determined that PPG *was* entitled to relief and reversed the determination of the Scott Township Assessor, the Vanderburgh County Auditor, and the Vanderburgh County Treasurer.

Believing that the Vanderburgh County Board of Review erred, the Scott Township Assessor filed Petitions for Review of Assessment (Forms 131) with the ISBTC. However, the ISBTC dismissed the Scott Township Assessor's Forms 131 on the ground that no statute conferred a right or power on such persons to make such an appeal to the ISBTC.<sup>35</sup> Thereafter, the Vanderburgh County Assessor and the Scott Township Assessor filed the original tax appeal involved in this case, seeking to reverse the ISBTC's final determination. In response, the

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32. *Id.* at 819.

33. *Id.* at 819-20.

34. 658 N.E.2d 135 (Ind. T.C. 1995).

35. *Id.* at 137-38.

ISBTC and PPG filed separate motions asking the tax court to dismiss the appeal.

In addressing such motions, the tax court determined that it had subject matter jurisdiction over the matter involved.<sup>36</sup> The tax court observed that: (1) the tax court had exclusive jurisdiction over any case that arose under the tax laws of the State of Indiana, including, but not limited to, cases that arose from a final determination of the ISBTC;<sup>37</sup> (2) the tax court was created to provide a court that had exclusion jurisdiction over Indiana tax matters (but the tax court was not a court of general jurisdiction); (3) Indiana Code section 6-1.1-15-3(b) required the ISBTC to consider the merits of an assessor's Forms 131, and if the ISBTC refused to do so, the ISBTC thereby denied the assessor a right to review in direct contravention of the law; and (4) it would be anomalous for the tax court to hold that the assessors did not have standing to enforce a right that was specifically granted to the assessors by the general assembly.<sup>38</sup> The tax court stated that county officials might not have standing to challenge the allowance or disallowance of an exemption or of a reduced assessment; however, such officials did have such standing in cases that sought to challenge the ISBTC's interpretation or application of a statute.<sup>39</sup> The tax court held, therefore, that the assessors had standing to bring the case to the tax court.<sup>40</sup> However, with respect to the sufficiency of the assessors' complaint, the tax court stated that the assessors' complaint failed to state a claim upon which relief could be granted; and therefore, the tax court dismissed the case.<sup>41</sup>

In dismissing the case, the tax court reviewed the two methods by which a taxpayer could have appealed a property tax assessment. The tax court explained that the first method was the Petition for Review of Assessment, otherwise known as the "Form 130/131 procedure."<sup>42</sup> Form 130 is used to petition a county board of review for a review of assessment.<sup>43</sup> Form 131 is used to appeal a county board of review's decision on Form 130 to the ISBTC.<sup>44</sup> Form 130 is a prerequisite to Form 131.<sup>45</sup> The second method the court reviewed was the Petition for Correction of Errors, otherwise known as the "Form 133 procedure."<sup>46</sup>

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36. *Id.* at 138.

37. *See* IND. CODE § 33-3-5-2 (1993).

38. *Musgrave*, 658 N.E.2d at 138-39.

39. *Id.* at 139.

40. *Id.*

41. *Id.* at 141.

42. *Id.* at 140. The Form 130/131 procedure and appeal rights thereunder are prescribed by IND. CODE §§ 6-1.1-15-1 to -4 (1993 & Supp. 1995). *See also* IND. ADMIN. CODE tit. 50, rr. 4.2-2-9, 4.2-3-3 (1996).

43. IND. CODE § 6-1.1-15-1 (1993); IND. ADMIN. CODE tit. 50, r. 4.2-3-3 (1996).

44. IND. CODE § 6-1.1-15-3 (1993); IND. ADMIN. CODE tit. 50, r. 4.2-3-3 (1996).

45. IND. CODE § 6-1.1-15-3 (1993); IND. ADMIN. CODE tit. 50, r. 4.2-3-3 (1996). *See also* *Reams v. State Bd. of Tax Comm'rs*, 620 N.E.2d 758, 759 (Ind. T.C. 1993).

46. *Musgrave*, 658 N.E.2d at 140. The Form 133 procedure and appeal rights thereunder are prescribed by IND. CODE § 6-1.1-15-12 (Supp. 1995). *See also* IND. ADMIN. CODE tit. 50, rr. 4.2-2-9, 4.2-3-12 (1996).

Although both Form 130/131 and Form 133 could have been used to challenge objective errors in an assessment, the two procedures, including appeals therefrom, are separate and distinct.<sup>47</sup> If PPG had filed Forms 130, then the assessors could have appealed the Vanderburgh County Board of Review's decision to the ISBTC by using Forms 131, because Indiana Code section 6-1.1-15-3(b) specifically grants township assessors and members of a county board of review the right to appeal to the ISBTC from a county board of review's determination on a Form 130.<sup>48</sup> PPG, however, did not file Forms 130. Instead, it filed Forms 133, and Indiana Code section 6-1.1-15-12 does not grant township assessors and members of a county board of review the right to appeal to the ISBTC from a county board of review's determination on Form 133.<sup>49</sup>

The only person authorized to appeal to the ISBTC from a determination by a county board of review on Form 133 is a taxpayer.<sup>50</sup> Indeed, Indiana Code section 6-1.1-15-12(e) provides that a taxpayer may appeal a determination of the county board of review to the ISBTC for a final administrative determination.<sup>51</sup> In this case, the taxpayer was PPG, therefore, because no Indiana law authorized township and county assessors to appeal a county board of review's decision on Form 133 to the ISBTC, the tax court determined that the assessors' complaint failed to state a claim upon which relief could have been granted.<sup>52</sup>

#### H. Indiana State Gross Retail Tax and Indiana Use Tax (Collectively, ISUT)

1. *Mechanics Laundry & Supply, Inc. v. Indiana Department of State Revenue.*<sup>53</sup>—In *Mechanics Laundry*, the taxpayer was in the business of purchasing shop rags, shop towels, shop mats, shop uniforms, shop shirts, and other materials, and renting such materials to customers, attaching logos to some of the materials, and repairing some of the materials. The taxpayer would then deliver the materials to customers, picking up the materials after the customers had used them for a week, and deliver clean materials to the customers for the next week (cleaning and repairing the materials picked up). The taxpayer continued the delivery, pickup, cleaning, attaching, repairing cycle throughout the year.

The IDSR determined that the taxpayer should pay the Indiana State Gross Retail Tax (the Indiana sales tax), or in lieu thereof, the Indiana Use Tax (collectively, ISUT) when the taxpayer purchased equipment and supplies to clean such materials. As a consequence, the taxpayer petitioned the tax court for a determination of whether the taxpayer came within the scope of one of the exemptions to the ISUT, specifically, the exemptions that are commonly referred to, collectively, as the "industrial exemptions." Among other things, the taxpayer

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47. *Musgrave*, 658 N.E.2d at 140.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 141.

53. 650 N.E.2d 1223 (Ind. T.C. 1995).

maintained that the taxpayer was a "processor," that the taxpayer "processed" tangible personal property, and that the taxpayer was in the business of "processing" tangible personal property as those terms (and variations of those terms) were used in the following ISUT exemption statutes:

Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining or finishing of other tangible personal property.<sup>54</sup>

Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for his direct use in the direct production of the machinery, equipment, tools, or equipment described in section 2 [Indiana Code section 6-2.5-5-2] or section 3 [Indiana Code section 6-2.5-5-3] of this chapter.<sup>55</sup>

Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for the direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture.<sup>56</sup>

Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for incorporation as a material part of other tangible personal property which the purchaser manufactures, assembles, refines, or processes for sale in his business.<sup>57</sup>

Sales of tangible personal property are exempt from the state gross retail tax if:

- (1) the property constitutes, is incorporated into, or is consumed in the operation of, a device, a facility, or structure predominantly used and acquired for the purpose of complying with any state, local, or federal environmental quality statutes, regulations, or standards; and
- (2) the person acquiring the property is engaged in the business of manufacturing, processing, refining, mining, or agriculture.<sup>58</sup>

In denying every one of the ISUT exemptions to the taxpayer, the tax court first conceded that the Indiana Supreme Court had adopted an expansive definition

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54. IND. CODE § 6-2.5-5-3(b) (1993).

55. *Id.* § 6-2.5-5-4.

56. *Id.* § 6-2.5-5-5.1.

57. *Id.* § 6-2.5-5-6.

58. *Id.* § 6-2.5-5-30.

of the term "production" in order to ensure that all equipment that was used in an integral step of production would qualify for one of the above ISUT exemptions.<sup>59</sup> However, the tax court waived a judicial wand and, despite the absence of any supporting legislative history and despite the fact that every major (perhaps, every) English dictionary in the United States of America categorized the taxpayer as being a "processor" and as being in the business of "processing," read the word "processing" (and all variations thereof) out of the ISUT exemption provisions, so that the word "processing" was no longer on equal footing with the words "production, manufacture, fabrication, assembly, extraction, mining, . . . refining or finishing."<sup>60</sup> At the same time, the tax court also repositioned the word "processing" (and all variations thereof) so as to read the ISUT exemption provisions as exempting persons who were involved in a "production process" or in a "manufacturing process" or in an "assembly process," etc.

The tax court found that the taxpayer's cleaning, repairing, and other activities with respect to the shop rags, shop towels, shop mats, shop uniforms, shop shirts, and other materials, merely returned them to the same character or composition that the materials had been in when they were initially purchased by the taxpayer.<sup>61</sup> Having inserted the requirement in such ISUT exemption provisions—that taxpayers must be, for example, manufacturing or producing property (and not merely processing) in order to come within the scope of such ISUT exemptions provisions—the tax court determined that there was no manufacturing or producing of other property when the taxpayer processed dirty clothes into clean clothes which the taxpayer then rented to other persons.<sup>62</sup>

2. *Miles, Inc. v. Indiana Department of State Revenue*.—Another case involving the Indiana State Gross Retail Tax and the Indiana Use Tax was *Miles, Inc. v. Indiana Department of State Revenue*.<sup>63</sup> In *Miles*, the taxpayer was a manufacturer of various health care products, including, but not limited to, Alka-Selzer products. During the years involved, the taxpayer purchased promotional materials and stored the promotional materials in its Indiana warehouses. Later, the taxpayer shipped approximately ninety-seven percent of these promotional materials to the taxpayer's sales representatives in other states. The taxpayer also purchased bulk quantities of discount coupons for insertion into the boxes of the taxpayer's Alka-Selzer products, each coupon providing a discount on the holder's next purchase of an Alka-Selzer product. The boxes in which the discount coupons were inserted stated that the discount coupon was inside the box.

Eventually, the IDSR claimed that the taxpayer was subject to the Indiana State Gross Retail Tax (the Indiana sales tax) and the Indiana Use Tax

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59. *Mechanics Laundry & Supply, Inc. v. Indiana Dep't of State Revenue*, 650 N.E.2d 1223, 1229 (Ind. T.C. 1995).

60. *Id.* at 1227, 1229-32 (quoting IND. CODE § 6-2.5-5-3(b) (1993)). The tax court cited case law from Indiana and other states to support its interpretation. The tax court also purported to follow legislative intent.

61. *Mechanics Laundry & Supply, Inc.*, 650 N.E.2d at 1229-33.

62. *Id.*

63. 659 N.E.2d 1158 (Ind. T.C. 1995).

(collectively, ISUT) due to the taxpayer's storage of the promotional materials and the discount coupons. Thereafter, the taxpayer petitioned the tax court for a determination of the application of the ISUT. After the taxpayer filed the petition, the IDSR sent the taxpayer three "Letters of Resolution," which letters indicated that the IDSR had resolved the dispute with the taxpayer. However, as the tax court proceedings progressed, the respondent stated that these letters did not bind the IDSR to any particular settlement. Therefore, the tax court had the following three issues to resolve: (1) whether the IDSR released the taxpayer from liability when the IDSR mailed to the taxpayer the three "Letters of Resolution"; (2) whether the ISUT applied to the promotional materials that the taxpayer temporarily retained in its Indiana warehouses, but which (ninety-seven percent of them) were ultimately shipped to the taxpayer's sales representatives in other states; and (3) whether the taxpayer's discount coupons were exempt from the ISUT under either the ISUT incorporation exemption<sup>64</sup> or the ISUT resale exemption.<sup>65</sup>

With respect to the issue of whether the taxpayer's liabilities were mitigated by the three letters of resolution, the tax court observed that the letters were sent to the taxpayer after the taxpayer had filed the petition with the tax court and that Indiana Code section 4-6-2-11 provided that no "claim in favor of the state shall be compromised without the approval of the governor and the attorney-general, and such officers are hereby empowered to make such compromise when, in their judgment, it is in the interest of the state so to do."<sup>66</sup> In interpreting Indiana Code section 4-6-2-11, the tax court stated that, at the times when the IDSR sent such letters to the taxpayer, the IDSR no longer had authority to settle the disputes involved in the case or to cancel the taxpayer's tax liability without the approval of the Governor and Attorney General of the State of Indiana, which approval had not been given.<sup>67</sup>

With respect to the application of the ISUT to the taxpayer's storage of promotional materials, the tax court agreed with the taxpayer that such promotional materials were exempt from the ISUT under the definition of the term "storage."<sup>68</sup> The statutory definition reads as follows: "the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana."<sup>69</sup>

With respect to the application of the ISUT to the taxpayer's storage of the discount coupons, the tax court considered the application of the following ISUT exemption provision: "Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for incorporation as a material part of other tangible personal property which the purchaser manufactures, assembles, refines, or processes for sale in his

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64. IND. CODE § 6-2.5-5-6 (1993).

65. *Id.* § 6-2.5-5-8.

66. *Miles*, 659 N.E.2d at 1162 (quoting IND. CODE § 4-6-2-11 (1993)).

67. *Id.* at 1163.

68. *Id.* at 1164.

69. IND. CODE § 6-2.5-3-1(b) (1993).

business.”<sup>70</sup> The tax court determined that this ISUT exemption provision was not applicable to the taxpayer’s storage of the discount coupons, because, while Alka-Selzer products alleviated acid indigestion, heartburn, and other physical maladies, and while each ingredient in an Alka-Selzer product was essential to the product, the discount coupons were not essential to an Alka-Selzer product.<sup>71</sup> The tax court also determined that the discount coupons neither hindered nor enhanced an Alka-Selzer product’s effectiveness, and in fact, the discount coupons had no impact on the physical effects of an Alka-Selzer product. Rather, the discount coupons’ only effect was to reduce the price of a customer’s next purchase of one of the taxpayer’s Alka-Selzer products, and this effect was far removed from the purpose of an Alka-Selzer product—to alleviate individuals’ physical maladies.<sup>72</sup> Thus, the tax court concluded that the discount coupons were not a material part of an Alka-Selzer product, and therefore, did not qualify for the incorporation exemption in Indiana Code section 6-2.5-5-6.<sup>73</sup>

With respect to the application of the ISUT resale exemption to the discount coupon storage issue, the tax court examined the ISUT resale exemption provision, which reads as follows: “Transactions involving tangible personal property are exempt from the ISUT if the person acquiring the property acquires the property for resale, rental, or leasing in the ordinary course of the person’s business without changing the form of the property.”<sup>74</sup> After such examination, the tax court concluded that the taxpayer’s customers did not pay an itemized amount for the discount coupons and that no bargaining occurred between the taxpayer and the taxpayer’s customers as to the face value of the discount coupons or as to the Alka-Selzer products to which the discount coupons applied.<sup>75</sup> For these reasons, the tax court concluded that the taxpayer did not resell the discount coupons to the taxpayer’s customers within the meaning of Indiana Code section 6-2.5-5-6.<sup>76</sup>

### III. INDIANA TAX COURT DECISIONS REVERSED BY THE INDIANA SUPREME COURT

#### A. *Indiana Controlled Substance Excise Tax (ICSET)*

On July 1, 1992, the Indiana Controlled Substance Excise Tax (ICSET),<sup>77</sup> which levied a tax on the delivery, possession, and manufacture of controlled substances, came into effect. Specifically, the ICSET was imposed on persons who delivered or possessed or manufactured controlled substances in the State of Indiana, in violation of Indiana Code section 35-48-4 or 21 U.S.C. sections 841

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70. *Id.* § 6-2.5-5-6.

71. *Miles*, 659 N.E.2d at 1164.

72. *Id.*

73. *Id.*

74. IND. CODE § 6-2.5-5-8 (1993).

75. *Miles*, 659 N.E.2d at 1165.

76. *Id.*

77. IND. CODE §§ 6-7-3-1 to -17 (1993).

through 852. The ICSET did not apply to a controlled substance that was distributed, manufactured, or dispensed by a person who was registered under Indiana Code section 35-48-3.<sup>78</sup> If the ICSET was not paid when the ICSET was due, the person who was liable for the ICSET would be subject to a penalty of one-hundred percent of the ICSET, in addition to the ICSET.<sup>79</sup> The amount of the ICSET was based upon the weight and class of the controlled substance involved.<sup>80</sup>

After the ICSET became effective, Indianapolis, Indiana and Speedway, Indiana law enforcement officers confiscated marijuana from various individuals and charged these individuals with crimes. Thereafter, these law enforcement authorities shared the information about the alleged illegal activities with the IDSR, and the IDSR made jeopardy assessments of the ICSET against some of the individuals. The IDSR began collection activities against the individuals in order to collect the ICSET, the one-hundred percent penalty, certain fees and other charges, and interest with respect to such amounts.

Several of the individuals subject to the collection activities filed petitions for hearings with the tax court<sup>81</sup> regarding the IDSR's collection activities. In four separate cases, at least one of the petitioners had pled guilty to or had been convicted of a crime. The petitions presented the following four major constitutional issues to the tax court: (1) whether the ICSET violated the privilege against self-incrimination under the Fifth Amendment to the United States Constitution; (2) whether the ICSET violated the taxpayers' equal protection rights under the Fourteenth Amendment to the United States Constitution; (3) whether the ICSET violated the taxpayers' due process rights under the Fourteenth Amendment to the United States Constitution; and (4) whether the ICSET violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

With respect to the self-incrimination issue, the tax court held that the ICSET did not compel a person, who was liable for the ICSET, to reveal any self-incriminating information. The court further concluded that even if the ICSET did have such a requirement, the ICSET granted use immunity and derivative use immunity over all of the confidential information which the IDSR acquired.<sup>82</sup> Therefore, the tax court held that the ICSET did not violate the Fifth Amendment's privilege against self-incrimination.<sup>83</sup>

With respect to the equal protection rights issue, the tax court stated that

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78. *Id.* § 6-7-3-5.

79. *Id.* § 6-7-3-11(a).

80. *Id.* § 6-7-3-6.

81. *Cliff v. Indiana Dep't of State Revenue*, 641 N.E.2d 682 (Ind. T.C. 1994), *rev'd in part*, 660 N.E.2d 310 (Ind. 1995); *Hall v. Indiana Dep't of State Revenue*, 641 N.E.2d 694 (Ind. T.C. 1994), *rev'd in part*, 660 N.E.2d 319 (Ind. 1995); *Bailey v. Indiana Dep't of State Revenue*, 641 N.E.2d 695 (Ind. T.C. 1994), *rev'd*, 660 N.E.2d 322 (Ind. 1995); *Hayse v. Indiana Dep't of State Revenue*, 641 N.E.2d 698 (Ind. T.C. 1994), *rev'd*, 660 N.E.2d 325 (Ind. 1995).

82. *Cliff*, 641 N.E.2d at 686-89.

83. *Id.* at 689.

because an Indiana Code section 35-48-3 registration was a nullity as to activities and controlled substances that were beyond the scope of the ICSET, any person who delivered, possessed, or manufactured a controlled substance in violation of Indiana Code section 35-48-4 or 21 U.S.C. sections 841 through 852, was simply not registered under Indiana Code section 35-48-3 for purposes of the ICSET.<sup>84</sup> Thus, the tax court concluded, the ICSET did not discriminate between Indiana Code section 35-48-3 registrants and non-registrants and, therefore, there was no equal protection violation.<sup>85</sup>

With respect to the due process issue, the tax court stated that the moment a person received a jeopardy assessment from the IDSR, with the IDSR's concomitant payment demand, and before the IDSR issued a tax warrant and began collection efforts, the person assessed had the ability to seek injunctive relief from the tax court. The court noted that the procedure allowed for review in a meaningful time and a meaningful manner before a court of competent jurisdiction, and thus, the procedure satisfied due process.<sup>86</sup>

Finally, with respect to the double jeopardy issue, the tax court stated that the ICSET was a punishment for double jeopardy purposes.<sup>87</sup> Therefore, the IDSR was not entitled to collect the ICSET from any petitioner who had already pled guilty to or been convicted of a Class A misdemeanor.<sup>88</sup> The Indiana Supreme Court reversed the tax court's decision with respect to the double jeopardy issue.<sup>89</sup> The supreme court held that the ICSET was a punishment that attaches at the moment of the assessment of the ICSET.<sup>90</sup> Consequently, in each case, the assessment was the first jeopardy and the conviction or plea bargain was the second jeopardy, the latter being contrary to the double jeopardy clause.

### B. *Indiana Financial Institutions Tax (FIT)*

In *Fort Wayne National Corp. v. Indiana Department of State Revenue*,<sup>91</sup> the taxpayer was a bank which carried on business in the State of Indiana, and the IDSR attempted to impose the Indiana Financial Institution Tax (IFIT)<sup>92</sup> on the taxpayer with respect to certain municipal bond income that the taxpayer received during 1990. The IFIT, which took effect on January 1, 1990, was an 8.5% levy on the remainder of a taxpayer's apportioned income or adjusted gross income

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84. *Id.* at 690.

85. *Id.*

86. *Id.* at 691.

87. *Id.* at 692-93.

88. *Id.* at 693.

89. *Cliff v. Indiana Dep't of State Revenue*, 660 N.E.2d 310 (Ind. 1995); *Hall v. Indiana Dep't of State Revenue*, 660 N.E.2d 319 (Ind. 1995); *Bailey v. Indiana Dep't of State Revenue*, 660 N.E.2d 322 (Ind. 1995); *Hayse v. Indiana Dep't of State Revenue*, 660 N.E.2d 325 (Ind. 1995).

90. *Cliff*, 660 N.E.2d at 313; *Hall*, 660 N.E.2d at 321; *Bailey*, 660 N.E.2d at 324; *Hayse*, 660 N.E.2d at 326.

91. 621 N.E.2d 668 (Ind. T.C. 1993).

92. IND. CODE §§ 6-5.5-2-1 to -8 (1993).

minus the taxpayer's deductible Indiana net operating losses and net capital losses.<sup>93</sup> In the taxpayer's petition to the tax court, the taxpayer alleged that such municipal bond income was exempt from the IFIT because Indiana Code section 6-8-5-1(a), which is part of the Indiana General Exemption Statute (IGES), provided, in part, that:

All bonds issued after March 11, 1959, or notes, warrants, or other evidences or indebtedness issued in the state of Indiana by or in the name of any county, township, city, incorporated town, school corporation, state educational institution or state supported institution of higher learning, or any other political, municipal, public or quasi-public corporation or body, or in the name of any special assessment or taxing district or in the name of any authorized body of any such corporation or district, the interest thereon, the proceeds received by a holder from the sale of such obligations to the extent of the holder's cost of acquisition, or proceeds received upon redemption prior to maturity, or proceeds received at maturity, and the receipt of such interest and proceeds, shall be exempt from taxation in the state of Indiana for all purposes except the state inheritance tax.<sup>94</sup>

Based primarily on an historical analysis of the relevant statutory provisions, the tax court determined that the IDSR improperly included the municipal bond income in computing the taxpayer's IFIT liability.<sup>95</sup> However, the supreme court made a different analysis of the issue and held that such municipal bond income could be used in computing the IFIT. The court noted that the IFIT was not a direct tax on the municipal bonds or on the municipal bond income. Thus, the court concluded that the IFIT was levied on franchises as an excise tax on the exercise of the corporate privilege of operating as a financial institution in the State of Indiana.

*C. Indiana Motor Carrier Fuel Taxes—Motor Carrier Fuel Tax and Motor Carrier Surcharge Tax (Collectively, IMCFT)*

In *Bulkmatic Transport Co. v. Indiana Department of State Revenue*,<sup>96</sup> the taxpayer was a commercial motor carrier, which transported liquid and dry bulk commodities throughout Indiana and surrounding states. In order to transport commodities, the taxpayer used specially designed tractor/trailer vehicles with pneumatic pumping equipment and with a common fuel reservoir for transportation and for the operation of the motor vehicle's auxiliary equipment. With respect to the years involved, the IDSR assessed additional Indiana Motor Carrier Fuel Taxes (collectively, IMCFT)<sup>97</sup> against the taxpayer.

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93. *Id.* § 6-5.5-2-1(a).

94. *Id.* § 6-8-6-1(a).

95. *Fort Wayne Nat'l Corp.*, 621 N.E.2d at 677.

96. 629 N.E.2d 955 (Ind. T.C. 1995), *rev'd*, 648 N.E.2d 1156 (Ind. 1995).

97. IND. CODE §§ 6-6-4.1-1 to -27 (1993 & Supp. 1995).

The IMCFT was imposed on a motor carrier due to the consumption of fuel in the motor carrier's vehicles on Indiana highways. The IMCFT was not imposed on that portion of such fuel which was used for the purpose of operating any equipment that was mounted on a motor vehicle, even though the motor vehicle had a common reservoir of fuel which was used both for locomotion on an Indiana highway and for the operation of such auxiliary equipment.<sup>98</sup> The type of motor vehicle determined the portion of fuel that was excluded from the IMCFT. Thus, the taxpayer petitioned the tax court in order to have the tax court determine whether the taxpayer's motor vehicles received a partial exemption, as tank trucks, under Indiana Administrative Code Title 45, Rule 13-4-7(b) (45 I.A.C. 13-4-7(b)).

As provided in 45 I.A.C. 13-4-7(b), the IMCFT did not apply to twenty-four percent of the motor fuel that was consumed on Indiana highways by a tank truck which had a common fuel reservoir for both locomotion on the highway and for operation of pumping equipment. However, the regulations also provided, in Indiana Administrative Code Title 45, Rule 13-4-7(f) (45 I.A.C. 13-4-7(f)), that the administrator determined which portion of the IMCFT imposed under Indiana Code section 6-6-4.1-4 did not apply to the motor fuel consumed on Indiana highways by fire trucks, street sweepers, and other motor vehicles that had a common fuel reservoir for both locomotion on the highway and for operation of other equipment. This partial exemption applied only after a showing, by the motor carrier, of the proportion of motor fuel that the motor carrier used for the operation of equipment other than for locomotion along the highway, and by a presentation of documents and information as requested by the administrator.

In *Bulkmatic Transport*, the taxpayer claimed that the taxpayer's motor vehicles were within the scope of 45 I.A.C. 13-4-7(b), and therefore, the taxpayer was entitled to a twenty-four percent exemption of fuel purchases. The IDSR, on the other hand, claimed that the taxpayer's motor vehicles were within the scope of 45 I.A.C. 13-4-7(f), and therefore, the taxpayer was entitled to only a fifteen percent exemption of fuel purchases, based on the facts presented to the IDSR and the administrator's decision.

After reviewing the applicable statutory and regulatory provisions, the tax court concluded that the only requirement which had to be met in order for a motor carrier's fuel purchases to qualify for the twenty-four percent exemption was that the motor carrier use "tank trucks." The court concluded that a "tank truck" was a truck which had "a common fuel reservoir for both locomotion on the highway and operation of the pumping equipment."<sup>99</sup> Further, the tax court determined that the ordinary and accepted meaning of the term "tank truck" was broad and that, for purposes of the twenty-four percent exemption, the term included both motor vehicles with single unit configurations and motor vehicles with tractor/trailer combinations.<sup>100</sup> The tax court held that the taxpayer was entitled to the twenty-four percent exemption for fuel purchases because the taxpayer's motor vehicles

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98. *Id.* § 6-6-4.1-4(d) (Supp. 1995).

99. *Bulkmatic Transp. Co.*, 629 N.E.2d at 957-58; IND. ADMIN. CODE tit. 45, r. 13-4-7(b)(2) (1996).

100. *Bulkmatic Transp. Co.*, 629 N.E.2d at 957-58.

qualified as "tank trucks" under 45 I.A.C. 13-4-7(b).<sup>101</sup>

The Indiana Supreme Court determined that such a conclusion presupposed that pneumatic trucks were entitled to the twenty-four percent exemption and that, at some later time, the exemption for fuel purchased for pneumatic trucks was reduced to fifteen percent.<sup>102</sup> The supreme court determined that this presupposition was erroneous because the taxpayer had not shown, nor did the record reveal, any evidence that the IDSR had ever subjected pneumatic trucks to an IMCFT exemption percentage other than fifteen percent.<sup>103</sup> The supreme court also noted that ambiguous exemption statutes were to be strictly construed against a taxpayer.<sup>104</sup> The court concluded that the tax court's failure to give any weight to the IDSR's historically uniform interpretation of 45 I.A.C. 13-4-7 violated the principle of strictly construing exemption statutes against a taxpayer.<sup>105</sup>

*D. Indiana Procedures for Tax Administration—Taxpayer's Failure to Remit Indiana State Gross Retail Tax and Indiana Use Tax (Collectively, ISUT) and to Remit the Indiana Adjusted Gross Income Tax and Indiana County Tax (Collectively, IAGIT), which Taxes were Withheld by the Taxpayer due to the Payment of Wages by the Taxpayer*

In *Safayan v. Indiana Department of State Revenue*,<sup>106</sup> the taxpayer was the president of a corporation that operated a restaurant and did not remit Indiana State Gross Retail Taxes (ISUT) to the IDSR. The taxpayer also failed to remit Indiana Adjusted Gross Income Taxes and County Income Taxes (collectively, IAGIT) to the IDSR when the corporation paid wages to employees of the corporation. When the IDSR learned that such taxes were not remitted, the IDSR began collection proceedings against both the corporation and the taxpayer, claiming that the taxpayer was personally liable for such delinquent taxes. Later, the IDSR claimed that a general partnership, the partners of which included the taxpayer, was the owner and operator of the restaurant.

Based upon the above facts, the tax court determined that there were two general issues which the tax court had to address. First, the tax court had to decide if the corporation was liable for the delinquent sales and withholding taxes of the restaurant. Second, it had to determine if the taxpayer was personally liable for the delinquent sales and withholding taxes of the corporation. In discussing these separate liabilities, the tax court stated that the ISUT was an excise tax that was imposed on retail transactions made in Indiana.<sup>107</sup> It explained that, with some

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101. *Id.* at 958.

102. *Bulkmatic Transp. Co. v. Indiana Dep't of State Revenue*, 648 N.E.2d 1156, 1159 (Ind. 1995).

103. *Id.*

104. *See General Motors Corp. v. Indiana Dep't of State Revenue*, 578 N.E.2d 399, 404 (Ind. T.C. 1991), *aff'd*, 599 N.E.2d 588 (Ind. 1992).

105. *Bulkmatic Transp. Co.*, 648 N.E.2d at 1159.

106. 631 N.E.2d 25 (Ind. T.C. 1994), *rev'd*, 654 N.E.2d 270 (Ind. 1995).

107. IND. CODE § 6-2.5-2-1(a) (1993).

exceptions, the person who acquired property in a retail transaction was liable for the ISUT on the transaction and was required to pay the ISUT to the retail merchant as a separate added amount to the consideration in the transaction. The court went on to explain that the retail merchant was required to collect the ISUT as the agent for the State of Indiana.<sup>108</sup>

With respect to the IAGIT that was withheld by the corporation, the tax court observed that every employer who made payments of wages which were subject to tax under Indiana Code section 6-3, regardless of the place where such payments were made, and who was required under the provisions of the Internal Revenue Code<sup>109</sup> to withhold, collect, and pay over income tax on wages paid by such employer to such employee, was required, at the time of payment of such wages, to deduct and retain therefrom the amount of IAGIT that was prescribed in the withholding instructions which were issued by the IDSR.<sup>110</sup> The tax court further observed that an employer who made payments of any wages was liable to the State of Indiana for the payment of the tax required to be deducted and withheld from such wages, and that such employer must file returns with the IDSR and make payments of such withheld amounts to the IDSR.<sup>111</sup> The tax court then held that the corporation was the owner and operator of the restaurant business and that the corporation had engaged in retail transactions and paid wages. Therefore, the corporation was liable for the ISUT and for the amounts that were required, by Indiana law, to be withheld from the wages that were paid by the corporation.<sup>112</sup>

With respect to the taxpayer's personal liability for the delinquent taxes, the tax court first examined Indiana Code section 6-2.5-9-3 which provided that an individual, who was an employee, officer, or member of a corporate or partnership retail merchant and who had a duty to remit the ISUT to the IDSR, held such taxes in trust for the State of Indiana and was personally liable to the State of Indiana for the payment of such taxes, plus any penalties and interest attributable to such taxes.<sup>113</sup> The tax court also examined Indiana Code section 6-3-4-8(f) which stated that a corporate or partnership employer, and every officer, employee, or member of such employer, who, as such officer, employee, or member, was under a duty to deduct and remit withholding taxes, was personally liable for such taxes, penalties, and interest.

The tax court concluded that the taxpayer's personal liability for the payment of the delinquent sales and withholding taxes plus interest and penalties was based on a two-prong analysis: (1) whether the taxpayer was an officer; and (2) whether she had a duty to remit the taxes to the IDSR.<sup>114</sup> Because the taxpayer was the president of the corporation, the tax court stated that the sole remaining question

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108. *Safayan*, 631 N.E.2d at 27; *see also* IND. CODE § 6-2.5-2-1(b) (1993):

109. I.R.C. §§ 3401-3509 (1994).

110. *Safayan*, 631 N.E.2d at 27-28.

111. *Id.* at 28; *see also* IND. CODE § 6-3-4-8(a) (Supp. 1995).

112. *Safayan*, 631 N.E.2d at 27-28.

113. IND. CODE § 6-2.5-9-3 (1993).

114. *Safayan*, 631 N.E.2d at 28.

