

1998 DEVELOPMENTS IN INDIANA TAXATION

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INTRODUCTION

Both the 110th Indiana General Assembly and the Indiana Tax Court contributed changes and clarifications to all of the major, and many of the minor, Indiana tax laws in 1998. This Article highlights the more interesting developments for the period of October 1, 1997 through September 30, 1998.

I. GENERAL ASSEMBLY LEGISLATION

There were hundreds of 1998 legislative changes that impacted Indiana taxation, many of which had a direct effect on both broad and narrow segments of Indiana residents. Many of the changes were attempts to fine-tune existing laws, but significant policy changes surfaced in the following major areas: state offices and administration; state and local income taxes; sales and use taxes; and property taxes.

A. Tax Administration

The general assembly enacted one bill containing four provisions that have an impact on tax administration.¹ The first provision establishes a registration center² that is charged with servicing the registration of commercial motor vehicles by the owners.³ The motor carrier services division of the Indiana Department of State Revenue ("IDSR") is to supervise the registration center.⁴ The new law also establishes the motor carrier regulation fund to pay for the development and operation of the registration center.⁵ The funds are not to be used for gasoline tax or special fuel tax administration, as had been done prior to the new law. In addition, the new law provides for an extension of time to file a claim for a refund if a taxpayer's federal income tax liability is modified by the Internal Revenue Service ("IRS") and if the modification results in a reduction of the tax legally due.⁶ Normally, a claim for a refund must be filed within three years after the later of the due date of the return or the date of payment.⁷ The

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1. H.R. 1157, 110th Leg., 2d Reg. Sess. §§ 16, 17, 19, 26 (Ind. 1998).

2. See IND. CODE § 6-8.1-4-4(a) (1998) (eff. Mar. 13, 1998).

3. See *id.*

4. See *id.* § 6-8.1-4-4(b).

5. *Id.* § 8-2.1-23-1.

6. *Id.* § 6-8.1-9-1(f) (eff. Jan. 1, 1999).

7. See *id.* § 6-8.1-9-1(a).

new law extends the amount of time to file a claim for a refund to the later of the normal three-year period or six months after the taxpayer is notified of the modification by the IRS.⁸ The final change made with respect to tax administration allows Indiana taxpayers to elect to round amounts reported on a return to the nearest whole dollar.⁹ If the amount is greater than or equal to fifty cents, then the amount may be rounded up to the nearest whole dollar;¹⁰ and, if the amount is less than fifty cents, then the amount may be rounded down to the nearest whole dollar.¹¹ By the literal terms of the statute, a taxpayer is allowed to pick and choose which items or amounts the taxpayer wants to round, which could nominally decrease the amount of a taxpayer's liability. However, this provision is in conformity with federal filing provisions and is expected to have a minimal impact on collections.

B. Gross Income Taxation

In the area of income taxation, the general assembly enacted one bill that contained four key provisions.¹² The first provision is a conforming amendment that changes a reference to the taxation of a small business' gross income to the federal law, which defines "passive investment income."¹³ The second provision changes the dates for quarterly payment of gross income tax by withholding agents.¹⁴ Had the law not been changed, a withholding agent would have been required to make only yearly payments. The general assembly also changed all references in the Indiana Code to the Internal Revenue Code ("IRC") as the IRC was in effect on January 1, 1998.¹⁵ The final change in the area of income taxation requires Indiana residents to notify the IDSR of any modifications to the taxpayer's federal return or federal tax liability.¹⁶ As the Indiana law was originally written, only nonresidents were required to notify the IDSR of such modifications.

C. Adjusted Gross Income Taxation

In the area of adjusted gross income tax, the general assembly enacted one bill that contained two key provisions.¹⁷ The first provision specifies that the capital gain portion, rather than the ordinary income portion (as under the old law), of certain lump sum distributions are added back to adjusted gross income

8. *Id.* §§ 6-8.1-9-1(f)(1), (2) (eff. Jan. 1, 1999).

9. *See id.* § 6-8.1-6-4.5 (retroactive to Jan. 1, 1998).

10. *See id.* § 6-8.1-6-4.5(1).

11. *See id.* § 6-8.1-6-4.5(2).

12. H.R. 1157, 110th Leg., 2d Reg. Sess. §§ 1, 2, 4, 5 (Ind. 1998).

13. IND. CODE § 6-2.1-3-24.5(c) (1998) (retroactive to Jan. 1, 1998).

14. *Id.* § 6-2.1-6-3.1 (retroactive to Jan. 1, 1998).

15. *See id.* § 6-3-1-11 (retroactive to Jan. 1, 1998).

16. *See id.* § 6-3-4-6 (retroactive to Jan. 1, 1998).

17. H.R. 1157, 110th Leg., 2d Reg. Sess. §§ 3, 13 (Ind. 1998).

for state tax purposes.¹⁸ For purposes of the financial institutions tax, the second provision adds a deduction from income concerning bad debt reserves for building and loan associations, mutual savings banks, and certain cooperative banks to correspond to federal tax law.¹⁹ Federal tax law changed the way in which thrifts calculate their allowable bad debt deductions for federal tax purposes, and Indiana merely conformed its laws to correspond to the federal change. The new deduction will accommodate accounting method changes required under the IRC for federal and state saving institutions. Without the change, Indiana would realize a windfall for taxing the recapture income from the savings institutions.

D. Sales and Use Taxation

In the area of sales and use taxation, the general assembly enacted into law one bill that contained three key provisions.²⁰ The first provision provides that hard cider is an alcoholic beverage if the cider has at least .5%, but not more than 7%, of alcohol by volume.²¹ "Hard cider" is defined as a wine, "except for alcoholic beverage tax purposes."²² The new law creates a hard cider excise tax at a rate of \$0.115 per gallon upon the manufacture, sale, or gift of hard cider within Indiana.²³ As a result of the new law, the excise tax with respect to hard cider is now the same as the excise tax with respect to beer. The wine excise tax rate is \$0.47 per gallon. Thus, the new law reduces the excise tax rate on hard cider by \$0.355 per gallon.

E. Tax Credits

In the area of tax credits, the general assembly enacted one bill that allows for two tax credits.²⁴ The first credit is titled "Military Base Recovery Tax Credit." The new law establishes a state tax credit for rehabilitation of buildings that are located on military base facilities designated by the Indiana Enterprise Zone Board if a qualified investment is made.²⁵ The credit is nonrefundable but may be carried forward to future years and applied against future state tax liability.²⁶ The credit is based on the amount of qualified investment for the rehabilitation of a building. For buildings between twenty and thirty years old, the credit is equal to 15% of the qualified investment,²⁷ for buildings between

18. IND. CODE § 6-3-1-3.5(a)(7) (1998) (retroactive to Jan. 1, 1998).

19. *Id.* § 6-5.5-1-2(a)(2)(D) (retroactive to Jan. 1, 1998).

20. H.R. 1157, 110th Leg., 2d Reg. Sess. §§ 21, 22, 24 (Ind. 1998).

21. IND. CODE § 7.1-1-3-9.5(2) (1998) (eff. July 1, 1998).

22. *Id.* § 7.1-1-3-49 (eff. July 1, 1998).

23. *Id.* § 7.1-4-4.5-1 (eff. July 1, 1998).

24. H.R. 1319, 110th Leg., 2d Reg. Sess. §§ 2, 3, 14, 16, 20 (Ind. 1998).

25. IND. CODE § 6-3.1-11.5-18(a) (1998) (retroactive to Jan. 1, 1998).

26. *See id.* §§ 6-3.1-11.5-19(a), (b).

27. *See id.* § 6-3.1-11.5-1(1).

thirty and forty years old, the credit is equal to 20% of the qualified investment;²⁸ and for buildings at least forty years old, the credit is equal to 25% of the qualified investment.²⁹ Any part of the credit may be assigned to a lessee of the recovery site.³⁰ Additionally, a taxpayer who substantially reduces or ceases operations in another area of Indiana in order to relocate within the military base recovery site may not claim the credit.³¹ This limitation prevents a taxpayer from claiming the credit if the taxpayer was motivated to relocate only to take advantage of the credit. In essence, the credit was established to enhance economic development and not to provide a credit to taxpayers who merely relocate their business operations, which does little to benefit the economy.

The second tax credit is titled the "Community Revitalization Enhancement District Tax Credit." The new law grants a taxpayer a credit against both Indiana and local tax liability if a qualified investment is made.³² The amount of the credit equals 25% of the qualified investment.³³ The tax credit is available for a qualified investment made for the redevelopment or rehabilitation of property that is located within a community revitalization enhancement district in a county having a population of individuals between 108,950 and 112,000, e.g., Monroe County or a municipality in Monroe County.³⁴ To be designated a "district," Monroe County is required to submit an application to the Advisory Commission on Industrial Development.³⁵ For the advisory commission to designate an area as a district, the commission must find all of the following: the area contains a building or buildings with at least one million square feet that is vacant or about to become vacant due to relocation of an employer;³⁶ at least 1000 fewer persons are employed currently as compared to the prior ten-year period;³⁷ there are significant obstacles to redeveloping the area, including obsolete buildings and infrastructure, utility problems, accessibility problems, topographical obstacles or environmental contamination;³⁸ the unit has expended, appropriated, pooled, set aside, or pledged at least \$100,000 for purposes of addressing the redevelopment obstacles;³⁹ and the area is located in a county having a population of individuals between 108,950 and 112,000.⁴⁰ Additionally, an area can only be designated a "district" for a period of up to fifteen years.⁴¹ The law

28. *See id.* § 6-3.1-11.5-1(2).

29. *See id.* § 6-3.1-11.5-1(3).

30. *See id.* § 6-3.1-11.5-18(c).

31. *See id.* § 6-3.1-11.5-23.

32. *Id.* § 6-3.1-19-3(a) (eff. Jan. 1, 1999).

33. *See id.* § 6-3.1-19-3(b).

34. *See id.* § 36-7-13-12(b)(5) (eff. July 1, 1998).

35. *See id.* § 36-7-13-10(a).

36. *See id.* §§ 36-7-13-12(b)(1)(A), (B).

37. *See id.* § 36-7-13-12(b)(2).

38. *See id.* §§ 36-7-13-12(b)(3)(A) to (F).

39. *See id.* § 36-7-13-12(b)(4).

40. *See id.* § 36-7-13-12(b)(5).

41. *See id.* § 36-7-13-12(c).

also provides that a "unit," the person or persons redeveloping the area, may issue bonds to finance the cost of addressing redevelopment obstacles or problems.⁴² Thus, it need not be the unit's own money that the unit is pledging to cure the defects with the redevelopment area. Like the military base recovery tax credit, the revitalization credit is a nonrefundable credit that can be carried forward against any future state tax liability,⁴³ and any part of the credit may be assigned to a lessee of the redeveloped property.⁴⁴ In addition, a taxpayer who substantially reduces or ceases operations in another area of the state in order to relocate within the district may not claim the credit.⁴⁵ Notwithstanding the limitation on the availability of the credit, a taxpayer may claim the credit if the taxpayer had existing operations within the district and the relocation represents an expansion of the taxpayer's operations within the district.⁴⁶

F. Local Option Taxes

With respect to local option taxes, the general assembly enacted a law that contains three key provisions.⁴⁷ The first of these provisions permits a county having a population of individuals between 37,000 and 37,800,⁴⁸ e.g., Jackson County, to impose a County Adjusted Gross Income Tax ("CAGIT") at a rate of 1.1% on adjusted gross income for not more than four years.⁴⁹ After the county imposes the CAGIT for four years, the rate must be reduced to 1.0%.⁵⁰ The funds generated by the additional 0.1% must be used to pay the costs of operating and maintaining a jail and juvenile detention center opened in 1998.⁵¹

The new law also allows a county having a population between 12,600 and 13,000,⁵² e.g., Pulaski County, to impose a CAGIT at a rate of 1.3%.⁵³ The gross revenues from the additional 0.3% must be used to pay the costs of operating and maintaining a jail and justice center.⁵⁴ However, with respect to this credit, there is no requirement that the jail and justice center be opened after a specific date in order to use the funds. The new law permits a CAGIT rate of 1.3% for four years, and after the four-year period, requires the county to reduce its CAGIT rate to 1.0%.⁵⁵ The new law also provides that the county council may decrease the

42. *Id.* § 36-7-13-16(a).

43. *See id.* § 6-3.1-19-4.

44. *See id.* § 6-3.1-19-3(c).

45. *See id.* § 6-3.1-19-5.

46. *See id.* §§ 6-3.1-19-5(1), (2).

47. H.R. 1157, 110th Leg., 2d Reg. Sess. §§ 7, 8, 11 (Ind. 1998).

48. IND. CODE § 6-3.5-1.1-2.5(a) (1998) (eff. July 1, 1998).

49. *Id.* § 6-3.5-1.1-2.5(c).

50. *See id.*

51. *See id.* § 6-3.5-1.1-2.5(d)(2).

52. *Id.* § 6-3.5-1.1-3.5(a) (eff. Mar. 13, 1998).

53. *Id.* § 6-3.5-1.1-3.5(c).

54. *See id.* § 6-3.5-1.1-3.5(d)(2).

55. *Id.* § 6-3.5-1.1-3.5(c).

tax rate or rescind the tax in the same manner as other reductions or rescissions under the county's CAGIT law.⁵⁶

The final provision in the new law relating to local option taxes increases limits on the CAGIT plus County Economic Development Income Tax ("CEDIT") rates. Normally, a county's CAGIT plus CEDIT rate may not exceed 1.25%.⁵⁷ However, the new law increases the limit to 1.35% for the 37,000 to 37,800 population counties⁵⁸ and to 1.55% for the 12,600 to 13,000 population counties.⁵⁹

G. Property Taxation

In the area of property tax, the general assembly enacted three bills.⁶⁰ The first bill⁶¹ provides that a county having a population of between 400,000 and 700,000, e.g., Lake County, may remove real property from the list of property eligible for tax sale if the taxpayer and the county treasurer agree to a mutually satisfactory arrangement for the payment of the delinquent property taxes in full.⁶² The property may be removed from the list if the agreement between the county treasurer and the taxpayer is in writing, signed by the taxpayer, and provides for full payment of delinquent taxes within one year.⁶³ Prior to this legislation, property could not be removed from the tax sale list until all past due tax and other costs were paid in full. However, under the new law, if the taxpayer misses a payment, the county auditor is required to place the property back on the list of property eligible for sale at a tax sale.⁶⁴

The new law also allows cities having a population between 110,000 and 120,000,⁶⁵ 33,850 and 35,000,⁶⁶ and 75,000 and 90,000,⁶⁷ e.g., Gary, Hammond, and East Chicago, to offer property within their jurisdiction for sale at an expedited second tax sale if the property fails to receive the minimum amount in a county tax sale and the county auditor and city mayor agree to such an expedited tax sale.⁶⁸ Additionally, the new law allows cities such as Gary, Hammond, and East Chicago to acquire a lien and a tax sale certificate if the

56. *Id.* §§ 6-3.5-1.1-2.5(c) (eff. July 1, 1998), 6-3.5-1.1-3.5(c) (eff. Mar. 13, 1998).

57. *See id.* § 6-3.5-7-5(c).

58. *Id.* § 6-3.5-7-5(h).

59. *Id.* § 6-3.5-7-5(i).

60. H.R. 1002, 110th Leg., 2d Reg. Sess. §§ 1-6 (Ind. 1998); H.R. 1272, 110th Leg., 2d Reg. Sess. §§ 1, 3, 4, 6, 7, 10, 12, 13 (Ind. 1998); S. 327, 110th Leg., 2d Reg. Sess. §§ 1, 2 (Ind. 1998).

61. H.R. 1272, 110th Leg., 2d Reg. Sess. (Ind. 1998).

62. IND. CODE § 6-1.1-24-1.2(c) (1998) (eff. July 1, 1998).

63. *See id.* § 6-1.1-24-1.2(d).

64. *Id.* § 6-1.1-24-1.2(e).

65. *Id.* § 6-1.1-24-5.6(a)(1) (eff. July 1, 1998) (expires June 30, 2001).

66. *Id.* § 6-1.1-24-5.6(a)(2).

67. *Id.* § 6-1.1-24-5.6(a)(3).

68. *Id.* § 6-1.1-24-5.6(c).

property is not sold at the city's tax sale.⁶⁹ Under the new law, if the property is sold to a purchaser or acquired by the city, then the deed would be transferred in 120 days, if the property is not redeemed by then.⁷⁰ However, the county auditor is not required to issue a deed to the city if it is determined that the property contains hazardous waste.⁷¹ Prior to the new law, the usual redemption period was one year. The shortened redemption period is intended to encourage taxpayers to pay more expeditiously. The new law grants the county the power to enter the property in order to conduct environmental investigations.⁷² The proceeds from the sale of any property by the city are: First, to be applied against the costs of the sale;⁷³ second, to the payment of such taxes removed;⁷⁴ and third, any surplus is to be deposited in the city's general fund.⁷⁵ The fiscal body, e.g., of Gary, Hammond, and East Chicago, must approve sales of property valued at \$10,000 or greater, leases with annual payments of at least \$5000, transfers of gift property back to the grantors, and transfers to a neighborhood development corporation.⁷⁶

In a noncode provision, the new law allows the cities, e.g., of Gary, Hammond, and East Chicago, to conduct an additional tax sale of properties within the city's jurisdiction on which at least six property tax installments are delinquent.⁷⁷ All of these provisions are expected to help the cities, e.g., Gary, Hammond, and East Chicago and Lake County, to quickly sell or otherwise dispose of real property on which there is a property tax delinquency. This provision is intended to help get taxable property back onto the tax rolls sooner and should reduce long-term collection expenses and increase the cash flow to the cities and county. The fact that the cities can take possession of the property may also encourage some taxpayers to pay in a more timely fashion.

The second bill⁷⁸ contained two key provisions. The first provision requires a county auditor to include the name of the owner of a tract of real property eligible for sale at a tax sale in the notice of the tax sale.⁷⁹ If the property is owned by more than one individual, then the name of at least one owner must be included in the notice of the tax sale.⁸⁰ Prior to this legislation, when parcels of real property went to tax sale, the county auditor had to prepare a notice that included various information such as a list of parcels for sale, the minimum sale

69. *Id.* §§ 6-1.1-24-6.6(b), (c) (eff. July 1, 1998) (expires June 30, 2001).

70. *Id.* §§ 6-1.1-25-4.2(b), (c) (eff. July 1, 1998) (expires Sept. 30, 2001).

71. *See id.* § 6-1.1-25-4(e) (eff. July 1, 1998).

72. *See id.*

73. *See id.* § 6-1.1-25-9.5(b)(1) (eff. July 1, 1998) (expires Dec. 31, 2001).

74. *See id.* § 6-1.1-25-9.5(b)(2).

75. *See id.* § 6-1.1-25-9.5(b)(3).

76. *See id.* §§ 36-1-11-3.2(b)(1) to (3) (eff. July 1, 1998).

77. H.R. 1272, 110th Leg., 2d Reg. Sess. § 13 (Ind. 1998) (eff. Mar. 13, 1998) (expires Jan. 1, 2001).

78. S. 327, 110th Leg., 2d Reg. Sess. (Ind. 1998).

79. IND. CODE § 6-1.1-24-2(a)(6)(A) (1998) (eff. July 1, 1998).

80. *See id.* § 6-1.1-24-2(a)(6)(B).

price, and information regarding redeeming the property, but not the name of the owner of the property.⁸¹ Most counties already include the property owner's name in the tax sale notice, but for those counties that do not, the county is now required to include such information in the notice. The second provision requires the county auditor to mail a copy of a tax sale notice by certified mail, return receipt requested, to a mortgagee who requests by certified mail a copy of the notice.⁸² Prior to the new law, the county auditor was required to mail a copy of a tax sale notice to a requesting mortgagee by certified mail. Now, the county auditor must mail such notice by certified mail, return receipt requested.⁸³

The third new law⁸⁴ enacted by the general assembly relating to property taxes has five important provisions. The first provision requires a county to notify a taxpayer, by mail, at the taxpayer's last known address, that the taxpayer overpaid taxes before the excess tax payment may be transferred to the county general fund.⁸⁵ Prior to this new law, if a taxpayer overpaid a local tax or special assessment, the taxpayer could file a claim for refund within three years after November tenth of the year during which the payment was made.⁸⁶ The new law requires a county treasurer to give written notice to taxpayers who made overpayments of more than \$5.00.⁸⁷ The notice must include all of the following: a statement that the taxpayer may be entitled to a refund because of an overpayment;⁸⁸ the amount of the refund;⁸⁹ instructions for claiming the refund;⁹⁰ the date on or before which the refund must be claimed;⁹¹ and, a statement that the refund will be reduced by any amount which is applied to property taxes which are delinquent.⁹² The notice is intended to increase the likelihood that a taxpayer will file a claim for refund for an overpayment of taxes.

The second provision provides that, before an owner records a transfer of ownership for a property interest that is created from a larger existing parcel or a combination of smaller existing parcels, the owner is required to pay the property taxes for which the due date has passed before the county auditor may transfer the property on the last assessment list or apportion the assessed value of the property.⁹³ Prior to this provision, before an owner could record a transfer of ownership for such a parcel of property, the owner was required to pay all

81. *See id.* § 6-1.1-24-2(a).

82. *Id.* § 6-1.1-24-3(b) (eff. July 1, 1998).

83. *See id.*

84. H.R. 1002, 110th Leg., 2d Reg. Sess. (Ind. 1998).

85. IND. CODE § 6-1.1-26-6(d) (1998) (eff. July 1, 1998).

86. *See id.* § 6-1.1-26-6(c).

87. *Id.* § 6-1.1-26-6(d) (eff. July 1, 1998).

88. *See id.* § 6-1.1-26-6(d)(1).

89. *See id.* § 6-1.1-26-6(d)(2).

90. *See id.* § 6-1.1-26-6(d)(3).

91. *See id.* § 6-1.1-26-6(d)(4).

92. *See id.* § 6-1.1-26-6(d)(5).

93. *Id.* § 6-1.1-5-5.5(d) (eff. July 1, 1998).

property taxes “due and owing.”⁹⁴ The new law relaxes this requirement and only requires an owner to pay all property taxes that are “due” before such property can be transferred.⁹⁵

The third provision requires an assessing official to consolidate existing contiguous parcels of real property into a single parcel if the assessing official has knowledge that an improvement to the real property is located on or otherwise significantly affects the parcels.⁹⁶ The new law added the requirement that an assessing official “have knowledge” of such an improvement before the assessing official is required to consolidate the contiguous parcels.⁹⁷

The fourth provision provides that, in addition to serving a written demand for payment of delinquent taxes by certified or registered mail or in-person service by the treasurer or his deputy, a county treasurer may also serve a written demand “by proof of [a] certificate of mailing.”⁹⁸ With respect to this change, the new law increases the fee a county treasurer can charge from \$5.00 to \$8.00 if registered or certified mail is used in making a demand for payment of delinquent taxes.⁹⁹

The final provision relating to property taxes provides that property tax refunds are to be paid after the June or December settlement and apportionment of property taxes, or after both the June and December settlement and apportionment of property taxes.¹⁰⁰ Prior to this provision, if a refund was made to a taxpayer, the county auditor deducted the refund from the December distribution of taxes.¹⁰¹ This provision grants the county auditor an optional and quicker reimbursement method of distributing tax refunds.

H. Innkeeper and Other Local Taxes

In the area of innkeeper taxes and other local taxes, the general assembly enacted three bills that contained three significant provisions.¹⁰² The first of these provides that a county fiscal body adopting an ordinance to impose or rescind the county innkeeper’s tax or to change the tax rate must send a certified copy of the ordinance to the IDSR.¹⁰³ Additionally, the new law provides that the county fiscal body adopting the ordinance must specify the effective date of the ordinance that must take effect on the first day of a month at least thirty days

94. *Id.* § 6-1.1-5-5.5(d).

95. *Id.* § 6-1.1-5-5.5(d) (eff. July 1, 1998).

96. *Id.* § 6-1.1-5-16 (eff. July 1, 1998).

97. *Id.*

98. *Id.* § 6-1.1-23-1(a)(3) (eff. July 1, 1998).

99. *Id.* § 6-1.1-23-7(a)(1)(A) (eff. July 1, 1998).

100. *Id.* § 6-1.1-26-5(b) (eff. July 1, 1998).

101. *See id.* § 6-1.1-26-5(b).

102. H.R. 1157, 110th Leg., 2d Reg. Sess. § 20 (Ind. 1998); H.R. 1002, 110th Leg., 2d Reg. Sess. § 7 (Ind. 1998); H.R. 1097, 110th Leg., 2d Reg. Sess. § 6 (Ind. 1998).

103. IND. CODE § 6-9-29-1.5(b) (1998) (eff. July 1, 1998).

after adoption.¹⁰⁴

The second key provision expands the use of the Allen County food and beverage tax to include new expansions of the county's coliseum. Prior to the new law, Allen County could only use money from the coliseum expansion fund as the coliseum existed on the date that the ordinance establishing the food and beverage tax was adopted. The new law allows for acquisitions, improvement, remodeling, or expansion of the coliseum as the coliseum existed before January 1, 1998.¹⁰⁵ The new law also clarifies that money set aside for debt reserve prior to July 1, 1998 may not be used for acquisition, improvement, remodeling, or expansion of the coliseum.¹⁰⁶ The third provision requires the city-county council of a consolidated first class city, e.g., Indianapolis, to offer tickets for sale to the public by a "box office at the facility" or through "an authorized agent of the facility" before the council can impose a county admissions tax on the sale of tickets to an event.¹⁰⁷

I. Tax On Financial Institutions

In the area of tax on financial institutions, the general assembly enacted one bill containing one key provision.¹⁰⁸ The new law changes a reference to the provisions under which trust companies are established.¹⁰⁹ Because of the change, a regulated financial corporation in Indiana includes a trust company that is formed under Indiana Code section 28-12.¹¹⁰

II. INDIANA TAX COURT OPINIONS AND DECISIONS

A. Indiana Property Taxes—Real Property Taxes

1. *Town of St. John v. State Board of Tax Commissioners* ("St. John III").¹¹¹—This case originated when the plaintiffs filed suit and the tax court held that Indiana's property tax assessment system violated the Indiana Constitution.¹¹² However, the Indiana Supreme Court reversed the tax court decision and remanded the case for a determination of whether Indiana's assessment "system results in a uniform and equal rate of assessment and a just

104. *Id.* § 6-9-29-1.5(a).

105. *Id.* § 6-9-23-8(a)(1)(B) (eff. July 1, 1998).

106. *Id.* § 6-9-23-8(c).

107. *Id.* §§ 6-9-13-1(a)(2)(A), (B) (eff. Mar. 11, 1998).

108. H.R. 1157, 110th Leg., 2d Reg. Sess. § 14 (Ind. 1998).

109. IND. CODE § 6-5.5-1-17(c)(8) (1998) (retroactive to Jan. 1, 1998).

110. *See id.*

111. 690 N.E.2d 370 (Ind. Tax Ct. 1997) [hereinafter *St. John III*], *supplemented*, 691 N.E.2d 1387 (Ind. Tax Ct. 1998) [hereinafter *St. John IV*], *clarified*, 698 N.E.2d 399 (Ind. Tax Ct. 1998) [hereinafter *St. John V*], *aff'd in part, rev'd in part*, 702 N.E.2d 1034 (Ind. 1998) [hereinafter *St. John VI*].

112. *St. John III*, 690 N.E.2d at 372 (citing *Town of St. John v. State Bd. of Tax Comm'rs*, 665 N.E.2d 965 (Ind. Tax Ct. 1996) [hereinafter *St. John I*]).

valuation based on property wealth.”¹¹³ The tax court determined the following issues on remand: (1) whether Indiana’s property tax assessment system violated article X, section 1 of the Indiana Constitution; (2) whether the system violated article I, section 12 of the Indiana Constitution; (3) whether the system violated the federal Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, procedurally or substantively; and, (4) whether the system violated the federal Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.¹¹⁴ The tax court discussed each issue separately.

Indiana imposes a tax on the value of real property and the value of real property is defined by statute as the “True Tax Value.”¹¹⁵ “[T]rue tax value does not mean fair market value . . . [but rather] the value determined under the rules of the state board of tax commissioners.”¹¹⁶ The Indiana State Board of Tax Commissioners (“ISBTC”) is required by statute to assess property according to the laws of Indiana.¹¹⁷ In an attempt to execute its statutory duties, the ISBTC has promulgated regulations for determining the true tax value of real property.¹¹⁸ Under the regulations, the value of non-agricultural land is determined by a county land valuation commission.¹¹⁹ The county commission determines the value of land based on sales data for the county and forwards such values to the ISBTC for approval.¹²⁰ The ISBTC then either approves or modifies such values.¹²¹ Thus, the ISBTC has final say as to the value of the property.¹²² The final value of the property is reduced to a County Land Valuation Order. Therefore, the value of property as determined by the county approximates the land’s fair market value because sales data is used as the basis for the county’s determination of value.¹²³

A county agricultural land advisory committee determines the true tax value of agricultural land¹²⁴ by starting at a base rate of \$495 per acre and adjusting that rate to reflect the soil’s crop production capacity.¹²⁵ Thus, the value of agricultural land approximates the land’s earning capacity.¹²⁶

113. *Id.* (citing *Town of St. John v. State Bd. of Tax Comm’rs*, 675 N.E.2d 318 (Ind. 1996) [hereinafter *St. John II*]).

114. *Id.*

115. *See id.* at 372-73 (citing IND. CODE § 6-1.1-31-6(b)(7) (1998)).

116. *Id.* at 373 (quoting IND. CODE § 6-1.1-31-6(c) (1998)).

117. *See id.* (citing IND. CODE § 6-1.1-35-1 (1998)).

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.*

122. *See id.* at 373 n.2.

123. *See id.* at 373.

124. *See id.* (citing IND. CODE § 6-1.1-4-13) (1998)).

125. *See id.* (citing IND. ADMIN. CODE tit. 50, rs. 2.2-5-6(5), 2.2-5-7 (1996)).

126. *See id.* Though it appears that agricultural land is valued entirely based on the land’s earning capacity, this is not true. It depends upon what factors were taken into account in determining the base rate of \$495 per acre.

By regulation, the true tax value of an improvement is the cost of reproduction minus physical or obsolescence depreciation.¹²⁷ Though “[r]eproduction cost is defined as the ‘whole-dollar cost of reproducing the item[,]’ [t]he ‘reproduction cost’ of an improvement . . . is not the *actual* cost of reproducing the item. Rather, it is the ‘reproduction cost’ as specified in the [ISBTC’s] cost schedules.”¹²⁸ The cost schedules currently in effect represent 1985 reproduction costs, reduced by 15% for all items contained in the schedule.¹²⁹ The cost schedules are classified into different types of improvements and assigned a model. The model has many amenities that are assumed to exist in the property being taxed. If an amenity does not exist, as presumed in the model, or if additional amenities are present, then the value of the improvement is adjusted upward or downward to reflect the lack of similarity to the model.¹³⁰ The schedules are the only information that can be used in arriving at the improvement’s true tax value.¹³¹ The true tax value of property can only be determined by reference to ISBTC regulations; external evidence is disregarded by the ISBTC.¹³² “As a result, evidence of an improvement’s actual reproduction cost or evidence of the actual value of land is irrelevant under the True Tax Value system.”¹³³

The court next examined the claim that Indiana’s property tax assessment system violated Indiana Constitution article X, section 1. The court attempted to determine the intent of the framers in requiring the legislature “to provide for a ‘uniform and equal rate of property assessment and taxation,’ and to secure a ‘just valuation for taxation of all property, both real and personal.’”¹³⁴ In doing this, the court looked to history: “Delegate Read stated that he knew of farms ‘which were of equal value assessed at a difference of fifty perc., and farms of less value than others at a much higher rate.’”¹³⁵ After examining this comment and several others, the court reached the conclusion that the delegates “evaluated [the] fairness [of article X, section 1], not by any rules of assessment, but rather based on a real world understanding about what the particular property was worth.”¹³⁶ According to the court, it was apparent that the framers intended property assessments to be made based on a property’s actual worth, as determined by reference to “real world values.”¹³⁷

Using the perceived intent of the framers, the court examined whether the

127. See *id.* (citing IND. ADMIN. CODE tit. 50, rs. 2.2-2-1(c), 2.2-7-9 (1996)).

128. *Id.* (quoting IND. ADMIN. CODE tit. 50, r. 2.2-7-7.1(f)(8) (1996)).

129. See *id.* at 373 n.5.

130. See *id.* at 374.

131. See *id.*

132. See *id.*

133. *Id.*

134. *Id.* (quoting IND. CONST. art. X, § 1(a)).

135. *Id.* at 375 (quoting 1 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of State of Indiana 946 (1850)).

136. *Id.*

137. *Id.*

current tax system resulted in uniformity and equality. The ISBTC argued that the system “is an effort to provide uniformity and equality”¹³⁸ However, the court noted that the tax commissioners testified at trial that “they [were] unaware of any way under the True Tax Value system to measure whether there is equality among the various classes of property.”¹³⁹ Uniformity and equality “requires that the property tax system be based on objectively verifiable data [to ensure] that taxpayers have a means to evaluate the taxing authorities’ assessment of their property.”¹⁴⁰ After finding that uniformity and equality requires resort to objectively verifiable data, the court examined whether the use of cost schedules satisfied this requirement. As previously stated, “the cost schedules were generated by using the 1985 prices of items found in buildings reduced [15%] across the board.”¹⁴¹ The ISBTC regulations were the only means by which a complaining taxpayer could challenge the cost schedules. “Because the present system does not allow comparison of assessments to objective data, it cannot satisfy the constitutional requirements of uniformity and equality in property assessment.”¹⁴² Without use of objectively verifiable data, a taxpayer cannot challenge an assessment and a court has no way to review such an assessment for uniformity and equality.¹⁴³ Because the current true tax value system does not provide for uniformity and equality, as measured by reference to objectively verifiable data, the court held that the system was in violation of article X, section 1 of the Indiana Constitution.¹⁴⁴

The court next addressed whether Indiana’s property tax system violated Due Course of Law, article I, section 12 of the Indiana Constitution. The petitioners argued that Indiana’s system lacked due process, basing their argument on the fact that in Indiana, “every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.”¹⁴⁵ The ISBTC countered that the “regulations provide all the process that is constitutionally due.”¹⁴⁶ To satisfy due process, the ISBTC must use ascertainable standards in rendering a decision.¹⁴⁷ Not only must the regulations provide a taxpayer with the right to challenge an assessment, “they must also provide an opportunity to be heard ‘in a meaningful manner.’”¹⁴⁸ The court examined some examples¹⁴⁹ and held that

138. *Id.* at 376.

139. *Id.*

140. *Id.*

141. *Id.* at 377.

142. *Id.* at 378.

143. *See id.*

144. *Id.* at 382.

145. *Id.* at 383 (quoting IND. CONST. art. I, § 12).

146. *Id.*

147. *See id.* at 383-84 (quoting *Harrington v. State Bd. of Tax Comm’rs*, 525 N.E.2d 360, 361 (Ind. Tax Ct. 1988) (citations omitted)).

148. *Id.* at 384 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

149. *Id.* at 385 (noting that in determining “neighborhood desirability,” no objective standards were used); *id.* at 385-86 (noting that taxpayers have no meaningful opportunity to

“[t]he [t]rue [t]ax [v]alue system violates due process because it deprives taxpayers of their right to introduce real world, objective evidence in order to challenge assessments.”¹⁵⁰

The court next addressed petitioners claim that the true tax value system violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, procedurally and substantively. As to procedural due process, the petitioners argued that taxpayers are not provided a meaningful opportunity to respond because real world information is irrelevant according to ISBTC regulations. Therefore, procedural due process was violated because the refusal to consider such information acts as a conclusive presumption against the taxpayer.¹⁵¹ The ISBTC contended that the presumption was merely a necessary substantive rule of law.¹⁵² Finding the petitioners’ argument unpersuasive, the court rejected the claim that procedural due process was violated.¹⁵³

The petitioners next argued that the tax system violated their substantive due process rights. The petitioners claimed that because of this violation, they paid a disproportionate amount of taxes.¹⁵⁴ To show that one’s substantive rights have been violated, the petitioners must

demonstrate either that 1) the law infringes “fundamental rights [or] liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed;’” or 2) the law is “arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹⁵⁵

Because the petitioners did not assert that a fundamental right was violated, the court reviewed the petitioners’ claim under the arbitrary and unreasonable standard.¹⁵⁶ The ISBTC argued that the system results in taxpayers paying their fair share.¹⁵⁷ The court found that the ISBTC’s action passed the rational basis test and held that petitioners failed to demonstrate a substantive due process

challenge the determination of a neighborhood’s boundaries because the ISBTC limits the use of comparison properties outside one’s subdivision, as determined by the ISBTC); *id.* at 386 (finding that “there are no objective standards to determine whether an opinion of condition is correct”); *id.* (finding that in determining grade factors, particularly when an “A” grade factor is adjusted upward, there are no ascertainable standards in deciding a grade factor other than the subjective beliefs of the hearing officer); and *id.* (finding that in determining obsolescence, “there are no objective standards used for measuring obsolescence”).

150. *Id.* at 388.

151. *See id.* at 389.

152. *See id.*

153. *Id.* at 390.

154. *See id.*

155. *Id.* (quoting *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997) (citations omitted); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

156. *Id.* at 390-91.

157. *See id.* at 391.

claim.¹⁵⁸

The petitioners' last argument was that the system violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution "because it is irrational and produces arbitrary results."¹⁵⁹ The Fourteenth Amendment states that "no state shall 'deny to any person within its jurisdiction the equal protection of the laws.'"¹⁶⁰ The petitioners claimed that their equal protection rights were violated because the true tax value system applies different assessment standards to different types of property. The petitioners also argued that their equal protection rights were violated because market values are not used in assessment. However, "so long as the classification is rationally related to a legitimate state interest" the system will be valid.¹⁶¹ The ISBTC maintained that the "classifications are rationally related to the legitimate governmental purposes of establishing a property taxation system that is understandable, easy to use, uniform across types of real property, and values like properties alike."¹⁶² Though the system differentiates among different classes of property, the court found that this was not enough to support a claim of equal protection violation.¹⁶³ Additionally, "even though [the system] is not based on market information"¹⁶⁴ and because the classifications "are not [arbitrary] under a federal equal protection standard[,]"¹⁶⁵ the court held that the system "is constitutional on equal protection grounds"¹⁶⁶ Thus, the tax court found that Indiana's true tax value system did not violate the U.S. Constitution, but struck down the law as unconstitutional based on provisions in Indiana's Constitution.

2. *Zakutansky v. State Board of Tax Commissioners*.¹⁶⁷—Zakutansky owned property located three rows off the shore of Lake Michigan. Pursuant to Indiana Code section 6-1.1-4-13.6 the county and ISBTC promulgated a land order to be used in assessing property in the county.¹⁶⁸ Zakutansky's land was assessed at \$350 per front foot and, disagreeing with the assessment, he appealed to the County Board of Review ("CBOR"). The CBOR reduced the assessment. Still unsatisfied, Zakutansky petitioned the ISBTC. However, the ISBTC denied the protest, believing that so long as the county complied with a valid land order, a taxpayer could not protest.¹⁶⁹ Zakutansky alleged that the ISBTC's determination violated the requirement of a uniform and equal rate of property assessment and

158. *Id.*

159. *Id.*

160. *Id.* (quoting U.S. CONST. amend. XIV, § 1.)

161. *Id.* (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985))

162. *Id.* at 393 (quoting ISBTC's Trial Brief, at 17).

163. *Id.*

164. *Id.* at 396.

165. *Id.*

166. *Id.* at 397.

167. 691 N.E.2d 1365 (Ind. Tax Ct. 1998).

168. *See id.* at 1367 (citing IND. CODE § 6-1.1-4-13.6 (1998)).

169. *See id.*

taxation¹⁷⁰ and that an incorrect depth table was used in calculating the property's base rate.¹⁷¹

Zakutansky submitted evidence as to the valuation of similar property within the neighborhood but not within his specific subdivision.¹⁷² The ISBTC contended that because the land order was valid and Zakutansky's property was valued consistently with other property within his subdivision, the assessment pursuant to the land order must also be valid. Therefore, the ISBTC did not consider the evidence submitted by Zakutansky in making its decision, believing that Zakutansky's only remedy was to challenge the land order. However, the court stated that the purpose of the right guaranteed by Indiana's Constitution is to protect taxpayers from governmental abuse; therefore, the court found that the ISBTC was obligated to review assessments challenged by a taxpayer.¹⁷³ Additionally, "[i]f an otherwise valid [l]and [o]rder results in an individual assessment that is not uniform and equal, the [l]and [o]rder as applied to the assessment yields to the constitution."¹⁷⁴ Moreover, the court determined that the ISBTC was obligated to consider surrounding properties, regardless of the subdivision involved, when assessing property.¹⁷⁵

In this case, Zakutansky introduced into evidence a list of comparable property in his neighborhood, property record cards for each property, and pictures of the properties.¹⁷⁶ The comparable properties were assessed at rates ranging from \$100 to \$150 per front foot, rates significantly less than the rate used for his property. Because the ISBTC did not testify as to any of the comparable properties and having already determined that the ISBTC had an obligation to consider comparable property within the neighborhood, the court remanded the case to the ISBTC to determine the rate that was applicable to Zakutansky's property, which rate was to be the same rate that was used for comparable properties.¹⁷⁷

The court next addressed whether the ISBTC used an incorrect depth table in calculating the base rate of Zakutansky's property. Zakutansky submitted evidence stating that the ISBTC did not consider any other depth factors within the neighborhood in determining the depth factor of his property and alleged that such error was arbitrary and capricious. Finding that Zakutansky bore his burden of going forward and that the hearing officer did not consider Zakutansky's evidence, the court remanded this issue to the ISBTC for a determination of the predominant lot depth of the neighborhood at issue.¹⁷⁸

170. *See id.* (citing IND. CONST. art. X, § 1(a)).

171. *See id.*

172. *See id.* at 1368.

173. *Id.*

174. *Id.* (citing IND. CODE § 1-1-2-1 (1998)).

175. *Id.* at 1369 (citing *Vonnegut v. State Bd. of Tax Comm'rs*, 672 N.E.2d 87, 90 (Ind. Tax Ct. 1996)).

176. *See id.*

177. *Id.* at 1370.

178. *Id.* at 1370-71.

3. *Town of St. John v. State Board of Tax Commissioners* (“*St. John IV*”).¹⁷⁹—This opinion supplements the tax court’s earlier decision in *St. John III*.¹⁸⁰ In *St. John III*, the court determined Indiana’s property tax assessment system to be unconstitutional¹⁸¹ and retained jurisdiction to determine a date upon which the system must comply with the Indiana Constitution.¹⁸² The ISBTC argued that the date of the next general reassessment, March 1, 2001, should suffice as an appropriate date upon which taxpayers may have their assessments tested against “real world values,” as mandated by the court in *St. John III*.¹⁸³ The petitioners countered that the ISBTC should be required to have such a system in place within thirty days.¹⁸⁴ In balancing the desire to avoid creating chaos among the taxing agencies by implementing such a sweeping change immediately and the desire to protect the constitutional rights of Indiana taxpayers, the court held that the ISBTC must “consider all competent real world evidence presented to the [ISBTC] by persons filing appeals on or after May 11, 1999.”¹⁸⁵

4. *Talesnick v. State Board of Tax Commissioners*.¹⁸⁶—Talesnick owned property in the Eagle Ridge subdivision off the banks of the Eagle Creek Reservoir. As compared to other subdivisions in the reservoir area, the Eagle Ridge subdivision did not have city water, sewers, fire hydrants, or city-maintained streets.¹⁸⁷ The ISBTC promulgated a land order, in accordance with statute, to be used by county officials in assessing property.¹⁸⁸ Under the land order, the base value of properties in Eagle Ridge subdivision could range between \$90,000 and \$110,000 for the first acre of land owned.¹⁸⁹ Talesnick’s land was assessed at the highest amount allowed under the land order. After the CBOR denied Talesnick’s request to alter the assessment, he petitioned the ISBTC for review.¹⁹⁰ The ISBTC denied Talesnick’s protest and increased the assessed value of the home. Talesnick brought suit alleging that the land was

179. 691 N.E.2d 1387 (Ind. Tax Ct. 1998), *clarified*, 698 N.E.2d 399 (Ind. Tax Ct. 1998), *aff’d in part, rev’d in part*, 702 N.E.2d 1034 (Ind. 1998).

180. 690 N.E.2d 370 (Ind. Tax Ct. 1997).

181. *Id.* at 398.

182. *Id.*

183. *See St. John IV*, 691 N.E.2d at 1388.

184. *See id.*

185. *Id.* at 1390. But note, this opinion was affirmed in part and reversed in part by the Indiana Supreme Court in *State Board of Tax Commissioners v. Town of St. John*, 702 N.E.2d 1034 (Ind. 1998), handed down on December 4, 1998. That case will be discussed in the *1999 Developments in Indiana Taxation* covering the period of October 1, 1998 through September 30, 1999.

186. 693 N.E.2d 657 (Ind. Tax Ct. 1998).

187. *See id.* at 658.

188. *See id.* (citing IND. CODE § 6-1.1-4-13.6 (Supp. 1997) (as amended at IND. CODE § 6-1.1-4-13.6 (1998))).

189. *See id.*

190. *See id.*

given an improper value and that an increase in value of the home was invalid because he was not given an opportunity to respond to the increase in assessment.¹⁹¹

Talesnick presented evidence that comparable properties in other subdivisions were valued at the same amount as the Talesnick's property, despite the lack of amenities (city water, sewage, and street maintenance) present on the other properties.¹⁹² Talesnick also presented evidence that a water flowage easement encumbered more of his land than compared with other property within the subdivision; therefore, his property was assessed at a higher comparable amount than his neighbor's property.¹⁹³ Talesnick argued that the property was entitled to a negative influence factor for the property due to the lack of amenities. "A negative influence factor is justified in instances where property has a 'condition peculiar to the land that dictates an adjustment, either positive or negative, to the extended value to account for variations from the norm.'"¹⁹⁴ The court, citing *Vonnegut v. State Board of Tax Commissioners*,¹⁹⁵ remanded the case to the ISBTC because the ISBTC failed to consider any evidence of comparable properties outside Talesnick's subdivision, and ordered that the ISBTC consider comparable properties within other subdivisions when examining the assessment of Talesnick's property, taking into account the evidence presented by Talesnick.¹⁹⁶

After the hearing officer inspected the property, the hearing officer increased the assessment of the home, claiming that the original assessment miscalculated the square footage of the finished basement. Talesnick argued that he was not given an opportunity to respond to the increase in assessment. The court pointed out that by statute¹⁹⁷ the ISBTC may raise the assessed value of property during a taxpayer initiated petition for review.¹⁹⁸ However, the court remanded the case to the ISBTC for a remeasurement of the basement, because there was confusion about the actual finished square footage in the basement.¹⁹⁹ The court did not address Talesnick's lack of opportunity to respond because it ordered the remeasurement.²⁰⁰

5. *Garcia v. State Board of Tax Commissioners*.²⁰¹—The Garcias' home consisted of 10,000 square feet of living space, including an indoor swimming

191. *See id.* at 659, 661.

192. *Id.* at 659 & n.6.

193. *Id.* at 660.

194. *Id.* (quoting IND. ADMIN. CODE tit. 50, r. 2.1-2-1 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-4-10(a)(9) (1996))).

195. 672 N.E.2d 87 (Ind. Tax Ct. 1996).

196. *Talesnick*, 693 N.E.2d at 660.

197. *Id.* at 661 (citing IND. CODE § 6-1.1-15-4(a) (1998)).

198. *Id.*

199. *Id.* at 662.

200. *Id.*

201. 694 N.E.2d 794 (Ind. Tax Ct. 1998).

pool with an area of 2717 square feet.²⁰² The home contained many amenities including cherry wood cabinets, vaulted ceilings, unusually large water and gas supply lines, and more than twenty windows on the front of the home.²⁰³ The home was given an “A + 10” grade by the county assessor.²⁰⁴ The Garcias unsuccessfully petitioned the CBOR for review of the assessment. The Garcias then petitioned the ISBTC to review the assessment. The ISBTC reduced the grade to “A + 4.” Still unsatisfied with the result, the Garcias brought suit alleging that it was error to use an “A + 4” grade factor for their home and swimming pool enclosure.²⁰⁵

Indiana assesses property according to its true tax value.²⁰⁶ “The [t]rue [t]ax [v]alue of a residential improvement is calculated by determining the whole dollar cost of reproducing the improvement as determined under the rules and regulations of the [ISBTC].”²⁰⁷ Assessors use cost schedules to determine the base cost of reproducing a dwelling. Grade factors ranging from “A” to “E” are then used to differentiate among the quality of homes.²⁰⁸ The grade factor determination is a subjective decision made by the assessor. However, ISBTC regulations define different characteristics to aid assessors in differentiating among the grades. For example, “A” grade dwellings are those having “outstanding architectural style and design and . . . are constructed with the finest quality materials and workmanship throughout.”²⁰⁹ “A” grade dwellings are given a grade factor of 160%; “B” grade dwellings are given a grade factor of 120%; “C” grade dwellings are given a grade factor of 100%; “D” grade dwellings are given a grade factor of 80%; and, “E” grade dwellings are given a grade factor of 60%.²¹⁰ The ISBTC also recognized that sometimes dwellings fall somewhere between the grade factors; therefore, this must be taken into account.²¹¹ All grade factors between “A” and “E” can be given an indication of plus or minus two, or plus or minus one. This indicates that a grade falls somewhere between one of two grade letters. Also, grades falling below “E” can

202. *See id.* at 795.

203. *See id.*

204. *See id.* (citing IND. ADMIN. CODE tit. 50, r. 2.1-3-2 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.1-3-2 (1996))).

205. *Id.* at 796.

206. *Id.* (citing IND. CODE § 6-1.1-31-6 (1998)).

207. *See id.* (citing IND. ADMIN. CODE tit. 50, rs. 2.2-7-7.1, 2.2-7-9, 2.2-2-1(c) (1996)).

208. *See id.* (citing IND. ADMIN. CODE tit. 50, r. 2.1-3-2 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-7-6(e) (1996))).

209. *Id.* (quoting IND. ADMIN. CODE tit. 50, r. 2.1-3-2 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.1-3-2 (1996))). “B” grade dwellings are “architecturally attractive dwellings with good quality materials and workmanship throughout.” *Id.* “C” are moderately attractive with average quality of materials used; “D” are constructed with economy quality materials; and “E” are dwellings with very cheap quality of material and workmanship used. *Id.* at 796-97.

210. *See id.* at 797 (citing IND. ADMIN. CODE tit. 50, r. 2.1-3-2 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-7-6(e) (1996))).

211. *See id.*

be given a negative indication such that "E - 4" would equal 0%. Additionally, grades falling above "A" can be given an indication such that a property designated "A + 10" is priced at 360% of its base price.²¹²

The problem with the true tax value system, when viewed by the court, was that an assessor was given no guidance in differentiating among an "A + 1" and an "A + 10." Thus, the court held that allowing an assessor complete autonomy and subjectivity in assessing a 200% difference in base price without providing ascertainable standards was arbitrary and capricious.²¹³ The court relied on *St. John III*²¹⁴ in holding that ascertainable standards are required to apprise a taxpayer of the appropriate standards that an agency will consider when making a grade factor decision, and to ensure that a reviewing court can effectively review the agency action.²¹⁵

The Garcias next argued that the ISBTC erred in applying an "A + 4" grade factor to the swimming pool enclosure. A separate schedule is used to classify swimming pool enclosures, and this schedule classifies swimming pools as type-1, type-2, or type-3, depending upon whether the enclosure is unfinished, semi-finished, or finished, respectively.²¹⁶ A table is then applied to assign cost ranges depending on the area and type of the enclosure. However, the table only includes areas of up to 1000 and the Garcias' enclosure was 2717 square feet.²¹⁷ The hearing officer merely located the cost amount of a 1000 square foot, type-3 enclosure (\$21.55 per square foot) and calculated the total value by applying an "A + 4" grade factor. The hearing officer reasoned that if the home was given an A + 4 rating, then the swimming pool enclosure should have the same factor.²¹⁸

However, the court first noted that according to ISBTC regulation, the hearing officer should have extrapolated the average cost per square foot in reaching a value to apply to a swimming pool enclosure greater than 1000 square feet.²¹⁹ The Garcias also argued, and the court agreed, that grade factors are not to be applied to swimming pool enclosures.²²⁰ The court compared swimming pool enclosures to cost schedules for similar improvements (gazebos, greenhouses, car sheds, etc.), with respect to which the applicable regulation specifically provided for grade factors to apply. Because the regulation under consideration did not contain a similar statement, the court held that in the absence of specific language to the contrary, grade factors were not to be applied

212. *See id.* (citing IND. ADMIN. CODE tit. 50, r. 2.1-3-2 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-7-6(e) (1996))).

213. *Id.* at 798.

214. 690 N.E.2d 370 (Ind. Tax Ct. 1997).

215. *Garcia*, 694 N.E.2d at 796.

216. *See id.* at 798.

217. *See id.*

218. *See id.* at 798-99.

219. *Id.* at 799 (citing IND. ADMIN. CODE tit. 50, r. 2.1-3-4 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-9-3 (1996))).

220. *Id.*

to swimming pool enclosures, but rather, the extrapolated amount was to be applied to the total square footage.²²¹

B. Indiana Property Taxes—Business Real Property Taxes

1. *Wareco Enterprises, Inc. v. State Board of Tax Commissioners*.²²²—Wareco appealed the ISBTC's final determination of a real property assessment by filing a Form 133 Petition for Correction of Errors. Wareco alleged that there was an error in calculating the perimeter to area ratio ("PAR"), an error in the base rate calculations, and an error in the use of the depreciation tables.²²³ A hearing officer was assigned to review the petition and made recommendations to the ISBTC to correct errors. Despite the recommendations, the ISBTC issued a final determination claiming that either the assessments were correct or that the errors could not be corrected using Form 133.²²⁴ The court found that because the hearing officer supplied ample evidence to show that the assessments were incorrect, the only issue remaining was whether Form 133 is the necessary form to correct such errors. The court has "held that '[t]he only errors subject to correction by a Form 133 are those which can be corrected without resort to subjective judgment.'"²²⁵

The PAR is used to calculate the total square foot area of a building. The applicable regulations state that adjustments to the PAR should be made to reflect variations in use or wall height.²²⁶ The court noted that according to the regulations, it is only necessary to measure the exterior walls in order to calculate the PAR and the court determined that these were objective measurements.²²⁷ The ISBTC claimed that PAR is a subjective determination and not correctable by filing a Form 133 Petition for Correction of Errors. The court held that, even though the hearing officer used a different method of calculating PAR than did the county board, the calculation of PAR under either method is objective and therefore correctable using Form 133.²²⁸

Wareco next argued that the base rate was incorrectly calculated. The ISBTC again reiterated the ISBTC's position that the base rate calculation is a subjective determination that cannot be corrected with Form 133. Models are used to establish the base rate of a building presumed to have the same interior and mechanical components as the model.²²⁹ The regulations provide schedules

221. *Id.* at 800.

222. 689 N.E.2d 1299 (Ind. Tax Ct. 1997).

223. *See id.* at 1299-1300.

224. *See id.* at 1300.

225. *Id.* at 1301 n.2 (quoting *Bock Prod., Inc. v. State Bd. of Tax Comm'rs*, 683 N.E.2d 1368, 1372 (Ind. Tax Ct. 1997)).

226. *See id.* at 1301 (citing IND. ADMIN. CODE tit. 50, r. 2.1-4-1 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-10-2 (1996))).

227. *Id.*

228. *Id.*

229. *See id.* at 1302 (citing IND. ADMIN. CODE tit. 50, r. 2.1-4-3 (1992) (recodified at IND.

showing the costs of components that are used to adjust for variations.²³⁰ The hearing officer testified that there was no heat in portions of the building and that the building did not have a partition wall as presumed by the model.²³¹ Additionally, the hearing officer testified that a mistake in calculating the PAR would result in an error in calculating the base rate.²³² Finding that the base rate calculation is an "uncomplicated" determination not requiring subjective judgment, and correctable using Form 133, the court held that it was arbitrary and capricious not to do so.²³³

The court next addressed Wareco's claim that an incorrect depreciation life was used. The ISBTC applied a forty-year life to the building as opposed to a thirty-year life. Applying the regulations, a light pre-engineered building has a thirty-year life and all fire resistant buildings not listed elsewhere in the regulation have a forty-year life.²³⁴ The testimony of the hearing officer established that the building was a light pre-engineered building; therefore, subject to a thirty-year life. The court held that no subjective determination was required to find that the building has a thirty-year life under the tables provided in the regulation and, therefore, correction using Form 133 was appropriate.²³⁵

2. Indianapolis Historic Partners v. State Board of Tax Commissioners.²³⁶— Indianapolis Historic Partners ("IHP") owned a three-story apartment building known as "The McKay." In 1989, the ISBTC established a county land valuation commission in each county;²³⁷ the commission was given the power to determine the value of land in its own county.²³⁸ The Marion County commission adopted schedules that provide acreage values for both apartment land and commercial land. The schedules place maximum limits upon which an acre of apartment or commercial land can be valued. The apartment land schedule also established criteria for which the land should be valued according to very good, good, average, fair, or poor standards.²³⁹ The ISBTC subsequently approved the county order.²⁴⁰

During the 1989 assessment, The McKay was assessed at a value per square foot using the commercial land schedule instead of the apartment land schedule. IHP brought suit alleging that the ISBTC applied the incorrect schedule.²⁴¹ The

ADMIN. CODE tit. 50, r. 2.2-10-6.1 (1996)).

230. *See id.* (citing IND. ADMIN. CODE tit. 50, r. 2.1-4-3 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-10-6.1 (1996))).

231. *See id.*

232. *See id.*

233. *Id.*

234. *See id.* (citing IND. ADMIN. CODE tit. 50, r. 2.1-5-1 (1992) (repealed)).

235. *Id.* at 1302-03.

236. 694 N.E.2d 1224 (Ind. Tax Ct. 1998).

237. *See id.* at 1225 (citing IND. CODE ANN. § 6-1.1-4-13.6 (West 1989 & Supp. 1997)).

238. *See id.*

239. *See id.* at 1225 n.1.

240. *See id.* at 1225.

241. *See id.* at 1226.

ISBTC contended that it could use the commercial land schedule to value The McKay. The ISBTC set forth several reasons for this contention including that the building: was located in an urban area; was on a small parcel of land; was on platted land; and, did not have amenities, such as, a pool or wooded rolling hills (as set forth in the schedule as characteristics to look for when determining whether the land is good, very good, average, etc.).²⁴² At trial, the ISBTC also contended that because the property was on land of less than one acre, the ISBTC could use the commercial land schedule to value the property.

The court found that the plain language of the county order in classifying the schedule as "Apartment Land" mandated that the schedule would apply to all land upon which an apartment is situated.²⁴³ In holding that use of the commercial land schedule for apartment buildings was erroneous, the court sarcastically stated that "[a] contention that land being used for industrial purposes should be assessed using the rural residential schedule of the Land Valuation Order would never be allowed to stand [and] [n]either should a contention that land upon which apartments have been constructed should be assessed using commercial values"²⁴⁴ The ISBTC made the following three arguments to demonstrate that it was entitled to use the commercial land schedule in valuing The McKay: The county order was to be applied as written; IHP cannot challenge the values in the order; and, as the assessing expert, the ISBTC's decision should control.²⁴⁵

As to the ISBTC's first argument, the court merely reiterated that according to the plain language of the county order, the ISBTC was applying the order as written by disallowing use of the commercial land schedule for apartment land.²⁴⁶ As to the second argument, the court pointed out that IHP was not challenging the values underlying the order, but rather, arguing that the schedules were improperly applied.²⁴⁷ As to ISBTC's third argument, the court merely stated that "[t]he State Board has presented no expertise here. Expertise is demonstrated by expert action, not a will to power."²⁴⁸

After determining that use of the commercial land schedule was error, the court addressed whether the assessment violated the requirement of uniformity and equality in assessment as guaranteed by the Indiana Constitution.²⁴⁹ The court stated that "[l]and [o]rders have the force of law and are to be complied with as long as the applied [l]and [o]rder results in constitutional assessments."²⁵⁰ In the absence of evidence demonstrating that The McKay was functionally distinct from other land upon which apartments are located, the court held that

242. *See id.*

243. *Id.* at 1227.

244. *Id.*

245. *See id.*

246. *Id.*

247. *Id.*

248. *Id.* at 1228.

249. *Id.* (citing IND. CONST. art. X, §1).

250. *Id.* at 1229.

the use of the commercial land schedule violated the mandates of the Indiana Constitution.²⁵¹

3. *Dana Corp. v. State Board of Tax Commissioners*.²⁵²—Dana challenged the ISBTC's final determination of the assessment of Dana's property and moved for summary judgment. Dana contended that any property assessment made pursuant to ISBTC regulations is arbitrary, capricious, and an abuse of discretion because the regulations provide no ascertainable standards upon which a taxpayer would know or a court could review such a decision.²⁵³ The ISBTC maintained, and the court agreed, that Dana had merely attempted to enjoy retroactive effect of the court's holding in *St. John III*.²⁵⁴ In *St. John III*, the court limited its holding to all assessments and appeals made on or after May 11, 1999. After that date, a taxpayer can facially challenge the property tax assessment system as unconstitutional, using *St. John III* in support of such claim.²⁵⁵

However, the court recognized that it would continue to entertain "as applied" challenges to the current system.²⁵⁶ The court then turned to whether Dana had supplied sufficient evidence to warrant summary judgment for an as applied challenge. Finding that Dana had not supplied any evidence to demonstrate that no genuine issue of material fact exists, the court denied the motion for summary judgment.²⁵⁷

4. *Wetzel Enterprises, Inc. v. State Board of Tax Commissioners*.²⁵⁸—Wetzel owned .4 acres of land and improvements made upon the land. During the 1989 general reassessment, Wetzel's property was increased in value over the previous reassessment. Wetzel did not appeal the assessment; however, a county assessor did file a petition for review with the Vanderburgh CBOR. In 1991, the CBOR reduced the assessed value, retroactive to 1989.²⁵⁹ Eight months after the CBOR's decision, the same county assessor filed a petition for review with the ISBTC. Wetzel did not receive notice of a hearing on the matter.²⁶⁰ Subsequently, on February 23, 1996, the ISBTC issued its final determination of assessment, invalidating the CBOR's reduction.²⁶¹

The ISBTC argued that only a specific taxpayer can file a petition for review with the CBOR and that any action taken by the CBOR with respect to Wetzel's property was invalid. The court pointed out that the relevant statute included language such that a CBOR could review an assessment brought to its attention by "any person" and that filing a petition for review was a way for "any person"

251. *Id.* at 1230.

252. 694 N.E.2d 1244 (Ind. Tax Ct. 1998).

253. *See id.* at 1246.

254. 690 N.E.2d 370 (Ind. Tax Ct. 1997).

255. *See Dana*, 694 N.E.2d at 1247.

256. *Id.*

257. *Id.* at 1248.

258. 694 N.E.2d 1259 (Ind. Tax Ct. 1998).

259. *See id.* at 1260.

260. *See id.* at 1261.

261. *See id.*

to bring an assessment to the CBOR's attention.²⁶² However, the court believed that the issue of the case was whether the ISBTC could review the CBOR's assessment more than four years after Wetzel received and paid the reduced tax bills.²⁶³

There are two ways in which the ISBTC can review an assessment: (1) when a taxpayer files a petition for review, or (2) where the ISBTC decides to sua sponte review an assessment.²⁶⁴ In this case, a petition was filed. However, a petition must be filed within thirty days after the CBOR's determination.²⁶⁵ Here, the petition was filed eight months after the CBOR's final determination. In limited circumstances, the ISBTC can review untimely filed petitions.²⁶⁶ In any event, whether by petition or sua sponte, the ISBTC can only alter assessments if done so within three years after the assessment was made.²⁶⁷ In this case, the ISBTC attempted to alter an assessment made four years prior. Even if the ISBTC could establish that it could review the assessment sua sponte, it failed to provide Wetzel with proper notice and a hearing. Therefore, the court held that the ISBTC could not alter the CBOR's reduction in value.²⁶⁸

5. *Zakutansky v. State Board of Tax Commissioners*.²⁶⁹—Zakutansky owned a marina consisting of land, several pole barns, and a series of docks. The property was assessed and Zakutansky sought review of the assessment. Still unsatisfied with the determination on review, Zakutansky appealed the decision, making three claims of error.²⁷⁰

First, Zakutansky argued that a sloped retaining wall was incorrectly assessed. The wall had been valued by the assessor using a per-square-foot basis rather than a per-linear basis, as required by regulation.²⁷¹ Though the ISBTC agreed to correct the mistake, the ISBTC maintained that an "A" grade factor was appropriate. Grade factors are used to differentiate among properties because of quality of materials and workmanship.²⁷² Zakutansky offered evidence tending to show that an "A" grade was not appropriate. The evidence proffered showed that the wall was deteriorating, there were no footings or metal rods supporting the concrete and the cost of building a similar wall was substantially less than the

262. *Id.* at 1261 n.5 (citing IND. CODE § 6-1.1-13-5 (1998)).

263. *Id.* at 1261.

264. *See id.* at 1261-62 (citing IND. CODE § 6-1.1-15-3 (1998); IND. CODE 6-1.1-14-10 (1998)).

265. *See id.* at 1262 (citing IND. CODE § 6-1.1-15-3 (1998)).

266. *See id.* (citing *State Bd. of Tax Comm'rs v. New Energy Co. of Indiana*, 585 N.E.2d 38, 39 (Ind. Ct. App. 1992) (holding that the ISBTC may consider untimely filed applications for deductions)).

267. *See id.* (citing IND. CODE §§ 6-1.1-9-4, 6-1.1-14-11 (1998)).

268. *Id.* at 1263.

269. 696 N.E.2d 494 (Ind. Tax Ct. 1998).

270. *See id.* at 495.

271. *See id.* (citing IND. ADMIN. CODE tit. 50, r. 2.1-4-5 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-12-5 (1996))).

272. *See id.* at 495 n.1.

value assigned by the ISBTC. Because Indiana's tax system is not based on fair market value, however, the court stated that evidence of reproduction cost is not determinative (though it is probative of the quality of materials and workmanship).²⁷³ Even though the evidence of reproduction cost was not dispositive, the ISBTC was still required to support its finding of an "A" grade with substantial evidence. The court held that the ISBTC had not presented substantial evidence justifying an "A" grade other than the unsupported subjective opinions of the hearing officer and remanded the issue to the ISBTC.²⁷⁴

Zakutansky next argued that the ISBTC used an incorrect schedule in valuing the pole barns located on the land. The ISBTC used the general commercial-mercantile cost schedule rather than the agricultural schedule.²⁷⁵ The ISBTC contended that the ISBTC used the appropriate schedule due to the use of the barns by Zakutansky. The court held that actual use of the property is not dispositive; but rather, physical features are used to determine which schedule is to be used.²⁷⁶ Thus, the court held that the schedule for agricultural pole barns was to be used in this case.²⁷⁷

Zakutansky's third argument was that the ISBTC improperly assessed the land. Zakutansky claimed that the land was subjected to a restrictive easement preventing construction on portions of the land. Furthermore, the only utility servicing the land was electricity.²⁷⁸ Zakutansky then presented evidence of comparable properties that were assessed at a lesser rate than his. The ISBTC had not considered the other properties when making its determination. Therefore, the court held that the ISBTC was required to consider such comparable properties and remanded the issue to the ISBTC.²⁷⁹

6. *King Industrial Corp. v. Indiana State Board of Tax Commissioners*.²⁸⁰—King, a tool and die manufacturer, used four buildings in its operations. The buildings were assessed in 1993.²⁸¹ King filed a petition for review with the CBOR, which did not change the assessment. King then filed petition for review with the ISBTC, claiming that King was entitled to a kit adjustment. The ISBTC denied the adjustment and King appealed.²⁸²

The ISBTC has provided for a 50% reduction in base price for "kit"

273. *Id.* at 496.

274. *Id.*

275. *See id.*

276. *Id.* at 497 (citing *Herb v. State Bd. of Tax Comm'rs*, 656 N.E.2d 890, 893 (Ind. Tax Ct. 1995)).

277. *Id.*

278. *See id.*

279. *Id.* at 498 (citing *Talesnick v. State Bd. of Tax Comm'rs*, 693 N.E.2d 657 (Ind. Tax Ct. 1998)).

280. 699 N.E.2d 338 (Ind. Tax Ct. 1998).

281. *See id.* at 339.

282. *Id.*

buildings (i.e., light pre-engineered buildings).²⁸³ Kit buildings are made of light weight and inexpensive materials and come pre-fabricated such that they can be assembled like a kit.²⁸⁴ To clarify what was intended to qualify for a kit adjustment, the ISBTC published Instructional Bulletin 91-8. The bulletin contained several examples of kit characteristics.²⁸⁵ Though the bulletin was intended to clarify the definition of a kit building, the court believed that it made such a determination more confusing than before due to the use of vague terminology that left many decisions to the subjective discretion of the assessors.²⁸⁶ The bulletin also discussed using grade factors in conjunction with the kit adjustment. Thus, a building could be given a 50% reduction as qualifying for the kit adjustment and then adjusted upward for additional amenities, or a building could be denied a kit adjustment and then adjusted downward to reflect a lack of amenities.²⁸⁷ Either way the determination was intended to compute the building's true tax value.²⁸⁸

King argued that it was entitled to the 50% adjustment because its buildings contained at least ten of the characteristics listed in the bulletin. To the contrary, the ISBTC argued that King was not entitled to the adjustment because the buildings did not satisfy several of the other characteristics contained in the bulletin. However, the court pointed out that none of the characteristics noted by the ISBTC absolutely disqualified the buildings from receiving the kit adjustment and stated that "a building may still qualify for the kit adjustment even though it contains minor enhancements."²⁸⁹ King also argued that the ISBTC applied an incorrect grade factor ("D + 1") to its buildings. Based on this information, the court found that the ISBTC had in no way supported its determination that a grade factor of "D + 1" should be used as opposed to any other grade factor.²⁹⁰ In light of the fact that the hearing officer testified that he may have made a mistake, the court remanded the issue to the ISBTC, holding that the ISBTC had acted arbitrarily and capriciously and that its determination was unsupported by substantial evidence.²⁹¹

7. *Barth, Inc. v. State Board of Tax Commissioners*.²⁹²—Barth owned two parcels of land upon which four buildings are constructed. Barth filed a Form 133 Petition for Correction of Error for the assessed value of its property for the tax years 1989 through 1991.²⁹³ The petition was subsequently denied by both

283. *See id.*

284. *See id.*

285. *See id.*

286. *Id.*

287. *See id.* at 341.

288. *See id.*

289. *Id.* at 342 (citing *Componx, Inc. v. State Bd. of Tax Comm'rs*, 683 N.E.2d 1372, 1375 (Ind. Tax Ct. 1997)).

290. *Id.*

291. *Id.* at 343.

292. 699 N.E.2d 800 (Ind. Tax Ct. 1998).

293. *See id.* at 801.

the county auditor and the ISBTC. Thereafter, Barth appealed to the court, claiming that the base rates used were incorrect, that the buildings were entitled to a kit adjustment for 1991, and that two of the buildings should have been depreciated using a thirty-year rather than a forty-year life expectancy table.²⁹⁴

Form 133 petitions can be filed to correct only objective errors.²⁹⁵ Thus, only in cases where error can be corrected without resorting to subjective judgment can a taxpayer use Form 133.²⁹⁶ The ISBTC argued that any changes in the base rate would be subjective in nature and could not be corrected using Form 133. However, it is incumbent upon the ISBTC to investigate a taxpayer's claim in order to determine whether the taxpayer is challenging objective or subjective determinations.²⁹⁷ The ISBTC failed to investigate the allegations, therefore the court discussed Barth's arguments. Base rate is a factor used in calculating the reproduction cost of an improvement.²⁹⁸ Base rates are calculated by first selecting the model most representative of the physical characteristics of the improvement at issue and then second, applying the pricing schedule to adjust for additional or non-existent components or amenities.²⁹⁹ A model presumes that many components exist within the subject improvement in setting a property's value. If any components are absent or if any additional amenities exist, the schedule assigns a cost to be deducted or added to the model's base rate.³⁰⁰ In this case, Barth argued that its buildings lacked many of the components presumed to be included in the model, such as a lack of partitioning and a lack of interior finish. As to whether these errors, if any, could be corrected using a Form 133 depends upon the nature of the features that are not present. For example, when the pricing schedule lists a cost for the feature alleged not to be present, it results in a simple observation of fact without resort to subjective judgment.³⁰¹ The court remanded this issue to the ISBTC because the ISBTC had failed to consider whether the base rate was correctable using a Form 133.³⁰²

The court next addressed Barth's contention that it was entitled to a kit adjustment. Subject to ISBTC regulations, kit buildings are entitled to a 50% reduction in base rate. By order, the ISBTC required all county assessors to reassess all improvements entitled to the 50% reduction. However, the county assessor did not grant Barth a kit adjustment and this was claimed as error. By bulletin, the ISBTC instructed taxpayers challenging the denial of a kit

294. *See id.*

295. *See id.* at 802.

296. *See id.* (citing *Bock Prod., Inc. v. State Bd. of Tax Comm'rs*, 683 N.E.2d 1368, 1370 (Ind. Tax Ct. 1997)).

297. *See id.* at 803 n.6 (citing *Wareco Enter. v. State Bd. of Tax Comm'rs*, 689 N.E.2d 1299, 1302 (Ind. Tax Ct. 1997)).

298. *See id.* at 802.

299. *See id.*

300. *See id.*

301. *See id.* at 803 (citing *Wareco Enter.*, 689 N.E.2d at 1302).

302. *Id.*

adjustment to file a Form 133.³⁰³ At the administrative level, the ISBTC found no error in the assessment because two of the buildings were given a grade factor of "D" and the other two were given a grade of "C - 2."³⁰⁴ The ISBTC believed that instead of receiving the kit adjustment, the buildings were given a lower grade which already compensated for the denial of the adjustment; therefore, the ISBTC did not reach the issue of whether the buildings were entitled to the kit adjustment in the first place. However, the court held that the "plain language of the regulation admits of no exceptions and requires [that] the kit adjustment [] be given where the building qualifies for the adjustment, whether local assessing officials have previously decided to give the building a lower grade or not."³⁰⁵ Because the ISBTC failed to consider whether Barth was entitled to the kit adjustment, the court remanded the issue to the ISBTC. If on remand the ISBTC determines that Barth is entitled to the kit adjustment, the ISBTC would be allowed to adjust the grade factors to prevent a windfall in favor of Barth even though, generally, the ISBTC cannot make subjective corrections with respect to a Form 133.³⁰⁶

Finally, Barth argued that two of the buildings should have been depreciated using a thirty-year rather than a forty-year life expectancy table. The ISBTC countered that to correct the error, if any, would require subjective judgment and therefore it need not consider Barth's argument. However, the court reiterated that the ISBTC has a duty to investigate a taxpayer's claim in order to determine whether the taxpayer is challenging objective or subjective determinations.³⁰⁷ Light pre-engineered buildings are depreciated using a thirty-year life expectancy table and all fire-resistant buildings, not listed elsewhere in the regulations, are depreciated using a forty-year life expectancy table.³⁰⁸ Thus, the court believed that the real issue was whether the buildings were classified as "light pre-engineered."³⁰⁹ Because Barth used Form 133, only objective errors can be corrected. Objective errors are those that require an uncomplicated (or straight forward true or false) application of the regulations. Thus, if on remand the ISBTC determines that the buildings are entitled to a kit adjustment, then the buildings should be depreciated using the thirty-year table because kit buildings are by definition light pre-engineered buildings. However, if on remand it is determined that the buildings are not entitled to the kit adjustment, then there would be a factual question as to whether the buildings are in fact light pre-engineered, which would require resort to subjective judgment; therefore, the fact could not be correctable using Form 133.³¹⁰

303. See *id.* at 804 n.10 (citing Instructional Bulletin 92-1).

304. See *id.* at 804.

305. *Id.* (citations omitted).

306. See *id.* at 807.

307. *Id.* at 805-06.

308. See *id.* at 808 (citing IND. ADMIN. CODE tit. 50, r. 2.1-5-1 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-10-7 (1996))).

309. *Id.*

310. See *id.*

*C. Indiana Real Property—Business Real Property Taxes
("Obsolescence Adjustment")*

*I. North Park Cinemas, Inc. v. State Board of Tax Commissioners.*³¹¹—After the 1989 general assessment, North Park Cinemas ("North Park") petitioned the CBOR for an obsolescence depreciation adjustment, which was granted. However, Musgrave, a member of the CBOR, petitioned the ISBTC seeking review of the CBOR's determination. At the hearing, Musgrave merely stated that North Park was not entitled to the adjustment.³¹² North Park did not appear at the hearing, but a county deputy assessor did appear and presented evidence that adjustments had been given to other businesses in the area. A hearing officer was assigned to the case, who inspected the property and spoke with the owner of North Park.³¹³ The hearing officer gave North Park an opportunity at that time to present additional evidence as to why North Park was entitled to the adjustment, but North Park did not do so. Four years later, the ISBTC issued a final determination stating that North Park was not entitled to the adjustment.³¹⁴ North Park appealed, claiming that neither Musgrave nor the ISBTC presented sufficient evidence to satisfy their respective burdens of proof. North Park also alleged that the ISBTC's final determination was arbitrary, capricious, and unsupported by substantial evidence, and in any event, that the denial of the adjustment violated the Indiana Constitution.³¹⁵

The court first addressed the admissibility of evidence not submitted to the ISBTC. North Park attempted to introduce property cards into evidence at trial to show that other theaters within the area had received obsolescence adjustments. However, the court, relying on *State Board of Tax Commissioners v. Gatling Gun Club, Inc.*,³¹⁶ held that the trial court can only consider evidence that was presented to the ISBTC.³¹⁷

North Park then argued that Musgrave failed to satisfy her burden of proof when she challenged the CBOR's determination. A member of a CBOR, by statute, may challenge the CBOR's determination.³¹⁸ However, the court found that Musgrave, as a board member, did not bear the burden of proof, and that a hearing officer does not owe a duty to make a case for a party,³¹⁹ but instead, it is the affirmative duty of a property owner to present evidence on its own behalf to support a claim of an obsolescence depreciation adjustment.³²⁰

311. 689 N.E.2d 765 (Ind. Tax Ct. 1997).

312. *See id.* at 767.

313. *See id.*

314. *See id.*

315. *See id.* at 767-68.

316. 420 N.E.2d 1324 (Ind. Ct. App. 1981).

317. *North Park*, 689 N.E.2d at 768.

318. *See id.* at 766 (citing IND. CODE ANN. § 6-1.1-15-3(b) (1998)).

319. *Id.* at 769.

320. *Id.*

Next, the tax court addressed whether the ISBTC failed on its burden of proof. The court gave little merit to this argument, stating that a party appealing an adverse administrative decision bears the burden of proof.³²¹

North Park also argued that the ISBTC's final determination was arbitrary, capricious, and unsupported by substantial evidence. However, the court relied on the following evidence in making its own decision: Musgrave presented evidence to the ISBTC that Musgrave believed North Park was not entitled to the depreciation adjustment. The deputy county assessor, acting on behalf of North Park, made only a bare assertion that the theater business is seasonal and therefore entitled to the adjustment received by other seasonal businesses.³²² The hearing officer then examined the property, discussed the findings with the owner of North Park, and gave North Park ten days to respond with additional evidence. North Park failed to respond and four years later a final determination was issued.³²³ Based on these facts, the court concluded that the ISBTC's final determination was not arbitrary and capricious or unsupported by substantial evidence.³²⁴

Finally, the court addressed North Park's contention that the denial of the obsolescence depreciation adjustment violated "the requirement of a uniform and equal rate of property assessment and taxation."³²⁵ North Park attempted to show that, because other theaters within the area had received an adjustment, North Park was also entitled to an adjustment. The ISBTC argued that it was not required to compare similar properties in making an assessment. The court recognized that the ISBTC is required to assess similar properties consistently and that the property record cards can be used to establish that the ISBTC did not follow the mandate of the Indiana Constitution.³²⁶ However, because North Park failed to present this evidence at the administrative level, the court reaffirmed that North Park was not entitled to use such evidence in court.³²⁷ The most important aspect of this case is that a party subject to a Petition for Review, even if instituted by a third party, must present evidence before the ISBTC in order to preserve potential error on appeal to the tax court.

2. Canal Square Limited Partnership v. State Board of Tax Commissioners.³²⁸—In this case, Canal Square owned land with apartment buildings constructed on the land. In 1991, the apartments were assessed as new construction and Canal Square petitioned for review with the CBOR.³²⁹ The CBOR decreased the valuation. Still unsatisfied, Canal Square petitioned for

321. *Id.* at 770 (citing *Meridian Hills Country Club v. State Bd. of Tax Comm'rs*, 512 N.E.2d 911, 913 (Ind. Tax Ct. 1987)).

322. *See id.*

323. *See id.* at 771.

324. *Id.*

325. *Id.* (citing IND. CONST. art. X, § 1(a)).

326. *Id.*

327. *Id.* at 771-72.

328. 694 N.E.2d 801 (Ind. Tax Ct. 1998).

329. *See id.* at 802.

review with the ISBTC.³³⁰ The ISBTC held a hearing and entered a final determination, decreasing the valuation due to an obsolescence adjustment. At the hearing, an expert witness testified on behalf of Canal Square. The expert testified that using recognized appraisal principles and based on a study compiled by the expert, the functional and economic obsolescence affecting the property equaled 34.35%. The expert concluded that because of this evidence, Canal Square was entitled to an obsolescence adjustment of 34.35%.³³¹ However, the ISBTC allowed an obsolescence adjustment of only 10%. Canal Square appealed the ISBTC's final determination, disputing the obsolescence adjustment and the amount of value assigned to the apartment land.

In general, if a taxpayer establishes a prima facie case of obsolescence, then the ISBTC must rebut the evidence or at a minimum enter conclusions or findings supporting a different result or the ISBTC's final determination will be reversed.³³² Thus, the court evaluated the sufficiency of evidence presented by Canal Square. In arriving at the conclusion that Canal Square was entitled to a 34.35% obsolescence adjustment, the expert testified that he used three approaches for valuing the apartment property: the income capitalization approach; the comparable sales approach; and the cost approach.³³³ Using these three approaches, different market values were calculated. The expert reconciled the difference between the market values and reached a final estimate of \$10,600,000.³³⁴ In accordance with ISBTC regulations, the expert then estimated obsolescence under the cost approach.³³⁵ The expert identified several sources of obsolescence, "including a narrow floor plan, excessive construction features required to meet the City of Indianapolis' Canal Corridor Design Guidelines, and the presence of an electrical power substation on the property site."³³⁶ The expert then quantified the effect of the sources in arriving at an obsolescence amount and concluded that the difference between the replacement cost value (after depreciation) and the value as determined by the income capitalization and comparable sales methods was attributable to obsolescence.³³⁷ The court agreed that such an approach could be used in calculating obsolescence.³³⁸

Having found that Canal Square submitted sufficient evidence to establish a prima facie case of obsolescence level, the court next addressed whether the ISBTC rebutted the evidence. The court found that the ISBTC did not provide any evidence to support its determination that Canal Square was only entitled to

330. *See id.*

331. *See id.* at 803.

332. *See id.* at 805.

333. *See id.*

334. *See id.*

335. *Id.* at 806 (citing IND. ADMIN. CODE tit. 50, r. 2.1-5-1 (1996)).

336. *Id.*

337. *See id.*

338. *Id.* at 807 (citing *Thorntown Tel. Co. v. State Bd. of Tax Comm'rs*, 588 N.E.2d 613, 619 (Ind. Tax Ct. 1994)).

a 10% obsolescence adjustment.³³⁹ In its final determination, the ISBTC did not even discuss or attempt to dispute the validity of the expert's testimony. The court pointed out the hearing officer's testimony in which the expert stated that he based his opinion merely on twenty-three years of experience.³⁴⁰ The court, citing *Western Select Properties v. State Board of Tax Commissioners*,³⁴¹ found that 10% was chosen based upon the subjective belief of the hearing officer, and for no other reason, and held that this required reversal.³⁴²

Finally, the tax court discussed whether the ISBTC applied an incorrect value to Canal Square's land. The court remanded the determination of the amount to the ISBTC for calculation in accordance with the county land order.³⁴³

3. *Clark v. State Board of Tax Commissioners*.³⁴⁴—Clark, an owner of two apartment buildings (Wood and Salisbury), filed a petition for review of the real property assessment with the CBOR. The CBOR did not change the assessment and Clark petitioned the ISBTC, which reduced the assessed value. Still unsatisfied, Clark appealed to the tax court claiming that an improper amount of obsolescence depreciation was applied.³⁴⁵ The court discussed the arguments made with respect to each property separately.

a. *The Wood property*.—With respect to the Wood property, Clark argued that a "C" grade factor was inappropriate. A "C" grade building is constructed of average quality materials and workmanship and is in conformity with all features of the model used in the pricing schedule. The property was assessed using a general commercial residential ("GCR") pricing schedule for apartment buildings. This schedule presumes that the buildings have concrete back-up walls³⁴⁶ and Clark's property did not have concrete back-up walls. However, just because a building does not contain all the features of the model does not mandate that the building be given a grade less than "C."³⁴⁷ A "C" grade may still be appropriate if the building contains other features, such as higher quality materials, to make up for the lack of a feature listed in the pricing schedule.

The court found that Clark established a prima facie case of error, and thus the burden was shifted to the ISBTC to show why a "C" grade was appropriate.³⁴⁸ This could be accomplished by showing the existence of the other features that were not considered in the model. The ISBTC asserted that the Wood property possessed other features, such as nice brickwork, and argued that this was sufficient to support the ISBTC's burden of proof.³⁴⁹ The ISBTC pointed to the

339. *Id.*

340. *Id.* at 808.

341. 639 N.E.2d 1068, 1073 (Ind. Tax Ct. 1994).

342. *Canal Square*, 694 N.E.2d at 808.

343. *Id.* at 810.

344. 694 N.E.2d 1230 (Ind. Tax Ct. 1998).

345. *See id.* at 1233.

346. *See id.* at 1235.

347. *See id.* at 1236.

348. *Id.*

349. *See id.* at 1237.

hearing officer's conclusion that the "pluses and minuses" balanced each other out and therefore a "C" grade was appropriate. However, the court noted that the ISBTC's findings must be supported by substantial evidence.³⁵⁰ Finding that there was no substantive evidence describing the particular "pluses and minuses" to determine whether the pluses outweighed or equaled the minuses, other than the mere conclusory statement, the court held that the ISBTC failed to bear its burden and remanded the issue to the ISBTC for further consideration.³⁵¹

Clark next argued that the obsolescence depreciation adjustment of 5% was inadequate. The term "obsolescence" is defined as functional (caused by internal factors) loss of value or economic (caused by external factors) loss of value. Clark proffered maintenance records indicating excessive costs due to the fact that Clark catered to students. Clark also pointed out a lack of parking spaces, lack of an elevator, and building code violations.³⁵² In rendering a decision on obsolescence, an assessor must identify the causes of the obsolescence, and in addition, quantify the amount of obsolescence.³⁵³ The court determined that because Clark established a prima facie case that other factors, not considered by the ISBTC, contributed to obsolescence, the burden of proof shifted to the ISBTC. However, the court also determined that the ISBTC rebutted the prima facie case by recognizing that the property experienced a high occupancy rate.³⁵⁴ By rebutting the evidence, the burden shifted back to Clark to show that even though the occupancy rate was high, obsolescence was still justified.³⁵⁵ For example, Clark might have demonstrated that Clark had to reduce rent in order to maintain the high occupancy rate. Because Clark failed to do this, the challenge on this basis failed.³⁵⁶

Clark also argued that the determination of a 5% obsolescence adjustment, as opposed to some other quantity, by the ISBTC was unsupported by substantial evidence. When the hearing officer was asked why she used 5%, as opposed to 10%, the hearing officer merely stated that it was in her discretion to select an amount of obsolescence.³⁵⁷ The court agreed with Clark and determined that the amount of obsolescence was not supported by substantial evidence.³⁵⁸ In its final determination, the ISBTC referenced no substantive or factual evidence indicating that 5% was chosen based on anything other than the subjective judgment of the hearing officer. Therefore, the court remanded this issue to the ISBTC for further consideration.

350. *Id.* at 1237-38 (citing *Talesnick v. State Bd. of Tax Comm'rs*, 693 N.E.2d 657, 661-62 (Ind. Tax Ct. 1998); *Thorntown Tel. Co. v. State Bd. of Tax Comm'rs*, 629 N.E.2d 962, 965 (Ind. Tax Ct. 1994)).

351. *Id.* at 1238.

352. *See id.*

353. *See id.* (citing IND. ADMIN. CODE tit. 50, r. 2.1-5-1 (1996)).

354. *Id.* at 1239.

355. *See id.*

356. *See id.*

357. *See id.* at 1240.

358. *Id.*

The court voiced its disgust with the current process when evaluating obsolescence depreciation adjustments.³⁵⁹ Taxpayers were given two avenues for attacking an obsolescence determination. A taxpayer could present evidence of other causes of obsolescence not considered by the ISBTC or demonstrate that the ISBTC's decision was not supported with substantial evidence. In the court's view, the taxpayer was allowed to present a "half-hearted" case of obsolescence and still secure reversal of a final determination.³⁶⁰ To ameliorate this perceived problem, the tax court

will not consider taxpayer complaints concerning obsolescence in cases where the [ISBTC] holds a hearing concerning an assessment (whether on a Form 131 Petition or otherwise) after the date of this opinion [April 24, 1998], unless the taxpayer has identified the causes of the alleged obsolescence and presented probative evidence that would support a quantification of obsolescence at the administrative level.³⁶¹

The court discussed the way in which a taxpayer could satisfy this burden.³⁶² This was a bold step by the court in an attempt to make judicial review more efficient.

b. The Salisbury property.—The Salisbury property was given a "C" grade factor. Clark argued that a "C" grade was inappropriate because there were no concrete back-up walls, as presumed by the pricing schedule, on any floors other than in the basement. This was a sufficient showing to establish a prima facie case, which shifted the burden to the ISBTC. Finding that the ISBTC failed to overcome this burden, the court reversed the final determination and remanded the issue to the ISBTC.³⁶³

The Salisbury property was awarded a 5% obsolescence adjustment. Clark proffered similar evidence of obsolescence as he did for the Wood property (i.e., lack of an elevator, building code violations, and high maintenance costs), which the court determined was sufficient to establish a prima facie case and shift its burden of proof to the ISBTC.³⁶⁴ The court again found that the ISBTC satisfied its burden of proof by considering the high occupancy rate of the property. The burden then shifted back to Clark who failed to proffer additional evidence. However, as with the Wood property, the court held that the ISBTC's determination of a 5% adjustment lacked a sufficient evidentiary basis and remanded this issue to the ISBTC.³⁶⁵

Finally, Clark argued that the ISBTC erred in applying the general commercial mercantile ("GCM") pricing schedule rather than the GCR schedule.

359. *Id.* at 1241.

360. *Id.*

361. *Id.*

362. *Id.* at 1242 n.18.

363. *Id.* at 1243.

364. *Id.* (citing *GTE N., Inc. v. State Bd. of Tax Comm'rs*, 634 N.E.2d 882, 887 (Ind. Tax Ct. 1994)).

365. *Id.*

Clark argued that under ISBTC regulations, the property had only three stories instead of four and was subject to the GCR schedule. The GCM schedule only applies to apartment buildings with four or more stories.³⁶⁶ Clark's argument rests on the contention that the basement floor is not considered in determining how many stories an apartment building contains. If the basement floor were not included, there would only be three stories and the GCR schedule would be applicable. However, the court pointed out that "basement" was defined by regulation as a "story" and held that the basement could be included when determining which pricing schedule to apply.³⁶⁷

4. *Lake County Trust Co. v. State Board of Tax Commissioners*.³⁶⁸—Lake County Trust Company ("LCTC"), a real property owner with buildings constructed on the land, sought review of the ISBTC's final determination denying LCTC an economic obsolescence adjustment. LCTC leased the buildings to another company. Under the terms of the lease, LCTC was responsible for all property taxes assessed on the land and buildings.³⁶⁹ LCTC presented evidence that other comparable properties did not provide for tax payment by the property owner and, therefore, the property in this case was less profitable as a result of the lease. Based on this difference, an expert testified, LCTC should be entitled to an economic obsolescence adjustment.³⁷⁰

The term "obsolescence" refers to the "diminishing of a property's desirability and usefulness brought about by either functional inadequacies and overadequacies inherent in the property itself, or adverse economic factors external to the property."³⁷¹ ISBTC regulations provide for functional and economic loss of value.³⁷² ISBTC regulations list several permissible causes of economic obsolescence, including "[m]arket acceptability of the product or devices for which the property was constructed or is currently used."³⁷³ LCTC argued that the market acceptability of the product, here the real estate under lease, justified an obsolescence depreciation adjustment.³⁷⁴ The ISBTC countered that the facts of the case did not compare to any of the listed causes of economic obsolescence and that LCTC was not entitled to an adjustment. LCTC responded that the list of causes in the regulation was not an exhaustive list and, in any event, LCTC believed that the "market acceptability of the product" cause

366. See IND. ADMIN. CODE tit. 50, r. 2.2-11-5.1(2)(B) (1996).

367. *Clark*, 694 N.E.2d at 1244 (citing IND. ADMIN. CODE tit. 50, r. 2.1-6-1 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-16-2(43) (1996))).

368. 694 N.E.2d 1253 (Ind. Tax Ct. 1998).

369. See *id.* at 1255.

370. See *id.*

371. *Id.* (quoting IND. ADMIN. CODE tit. 50 r. 2.1-6-1 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-16-2(43) (1996))).

372. See *id.* (citing IND. ADMIN. CODE tit. 50 r. 2.2-10-7(e)(2) (1996)).

373. *Id.* (quoting IND. ADMIN. CODE tit. 50 r. 2.1-5-1 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-10-7 (1996))).

374. See *id.*

fit the facts of this case.³⁷⁵

The court agreed with LCTC that the list of causes of economic obsolescence was not exhaustive, but also determined that the real estate of LCTC did not fit within any of the causes listed in the regulation.³⁷⁶ The court found depreciation includes loss in value from all causes and thus, the list was not meant to be exhaustive.³⁷⁷ The court then turned to whether the denial of an obsolescence adjustment was arbitrary and capricious. LCTC presented evidence that the market value of the property, as determined by what a willing buyer would pay, was depressed by as much as 48% because of the lease terms. However, because Indiana's property assessment tax system is not based on market value, the court found that the fact that a willing buyer would not pay as much because of the provisions in the lease was not dispositive.³⁷⁸ Rather, to show economic obsolescence, LCTC was required to show that some factors external to the property caused the loss of value. In holding that LCTC failed to demonstrate economic obsolescence, the court pointed out that LCTC merely made a bad business decision that LCTC would like to now change.³⁷⁹

5. *Loveless Construction Co. v. State Board of Tax Commissioners*.³⁸⁰—*Loveless Construction* ("Loveless") leased office space in a building that Loveless owned. After the building was assessed, Loveless filed a petition for review with the CBOR and with the ISBTC. Still unsatisfied with the results of review, Loveless appealed to the tax court, claiming it was entitled to an obsolescence adjustment greater than 5%.³⁸¹ By statute, a taxpayer is entitled to an adjustment for a loss in value caused by obsolescence.³⁸²

Loveless first argued that the ISBTC's allowance of a 5% obsolescence adjustment was unsupported by the evidence.³⁸³ The ISBTC countered that Loveless had not demonstrated that any additional obsolescence was warranted.³⁸⁴ The court determined that even if Loveless had failed to demonstrate that additional obsolescence was appropriate, which the court did not believe was the case, it was still incumbent upon the ISBTC to support the grant of 5% as opposed to any other figure.³⁸⁵ Having found that the ISBTC could not explain the facts relied upon in choosing the 5% figure, other than the subjective belief of the hearing officer, the court held that the ISBTC had not

375. *See id.* at 1257.

376. *Id.* at 1257, 1258.

377. *Id.* at 1256 (citing IND. ADMIN. CODE tit. 50 r. 2.1-5-1 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-10-7 (1996))).

378. *Id.* at 1258.

379. *Id.* at 1259.

380. 695 N.E.2d 1045 (Ind. Tax Ct. 1998).

381. *See id.* at 1047.

382. *Id.* (citing IND. ADMIN. CODE tit. 50, r. 2.1-5-1 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-10-7(e) (1996))).

383. *See id.* at 1048.

384. *See id.*

385. *Id.*

supported the finding with substantial evidence.³⁸⁶

The court next examined whether Loveless had presented sufficient evidence to demonstrate that an obsolescence adjustment for an amount greater than 5% was justified. Loveless presented financial statements showing a decrease in income over a three-year period.³⁸⁷ Further evidence presented tended to demonstrate that in order to keep the property fully occupied, Loveless had to change from net leases to gross leases.³⁸⁸ Gross leases result in less gross income for the property owner because the lessor is required to pay expenses such as utilities and taxes.³⁸⁹ A "cause of economic obsolescence is a decrease in the '[m]arket acceptability of the product or devices for which the property was constructed or is currently used.'" ³⁹⁰ The product in this case was the office space, and the court found that the change in lease terms from net leases to gross leases was evidence that the market considered the leases worth less than it had previously.³⁹¹ Consequently, the court held that Loveless had established a prima facie case of economic obsolescence and the ISBTC's failure to consider such in rendering its final assessment determination constituted an abuse of discretion.³⁹² The court remanded the case to the ISBTC for consideration of the amount of obsolescence to which Loveless was entitled, because neither party had supported its respective conclusion with substantial evidence.³⁹³

D. *Indiana Property Taxes—Business Personal Property Tax*

In *Monarch Steel Co. v. State Board of Tax Commissioners*,³⁹⁴ Monarch Steel ("Monarch"), a steel service center located in Indiana, purchased steel plates, bars, and coils from companies inside and outside Indiana and sold such to customers both inside and outside Indiana.³⁹⁵ In general, Monarch resold the bars and coils in the same form as received by Monarch. However, Monarch usually cut or changed the steel plates before reselling them.³⁹⁶ Monarch argued that because of its operations, Monarch was entitled to an interstate commerce exemption for its business personal property for the tax years 1987 through 1995.³⁹⁷ Indiana allows inventory to be exempt from property tax when located within Indiana if the inventory is merely within Indiana to be repackaged or is in

386. *Id.*

387. *See id.* at 1048-49.

388. *See id.*

389. *See id.* at 1048 n.2.

390. *Id.* at 1049 (quoting IND. ADMIN CODE tit. 50, r. 2.1-5-1 (1992) (recodified at IND. ADMIN. CODE tit. 50, r. 2.2-10-7 (1996))).

391. *Id.*

392. *Id.* at 1050.

393. *Id.*

394. 699 N.E.2d 809 (Ind. Tax Ct. 1998).

395. *See id.*

396. *See id.*

397. *See id.*

transit to a final destination (and kept within its original package).³⁹⁸

At the ISBTC hearing, Monarch provided the hearing officer with a box of receipts that Monarch alleged would prove that it was entitled to the exemption.³⁹⁹ The ISBTC argued that simply giving the hearing officer a box of receipts, without more, did not present sufficient evidence that Monarch was entitled to the exemption.⁴⁰⁰ The court noted that although the ISBTC is required to consider evidence submitted by a complaining taxpayer, the ISBTC is not required to make the case for the taxpayer.⁴⁰¹ Here, Monarch did not attempt to aid the hearing officer in understanding the invoices and provided no other evidence to the hearing officer as to why it was entitled to the exemption.⁴⁰² The hearing officer asked Monarch for information regarding the invoices, but Monarch failed to respond.⁴⁰³ Based on these facts, the court held that Monarch failed to support its case with substantial evidence and upheld the ISBTC's final determination denying the exemption.⁴⁰⁴

E. Charitable Exemption From Indiana Taxes

1. *Sangralea Boys Fund, Inc. v. State Board of Tax Commissioners*.⁴⁰⁵—Sangralea Boys Fund (“Sangralea”), a not-for-profit company, provided assistance and education to disrupted children. In 1987, Sangralea leased part of its property to other not-for-profit organizations. For the years 1992 and 1993, both the CBOR and the ISBTC denied Sangralea's request for property exemptions.⁴⁰⁶ At issue was the interpretation of Indiana's exemption statute, which 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 educational . . . or charitable purposes.”⁴⁰⁷

The ISBTC maintained that to be entitled to the exemption, the unity of ownership, occupation, and use of the property must be by a single entity.⁴⁰⁸ The current form of the statute is a recodification of a similar prior statute.⁴⁰⁹ The 1975 recodification included an uncodified savings clause stating that the “substantive operation and effect of any law repealed . . . shall continue without

398. *See id.* at 811 (citing IND. CODE §§ 6-1.1-10-29, -29.3, -30(a), (b), & (d) (1998)).

399. *See id.*

400. *See id.*

401. *Id.* at 812 (citing *North Park Cinemas, Inc. v. State Bd. of Tax Comm'rs*, 689 N.E.2d 765, 769 (Ind. Tax Ct. 1997)).

402. *See id.*

403. *See id.*

404. *Id.*

405. 686 N.E.2d 954 (Ind. Tax Ct. 1997).

406. *See id.* at 955.

407. *Id.* at 956 (quoting IND. CODE § 6-1.1-10-16(a) (1998)).

408. *See id.*

409. *See id.* at 957 (discussing IND. CODE ANN. § 6-1.1-10-16 (West 1989) (amended 1993, 1995)).

interruption if that law is reenacted, in the same or restated form, by this act.”⁴¹⁰ The ISBTC claimed that this savings clause meant that the prior interpretation of unity of ownership by a single entity continued after promulgation of the new statute.

However, the court believed that the general assembly did not reenact the law in the same or restated form as contemplated by the savings clause, but instead eased the restrictions for obtaining a property exemption.⁴¹¹ The court, in a footnote, also stated that even if the language of the statute had remained unchanged, the liberal construction that had been given to the Act would result in the same conclusion.⁴¹² The court examined *State Board of Tax Commissioners v. Wright*,⁴¹³ wherein the court of appeals liberally construed the prior statute to allow a charitable organization flexibility in carrying out the charitable organization’s mission and believed the same rationale applied to the facts of this case.⁴¹⁴

The court supported its conclusion by examining other statutes passed with the same act. Section 6-1.1-10-37 of the Indiana Code provides that if property is leased from a tax-exempt entity to a taxable entity, it becomes taxable as if owned by the lessee.⁴¹⁵ The court held that Indiana Code section 6-1.1-10-16 “does not require a single entity to own, occupy, and use a piece of property before it can be exempted from taxation.”⁴¹⁶ “Stated differently: a piece of property must be owned for charitable purposes; a piece of property must be occupied for charitable purposes; a piece of property must be used for charitable purposes.”⁴¹⁷ This case potentially will have significant ramifications for tax-exempt organizations because tax-exempt organizations may now come together in an effort to more efficiently and effectively fulfill their missions without losing the tax benefits of their status.

2. *Alte Salems Kirche, Inc. v. State Board of Tax Commissioners*.⁴¹⁸—*Alte Salem Kirche* (“Alte Salem”), a non-denominational church, owned a church building, a barn, and a mobile home, but not the land upon which these structures were located. The land was owned by Burgdorf, a director of the church.⁴¹⁹ According to Burgdorf, the mobile home was rented out to different persons for the purposes of having someone on the property to prevent vandalism and having a way to obtain insurance.⁴²⁰ The barn was used to store equipment and picnic tables. *Alte Salem* was organized for the purpose of providing a place where

410. *Id.* (quoting Act of Mar. 18, 1975, No. 45, § 5, 1975 Ind. Acts 247, 466).

411. *Id.*

412. *Id.* at 957 n.5.

413. 215 N.E.2d 57 (Ind. App. 1966).

414. *Sangrlea*, 686 N.E.2d at 957.

415. *See id.* at 958 (citing IND. CODE § 6-1.1-10-37 (1998)).

416. *Id.* at 959.

417. *Id.*

418. 694 N.E.2d 810 (Ind. Tax Ct. 1998).

419. *See id.*

420. *See id.*

“people could attend to their spiritual needs.”⁴²¹ Though the purpose of the church building was to provide a place where people could tend to their spiritual needs, the church building was often used by other churches and even other organizations not related to religion (e.g., Girl Scouts).⁴²² In this case, Alte Salem argued that it was entitled to an exemption for the improvements on the land and certain personal property, including the mobile home, for 1990.⁴²³

By statute, “[a]ll or part of a building is exempt from property taxation if it is owned, occupied, and used by a person for educational, literary, scientific, religious, or charitable purposes.”⁴²⁴ Thus, if the improvements and personal property were used for religious or charitable purposes, Alte Salem would be entitled to an exemption. Alte Salem contended that it did use the improvements and personal property in furtherance of such goals. On the other hand, the ISBTC found that Alte Salem presented no evidence supporting the claim for exemption in light of the fact that in 1990 the property had primarily been used for non-religious activities such as picnics and reunions.⁴²⁵ However, the court found sufficient uncontroverted evidence to conclude that the property likely was used for religious purposes.⁴²⁶ According to the ISBTC, the court could only look at activities taking place in 1990 to determine whether Alte Salem engaged in religious activities. However, the court, citing *Governours Square Apartments v. State Board of Tax Commissioners*,⁴²⁷ found that evidence of events occurring in other tax years, if relevant, is probative and should be considered by the ISBTC.⁴²⁸ In cases such as this, the issue of primary concern is the purpose for which the property is being used and events outside the tax year in issue may be helpful in the determining this purpose.⁴²⁹ Additionally, the fact that the church building may have been used for activities other than religion does not lead to the conclusion that exempt purposes were not furthered.⁴³⁰ The court held that the ISBTC failed to consider all relevant evidence and remanded the issue to the ISBTC so it could consider evidence of activities conducted in years other than 1990.⁴³¹

Alte Salem also argued that the barn and mobile home should be exempt from tax.⁴³² The ISBTC did not address this issue in its final determination.⁴³³ The ISBTC, believing that Alte Salem did not use the property for exempt

421. *Id.* at 813.

422. *See id.*

423. *See id.* at 812.

424. *Id.* (quoting IND. CODE § 6-1.1-10-16(a) (1998)).

425. *See id.* at 814.

426. *Id.*

427. 528 N.E.2d 864, 866 (Ind. Tax Ct. 1988) (citations omitted).

428. *Alte Salems*, 694 N.E.2d at 814.

429. *See id.*

430. *See id.*

431. *Id.* at 816.

432. *See id.* at 815.

433. *See id.*

purposes, merely assumed that the barn and mobile home would not be exempt if the church building was not exempt.⁴³⁴ Property that is “incidental and necessary for the effective welfare of [an] exempt religious institution’ is exempt from property taxation.”⁴³⁵ The court, finding that the ISBTC did not consider Alte Salem’s argument, also remanded to the ISBTC the issue of whether the barn and mobile home were “incidental and necessary” to an exempt purpose.⁴³⁶

3. *Trinity Episcopal Church v. State Board of Tax Commissioners*.⁴³⁷— Shortly after Trinity Episcopal Church (“Trinity”) purchased a building and a parking lot, Midtown Community Mental Health Center (“Midtown”) became interested in the property for use as a mental health center.⁴³⁸ Midtown, however, did not have the necessary capital to renovate the building.⁴³⁹ Consequently, Trinity and Midtown entered into an agreement whereby Trinity would finance the renovations and Midtown would repay the costs over a long-term lease. On July 12, 1995, shortly after the renovations were completed, Midtown leased the property from Trinity.⁴⁴⁰ The ISBTC granted Trinity an exemption for the parking lot because it was owned, occupied, and used for exempt purposes. However, because the building was vacant on March 1, 1995, the date of the assessment, the exemption for the building was denied.⁴⁴¹ Trinity appealed, contending that it was entitled to an exemption.

“All or part of a building is exempt from property taxation if it is owned, occupied, and used by a person for educational, scientific, religious, or charitable purposes.”⁴⁴² The court, relying on the similar case of *Foursquare Tabernacle Church of God in Christ v. State Board of Tax Commissioners*,⁴⁴³ held that Trinity was entitled to an exemption.⁴⁴⁴ In *Foursquare*, the court held that “property acquired for future use in furtherance of exempt purposes may qualify for a property tax exemption under section 6-1.1-10-16.”⁴⁴⁵ Therefore, it was only necessary that Trinity establish that it had the intent to use the building in furtherance of an exempt purpose as of the date of the assessment. On the other hand, the ISBTC, citing *Stark v. Kreyling*,⁴⁴⁶ argued that only those facts existing on March 1, 1995 could be taken into account in determining whether Trinity

434. *See id.*

435. *Id.* (quoting *LeSea Broad. Corp. v. State Bd. of Tax Comm’rs*, 525 N.E.2d 637, 639 (Ind. Tax Ct. 1988) (other citations omitted)).

436. *Id.* at 816.

437. 694 N.E.2d 816 (Ind. Tax Ct. 1998).

438. *See id.* at 817.

439. *See id.*

440. *See id.*

441. *See id.*

442. *Id.* at 818 (quoting IND. CODE ANN. § 6-1.1-10-16(a) (West Supp. 1997) (amended at IND. CODE § 6-1.1-10-16(a) (1998))).

443. 550 N.E.2d 850 (Ind. Tax Ct. 1990).

444. *Trinity*, 694 N.E.2d at 818.

445. *Id.* (citing *Foursquare*, 550 N.E.2d at 854).

446. 188 N.E. 680, 681 (Ind. 1934).

was exempt from property tax.⁴⁴⁷ Because the renovations were not complete on March 1, 1998, the ISBTC argued that Trinity was not entitled to an exemption.⁴⁴⁸ According to the court, Trinity had the requisite intent to use the property for exempt purposes in light of the fact that it had incurred significant renovation expenses and already had an agreement with Midtown.⁴⁴⁹ Therefore, the court held that it was an abuse of discretion to deny Trinity the exemption.⁴⁵⁰

F. Indiana Procedures For Tax Administration—Indiana State Board of Tax Commissioners

In *Kent Co. v. State Board of Tax Commissioners*,⁴⁵¹ Kent owned real property that was assessed during the 1989 general assessment.⁴⁵² Kent petitioned the CBOR to review the assessment, filing a Form 130.⁴⁵³ The CBOR issued a final assessment with which Kent disagreed. Kent then filed a Form 131 Petition for Review with the ISBTC.⁴⁵⁴ The ISBTC issued a final determination, lowering the assessment and Kent did not appeal the determination.⁴⁵⁵ During the assessment review process, Kent paid property taxes based on the 1988 assessed value of its property.⁴⁵⁶ After the ISBTC issued its final determination, the county treasurer sent Kent a revised tax bill that was higher than the initial tax bill, because it was based on the 1988 assessed value.⁴⁵⁷ Kent then filed a petition for review with the CBOR and the CBOR denied the petition, stating that the petition was not timely filed.⁴⁵⁸ Kent sought review with the ISBTC, which took no action for over twelve months.⁴⁵⁹ The issue before the court was whether the court had jurisdiction to determine a challenge to the assessed property value.

Kent argued that the initial tax bills reflected the ISBTC's assessment for each year as opposed to the 1988 assessment, and that as a result, the increase in tax liability was a sua sponte assessment, completed without notice and an opportunity for a hearing.⁴⁶⁰ The court addressed two claims made by Kent: (1)

447. See *Trinity*, 698 N.E.2d at 819.

448. See *id.*

449. *Id.* at 818.

450. *Id.* at 819.

451. 685 N.E.2d 1156 (Ind. Tax Ct. 1997).

452. See *id.*

453. See *id.* at 1156 n.2 (citing IND. CODE § 6-1.1-15-1 (1998) (amended eff. Jan. 1, 1999); IND. ADMIN. CODE tit. 50, r. 4.2-3-3 (1996)).

454. See *id.* at 1156 n.3 (citing IND. CODE § 6-1.1-15-3 (1998) (amended eff. Jan. 1, 1999); IND. ADMIN. CODE tit. 50, r. 4.2-3-3 (1996)).

455. See *id.* at 1156.

456. See *id.* at 1156-57 (citing IND. CODE § 6-1.1-15-10(a)(2) (1998)).

457. See *id.* at 1157.

458. See *id.*

459. See *id.*

460. See *id.* See also IND. CODE §§ 6-1.1-9-4, -14-11 (1998) (requiring notice and an opportunity for a hearing).

whether the 1989 assessment was incorrect; and (2) whether the notice given as to the increase in assessment was improper.⁴⁶¹ As to the first of Kent's claims, the court held that it had "no jurisdiction to entertain any dispute about the validity of the 1989 assessment."⁴⁶²

What Kent really is seeking to do here is collaterally attack the 1989 assessment as it applied to the tax years in issue. The time to assert error in the 1989 assessment as it applied to the tax years in issue in this Court was December 21, 1992 (forty-five days after the final determination by the State Board). After the forty-five days expired, this Court had no jurisdiction to hear Kent's appeal of the 1989 assessment as applied to the tax years at issue. (Of course, Kent's failure to appeal the State Board's final determination did not foreclose Kent's ability to challenge the 1989 assessment as it applied to other years.) Kent cannot confer that jurisdiction by reinitiating the Form 130/131 process and then filing an original tax appeal. Therefore, this Court has no jurisdiction to evaluate Kent's assertion that the 1989 assessment was erroneous as applied to the tax years in issue.⁴⁶³

As to the second of Kent's claims, the court held that the revised tax bill was valid.⁴⁶⁴ When a challenge is made, a taxpayer must make property tax payments based on the immediately preceding year.⁴⁶⁵ However, any increased amount in dispute need not be paid until after the petition for review is finally adjudicated.⁴⁶⁶ As the review process progressed, taxes accrued for the years 1990 through 1992 and Kent paid the property taxes for those years based on the 1988 assessment. Kent claimed that the initial tax bills represented an assessment and that the revised tax bill, sent only after final adjudication of the review process, constituted a *sua sponte* increase in assessment.

The court pointed out that the initial tax bills were required by statute only as a provisional tax liability subject to change by the outcome of the 1989 assessment under review.⁴⁶⁷ "Because the use of the 1988 value did not constitute an assessment, the subsequent revision of Kent's tax liability to reflect the [ISBTC's] final determination of the assessed value of Kent's property did not constitute a [*sua sponte*] increase in assessment."⁴⁶⁸ Because the action was not a *sua sponte* increase in assessment, notice and an opportunity for a hearing were not required.⁴⁶⁹ Therefore, the court dismissed Kent's tax appeal because the court lacked jurisdiction and entered summary judgment in favor of the

461. *Kent*, 685 N.E.2d at 1157.

462. *Id.* at 1161.

463. *Id.* at 1158-59 (citation omitted).

464. *Id.* at 1161-62.

465. *See id.* at 1160 (citing IND. CODE § 6-1.1-15-10(a)(2) (1998)).

466. *See id.*

467. *Id.* at 1161.

468. *Id.*

469. *See id.*

ISBTC.⁴⁷⁰*G. Indiana Sales and Use Taxes*

1. *Rotation Products Corp. v. Department of State Revenue*.⁴⁷¹—Rotation Products Corporation (“RPC”) repairs and remanufactures roller bearings.⁴⁷² After inspection of non-operational roller bearings, RPC determined whether the damaged roller bearings were to be scrapped, remanufactured, or merely cleaned and polished.⁴⁷³ When RPC remanufactured the bearings, the inner and outer rings were ground down, and as a consequence, the thickness of the rings changed.⁴⁷⁴ As a result of the change in thickness, a new rolling cage and rollers had to be fabricated so that the cage and rollers would fit between the new inner and outer rings.⁴⁷⁵ The Indiana Department of State Revenue (“IDSR”) and RPC disputed whether the equipment used and the materials consumed in remanufacturing the non-operational roller bearings were exempt from sales tax. The IDSR denied the exemption for the tax years 1990 through 1992 and RPC appealed.⁴⁷⁶

Indiana imposes a sales tax⁴⁷⁷ on retail transactions in Indiana and a use tax⁴⁷⁸ on tangible personal property used in Indiana. However, the general assembly has provided several exemptions from sales and use taxes, including “[t]ransactions involving manufacturing machinery, tools, and equipment . . . 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”⁴⁷⁹ and “[t]ransactions involving tangible personal property . . . if the person acquiring that property acquires it for 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.”⁴⁸⁰ The purpose behind exempting equipment and materials from the sales and use taxes is to encourage economic growth and limit multiple taxation.⁴⁸¹ The central issue in this case was whether the remanufacture of non-operational roller bearings constituted new tangible personal property within the meaning of the exemption statute.

The IDSR argued that RPC merely repaired the damaged bearings to a useful

470. *Id.* at 1161-62.

471. 690 N.E.2d 795 (Ind. Tax Ct. 1998).

472. *See id.* at 797.

473. *See id.*

474. *See id.*

475. *See id.*

476. *See id.* at 796.

477. *See id.* at 797 (citing IND. CODE § 6-2.5-2-1 (1998)).

478. *See id.* (citing IND. CODE § 6-2.5-3-2 (1998)).

479. *See id.* at 798 (citing IND. CODE § 6-2.5-5-3(b) (1998)).

480. *Id.* (citing IND. CODE § 6-2.5-5-5.1(b) (1998)).

481. *See id.*

condition; thus, a service activity was performed that is subject to sales tax.⁴⁸² The IDSR claimed that any form of repair could not be considered "production" within the meaning of the exemption statute because such repair was a service activity.⁴⁸³ RPC countered that it took raw materials (unuseable roller bearings) and transformed them into a new, useable product.⁴⁸⁴ The tax court determined that a repair activity could constitute production: "[A]t some point, the repair activity is so extensive in nature and so transforms the object such that it cannot be characterized as a mere service. Rather, the repair activity produces a new product and therefore constitutes exempt activity."⁴⁸⁵ The court stated that to constitute "production," the activity in question must generally entail a substantial amount of work that caused the end product to be "substantially different from the component materials used."⁴⁸⁶

To determine whether an activity constitutes "production" within the meaning of the exemption statute, the court focused on the following factors: (1) "the substantiality and complexity of the work done on the existing article and the physical changes to the existing article, including the addition of new parts;"⁴⁸⁷ (2) "a comparison of the article's value before and after the work;"⁴⁸⁸ (3) "how favorably the performance of the remanufactured article compared with the performance of newly manufactured articles of its kind;"⁴⁸⁹ and, (4) "whether the work performed was contemplated as a normal part of the life cycle of the existing article."⁴⁹⁰ The court then evaluated the remanufacturing process of the roller bearings to determine whether RPC produced new tangible personal property during such process.

The court determined that RPC performed substantial and complex work such that the bearings were physically changed during the process due to the grinding and polishing of the old rings, along with fabrication of a new rolling cage and elements.⁴⁹¹ Second, the court found that the value of the remanufactured roller bearing was significantly increased over the value of the non-operational bearing.⁴⁹² Third, the court found that the remanufactured bearing was at least as good or better than a newly manufactured roller bearing, as evidenced by RPC's guarantee that the load capacity would be greater than the load capacity was when the roller bearings were new.⁴⁹³ Finally, the court found

482. *See id.* at 800.

483. *See id.*

484. *See id.*

485. *Id.* at 801.

486. *Id.* at 802 (quoting *Mechanics Laundry & Supply, Inc. v. Department of State Revenue*, 650 N.E.2d 1223, 1229 (Ind. Tax Ct. 1994)).

487. *Id.* at 802-03.

488. *Id.* at 803.

489. *Id.*

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.*

that the remanufacturing was not contemplated as a normal part of the life-cycle of the roller bearing, particularly because of the fact that when a customer took the non-operational bearing to RPC, it was not known at that time whether the bearings could even be salvaged.⁴⁹⁴

Upon evaluation of the four factors, the court held that RPC produced "other tangible personal property" as contemplated by the exemption statute.⁴⁹⁵ The court further held that even if RPC only cleaned and polished the inner and outer rings (as opposed to additionally fabricating a new roller cage), RPC would still be entitled to the exemption for cleaning and polishing because those processes are integral parts of the operation of producing other tangible personal property.⁴⁹⁶ The court also found that granting an exemption in this case would further serve the legislative purposes of encouraging economic growth and avoiding multiple taxation or tax pyramiding.⁴⁹⁷

This case may give a greater number of companies the ability to claim an industrial tax exemption, providing the companies satisfy the above-stated four factors. Notably, new tangible personal property must be produced that is sufficiently different from the beginning product. Additionally, to be entitled to an exemption for repairs, the process must not be one contemplated during the ordinary life cycle of the original product.

2. *Indianapolis Fruit Co. v. Department of State Revenue*.⁴⁹⁸—Indianapolis Fruit, a supplier of fruits and vegetables, received bananas and tomatoes in an unmarketable form.⁴⁹⁹ The bananas arrived green and unripe. In order to market the bananas, Indianapolis Fruit exposed the bananas to ethylene gas. Additionally, Indianapolis Fruit inspected the pulp for temperature, firmness, temperature damage and overall quality.⁵⁰⁰ Indianapolis Fruit controlled the environment of the bananas throughout the ripening process and but for this process, the bananas would have turned from green to black, instead of from green to yellow.⁵⁰¹ The ripening process also converted the starch within the banana into sugar.⁵⁰² During the ripening process, which lasted between four to eight days, the bananas were inspected several times a day.⁵⁰³

The tomato ripening process was similar to the banana ripening process. However, Indianapolis Fruit usually did not expose the tomatoes to ethylene gas because many of its suppliers performed this activity.⁵⁰⁴ The tomatoes were

494. *Id.*

495. *Id.* at 804.

496. *Id.* (citing *Department of State Revenue v. Cave Stone, Inc.* 457 N.E.2d 520, 524 (Ind. 1983).

497. *Id.* at 805.

498. 691 N.E.2d 1379 (Ind. Tax Ct. 1998).

499. *See id.* at 1381.

500. *See id.*

501. *See id.*

502. *See id.*

503. *See id.* at 1382.

504. *See id.*

placed in a controlled environment and the temperature, humidity, and air circulation were monitored.⁵⁰⁵ Once the tomatoes ripened, they were either shipped in bulk or packaged by Indianapolis Fruit for later shipment.⁵⁰⁶

In addition to the banana and tomato ripening processes, Indianapolis Fruit operated a garden cut facility that supplied fresh fruits and vegetables to grocery stores and restaurants.⁵⁰⁷ Employees in direct contact with the food were required to wear hair restraints, lab coats, vinyl gloves, and neoprene aprons and sleeves.⁵⁰⁸ Those employees who were not in direct contact with food were only required to wear hair restraints.⁵⁰⁹

Indiana imposes a sales tax⁵¹⁰ on retail transactions and a use tax⁵¹¹ on tangible personal property used within Indiana. Indiana also provides exemption from such taxes. The IDSR denied Indianapolis Fruit exemptions for the materials and machinery used in the banana and tomato processes and denied an exemption for the protective clothing worn in the garden cut facility. Indianapolis Fruit appealed. The company contended that the tangible personal property used in the banana and tomato ripening processes were exempt from sales and use taxes.⁵¹² Indianapolis Fruit also claimed that the machinery, tools, and equipment used to produce "other tangible personal property" were exempt from taxation.⁵¹³

Before materials or machinery can be exempt from sales and use taxation, it must be shown that the taxpayer engaged in "production" within the meaning of the statute.⁵¹⁴ Once it is established that an activity constitutes production, the taxpayer must demonstrate that the items claimed to be exempt are "integral and essential to that production."⁵¹⁵ For a product to satisfy this element, the product must be placed in a "form, composition, or character substantially different from that in which [they] w[ere] acquired."⁵¹⁶

Indianapolis Fruit contended that it was engaged in activities constituting production. The court first examined whether the banana ripening process constituted production of "other tangible personal property." Indianapolis Fruit argued that it changed unripe and non-marketable bananas into ripened marketable bananas, and therefore, it engaged in production.⁵¹⁷ The IDSR

505. *See id.*

506. *See id.*

507. *See id.*

508. *See id.*

509. *See id.*

510. *See id.* at 1383 (citing IND. CODE § 6-2.5-2-1 (1998)).

511. *See id.* (citing IND. CODE § 6-2.5-3-2 (1998)).

512. *See id.* (citing IND. CODE §§ 6-2.5-5-1, -2 (1998)).

513. *See id.* (citing IND. CODE § 6-2.5-5-3(b) (1998)).

514. *See id.* at 1383.

515. *Id.* at 1384 (citing *Department of State Revenue v. Cave Stone*, 457 N.E.2d 520, 524 (Ind. 1983)).

516. *See id.* at 1385 (quoting IND. ADMIN. CODE tit. 45, r. 2.2-5-10(k) (1996)).

517. *See id.*

countered that Indianapolis Fruit merely controlled the banana's ripeness.⁵¹⁸ However, the court found that because the bananas underwent a substantial change, the process constituted production.⁵¹⁹ The court focused on the fact that without action by Indianapolis Fruit, the bananas would not have ripened, and because there was production, the court held that Indianapolis Fruit was entitled to an exemption for all items "integral and essential" to the ripening process.⁵²⁰ The court described the "integral and essential" items as all items from the beginning of the process (when the bananas were placed in the ripening booths) to the end of the process (when the bananas were packaged for shipment).⁵²¹

The court next addressed whether the tomato ripening process constituted production of "other tangible personal property" as contemplated by the exemption statute. The court held that the tomato ripening process did not constitute production.⁵²² Unlike the banana ripening process, Indianapolis Fruit did not trigger the ripening of the tomatoes. Rather, Indianapolis Fruit merely awaited the ripening of the tomatoes before distribution.⁵²³ Though Indianapolis Fruit did control the environment and increase the marketability of the tomatoes, it did not actively induce the ripening.⁵²⁴ Indianapolis Fruit was not entitled to receive an exemption merely because the tomatoes ripened while in their possession.⁵²⁵ To be considered production, Indianapolis Fruit would have to do something more than passively await the tomatoes to ripen.⁵²⁶ The court also denied an exemption for the packaging of the tomatoes for resale.⁵²⁷ Even though packaging may be an integral part of a production process, this did not mean that the packaging in and of itself constituted production because "the packaging [did] not change[] the 'form, composition, or character' of the tomatoes."⁵²⁸ As to an exemption for the protective clothing worn by employees in the garden cut facility, the court held that Indianapolis Fruit was entitled to the exemption because the clothing was necessary to prevent contamination, as provided for in an IDSR regulation.⁵²⁹

3. *White River Environmental Partnership v. Department of State Revenue*.⁵³⁰—White River Environmental Partnership ("WREP") treats wastewater so that it can be discharged into the White River.⁵³¹ The wastewater

518. *See id.* at 1384-85.

519. *Id.* at 1385.

520. *Id.*

521. *Id.*

522. *Id.*

523. *See id.*

524. *See id.*

525. *See id.*

526. *See id.*

527. *Id.* at 1386.

528. *Id.* (quoting IND. ADMIN. CODE tit. 45, r. 2.2-5-8(k) (1996)).

529. *Id.*

530. 694 N.E.2d 1248 (Ind. Tax Ct. 1998).

531. *See id.* at 1249.

treatment process is very extensive. As wastewater enters, WREP adds chemicals to control odors and coagulate the solids, and the water then goes through a process that removes plant matter and egg shells.⁵³² Next, the larger solids are removed, followed by aeration that allows bacteria to attack any remaining solids. Finally, the wastewater is disinfected and ultimately discharged into the White River.⁵³³

Indiana imposes a sales tax,⁵³⁴ with certain exemptions, on retail transactions and a use tax⁵³⁵ on tangible personal property stored, used, or consumed within Indiana. WREP argued that it was entitled to the consumption exemption and the environmental quality exemption.⁵³⁶ The consumption exemption provides, in part, that transactions are exempt from sales tax “if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property.”⁵³⁷ The environmental quality exemption provides that sales are exempt from tax if:

“(1) the property constitutes, is incorporated into, or is consumed in the operation of a device, facility, or structure predominantly used and acquired for the purpose of complying with any state . . . environmental quality statute[] . . .; and (2) the person acquiring the property is engaged in the business of manufacturing, processing, refining, mining, or agriculture.”⁵³⁸

Both provisions require that WREP engage in production to receive the exemption.

WREP argued that it was engaged in “production” because it makes clean water that can be used in irrigation, ash that can be used in making brick, and sludge that can be used as a fertilizer.⁵³⁹ Additionally, WREP substantially changes the wastewater it receives.⁵⁴⁰ The court agreed that WREP changed the wastewater to a “a form, composition, or character substantially [sic] different from that in which it was acquired.”⁵⁴¹ However, this change in the form or composition of wastewater did not establish the fact that WREP engaged in production as contemplated by the exemption provision.⁵⁴² In this case, the products of the wastewater treatment facility were not sold; therefore, there was no need for an exemption to prevent tax pyramiding, a major purpose of the

532. *See id.*

533. *See id.*

534. *See id.* at 1251 (citing IND. CODE § 6-2.5-2-1 (1998)).

535. *See id.* (citing IND. CODE § 6-2.5-3-2 (1998)).

536. *See id.* (citing IND. CODE § 6-2.5-5-30 (1998)).

537. *Id.* (quoting IND. CODE § 6-2.5-5-5.1 (1998)).

538. *Id.* (quoting IND. CODE § 6-2.5-5-30 (1998)).

539. *See id.* at 1251.

540. *See id.*

541. *Id.* (quoting IND. ADMIN. CODE tit. 45, r. 2.2-5-10(k) (1996)).

542. *See id.*

exemption provision.⁵⁴³ Despite the fact that wastewater treatment is an important public interest that would be promoted by granting an exemption, the court held that the statute was not meant to grant an exemption in this case because WREP had not engaged in “production of other tangible personal property” as contemplated by the exemption provision.⁵⁴⁴ The court noted that it was up to the general assembly, not the courts, to address any inadequacies of the exemption statute.

4. *Hyatt Corp. v. Department of State Revenue*.⁵⁴⁵—Hyatt purchased unprepared food for the purpose of preparing and serving complimentary meals to certain members and employees.⁵⁴⁶ The IDSR instituted an audit and discovered an unpaid tax liability.⁵⁴⁷ During the proceedings, Hyatt contended that it was entitled to offset the tax liability with use tax erroneously paid on its food purchases.⁵⁴⁸ However, Hyatt paid the assessment and then filed a claim for a refund for the amount of overpayment of use tax.⁵⁴⁹ The IDSR denied the refund claim and Hyatt appealed.⁵⁵⁰

Indiana imposes a sales tax⁵⁵¹ on retail transactions and a use tax⁵⁵² on tangible personal property stored, used, or consumed within Indiana. Indiana also provides for exemption from certain sales and use taxes. Hyatt claimed that its purchases of food were exempt under an exemption statute that provides: “Sales of food for human consumption are exempt from the state gross retail tax.”⁵⁵³ The exemption provision also defined “food for human consumption” and listed several types of food that were not to be considered food for human consumption.⁵⁵⁴ Hyatt argued that it was entitled to an exemption because its activities were not listed as an exclusion from the exemption.

The IDSR made several arguments contending that Hyatt was not entitled to an exemption. First, the IDSR argued that Hyatt could not claim an exemption because it did not sell the prepared food and consequently had not collected or paid sales tax on the food.⁵⁵⁵ According to the IDSR, this meant that the food purchases were taxable. Second, the IDSR attempted to show that Hyatt did not fall within the class of persons that the general assembly intended to benefit.⁵⁵⁶ However, the court viewed the IDSR’s arguments as attempts to add restrictions

543. *See id.* at 1251-52.

544. *See id.* at 1252.

545. 695 N.E.2d 1051 (Ind. Tax Ct. 1998).

546. *See id.* at 1052.

547. *See id.*

548. *See id.*

549. *See id.*

550. *See id.*

551. *See id.* at 1053 (citing IND. CODE § 6-2.5-2-1 (1998)).

552. *See id.* (citing IND. CODE § 6-2.5-3-2(a) (1998)).

553. *Id.* at 1054 (quoting IND. CODE § 6-2.5-5-20 (1998)).

554. *See id.*

555. *See id.* at 1055.

556. *See id.* at 1054.

to the availability of the exemption.⁵⁵⁷ The plain language of the statute had no such restrictions and the court refused to read such restrictions into the exemption provisions.⁵⁵⁸ The court held that Hyatt was entitled to a tax exemption for the purchase of food and stated: "But that escape is with the legislature's blessing; consequently, it is not for this court to prevent the escape simply because it deems a taxpayer unworthy of receiving an exemption. The legislature decides which taxpayer deserves to escape taxation."⁵⁵⁹

H. Indiana Motor Carrier Fuel Taxes

In *Bulkmatic Transport Co. v. Department of State Revenue*, Bulkmatic Transport ("Bulkmatic") is a trucking company that serves customers both inside and outside Indiana.⁵⁶⁰ Power take off ("PTO") equipment, attached to the delivery truck, was used to unload cargo. The PTO equipment was powered by fuel from the same tank as the engine and the average amount of fuel consumed during an unloading was seven gallons.⁵⁶¹ Trucking companies are taxed on the fuel consumed while using Indiana roads.⁵⁶² The companies are taxed on the percentage of fuel used in Indiana by calculating the amount of miles traveled on Indiana highways compared to the total amount of fuel consumed on all nationwide highways.⁵⁶³ The fuel used by PTO equipment, assuming the equipment is powered from the same tank as the engine, is also used in determining the amount of tax owed. Indiana has an exemption statute for the use of fuel during offloading with PTO equipment to ameliorate the additional tax liability.⁵⁶⁴ However, the general assembly limited the exemption to carriers who use PTO equipment "in Indiana."⁵⁶⁵ The exemption amount is not determined by the amount of fuel consumed during unloading with PTO equipment, but rather a motor carrier is reimbursed 15% of the total amount of tax paid for fuel consumption when PTO equipment is used "in Indiana."

Bulkmatic argued that the exemption statute was unconstitutional as violative of the Commerce Clause of the U.S. Constitution. The Commerce Clause grants Congress the "Power . . . [t]o regulate Commerce . . . among the several States."⁵⁶⁶ The court stated that the tax would be upheld if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the

557. *See id.* at 1056.

558. *Id.*

559. *Id.* at 1055-56.

560. *See id.* at 1372.

561. *See id.* at 1372-73.

562. *See id.* at 1372 (citing IND. CODE §§ 6-6-4.1-4, -4.5 (1998)).

563. *See id.* at 1373.

564. *See id.*

565. *Id.* (quoting IND. CODE § 6-6-4.1-4(d) (1998)).

566. *Id.* at 1374 (quoting U.S. CONST. art. I, § 8, cl. 3).

services provided by the State.”⁵⁶⁷ Bulkmatic argued that requiring the PTO equipment to be used “in Indiana” in order to qualify for the exemption discriminates against interstate commerce.⁵⁶⁸ The IDSR countered that this system was not discriminatory because it treats in-state and out-of-state companies equally.⁵⁶⁹ The court noted that the U.S. Supreme Court has held that it is unconstitutional to “tax . . . a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state.”⁵⁷⁰

The court discussed three cases and how they affected the outcome of this case. In *Camps Newfound/Owatonna v. Town of Harrison*,⁵⁷¹ the U.S. Supreme Court invalidated a property tax as violating the Commerce Clause because charitable organizations that catered to non-residents were given a reduced tax exemption as compared with charitable organizations catering to residents. The Supreme Court reasoned that the exemption statute encouraged organizations to limit the out-of-state participants.⁵⁷² Similar to *Camps Newfound*, the *Bulkmatic* court stated that limiting the exemption to offloads “in Indiana” encouraged carriers to limit deliveries to customers within Indiana to take advantage of the tax exemption.⁵⁷³

In *Boston Stock Exchange v. State Tax Commission*,⁵⁷⁴ New York imposed a tax on sales of securities. However, New York taxed out-of-state transactions more heavily than in-state transactions.⁵⁷⁵ The Supreme Court ruled that the exemption for in-state status was discriminatory.⁵⁷⁶ The tax court analogized *Boston Stock Exchange* to *Bulkmatic*, finding that “[l]ike the New York exemption scheme, the ‘in Indiana’ exemption does not result in ‘substantially evenhanded treatment’ of motor carriers.”⁵⁷⁷ Additionally, the court discussed *Westinghouse Electric Corp. v. Tully*,⁵⁷⁸ wherein the Supreme Court again struck down a New York statute because the statute placed a “discriminatory burden on commerce to sister States.”⁵⁷⁹ Like *Westinghouse*, the statute in *Bulkmatic* impermissibly discriminated against out-of-state interests.⁵⁸⁰

According to the IDSR, the exemption did not discriminate against interstate commerce. The IDSR claimed that because it did not differentiate between in-state and out-of-state companies, the statute did not violate interstate

567. *Id.* at 1376 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

568. *See id.* at 1375.

569. *See id.*

570. *Id.* at 1376 (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996)).

571. 520 U.S. 564 (1997).

572. *Id.* at 579.

573. *Bulkmatic*, 691 N.E.2d at 1376-77.

574. 429 U.S. 318 (1977).

575. *See Boston Stock Exch.*, 429 U.S. at 319.

576. *Id.*

577. *Bulkmatic*, 691 N.E.2d at 1378.

578. 466 U.S. 388 (1984).

579. *Id.* at 406 (citing *Boston Stock Exch.*, 429 U.S. at 331).

580. *Bulkmatic*, 691 N.E.2d at 1378.

commerce.⁵⁸¹ However, the court found that because the exemption statute encouraged deliveries into Indiana and taxed transactions more heavily once the deliveries crossed state lines, the statute violated the Commerce Clause.⁵⁸²

The IDSR also contended that the statute provided a generous exemption from taxes and was merely a means of assuring calculation of the amount of such exemption.⁵⁸³ However, the court stated that a generous intent or purpose does not insulate a statute from the mandates of the Commerce Clause.⁵⁸⁴ Finally, the IDSR claimed that this was not a case of discrimination, but rather a lack of exactness. According to the IDSR, even though two companies may be taxed differently for using the same amount of Indiana's highway, it was not required to formulate precisely the amount of fuel consumed and tax owed.⁵⁸⁵ However, the court stated that if a statute is found to discriminate against interstate commerce, then the statute must be struck down as violating the Commerce Clause.⁵⁸⁶ The court held that the "'in Indiana' limitation on Indiana's motor carrier fuel tax exemption discriminated against interstate commerce and . . . is not allowed under the Commerce Clause."⁵⁸⁷

I. Indiana Excise Taxes

In *Horrall v. Indiana Department of State Revenue*,⁵⁸⁸ Horrall appealed a final determination of the IDSR claiming that the IDSR erroneously assessed a Controlled Substance Excise Tax ("CSET") and that Horrall was entitled to a refund of the tax that was paid by levy.⁵⁸⁹ Horrall made the following challenges to the legality of the IDSR's assessment: (1) Horrall was an ultimate user of the marijuana and not liable for the tax; (2) other persons are liable for the tax; (3) the date of the assessment, May 20, 1997, renders the assessment fatally defective because Horrall was incarcerated on that date and did not possess the marijuana on that date; and (4) the tax statute was void for vagueness.⁵⁹⁰

A CSET is a tax imposed on those who possess a controlled substance, unless such person has a legal justification for possessing the controlled substance.⁵⁹¹ Horrall argued that because he was an ultimate user, he had a legal justification.⁵⁹² However, an ultimate user is defined by statute as "a person who

581. *See id.*

582. *Id.*

583. *See id.* at 1379.

584. *Id.*

585. *See id.*

586. *Id.*

587. *Id.*

588. 687 N.E.2d 1219 (Ind. Tax Ct. 1997).

589. *Id.* at 1220.

590. *See id.*

591. *See id.* at 1220-21 (citing IND. CODE § 6-7-3-5 (1998)).

592. *See id.* at 1221.

lawfully possess a controlled substance."⁵⁹³ Consequently, Horrall's challenge to the assessment on this basis failed.

Horrall next argued that others possessed or manufactured the controlled substance on the same day that Horrall was assessed the CSET and therefore, he cannot be liable for the tax.⁵⁹⁴ However, the court pointed out that even though others may be obligated to pay a tax, it would not relieve Horrall from his liability.⁵⁹⁵ Similarly, even if Horrall did not manufacture the marijuana, it is possession of such substance that triggers a tax liability.⁵⁹⁶

Horrall also argued that the assessment was defective because the notice of assessment listed a day in which he was incarcerated, and therefore, he could not have possessed the marijuana on that date.⁵⁹⁷ The IDSR countered that this technical error did not prejudice Horrall in any way. The court stated that the purpose of the notice of proposed assessment is to inform the taxpayer that he may owe taxes, provide protest information, and begin the running of the sixty-day period in which to file a written protest.⁵⁹⁸ Pointing out that the notice of proposed assessment serves an important function, the court determined that because Horrall was not prejudiced (he did not fail to file a written protest nor was the preparation of his case impaired), his claim must fail.⁵⁹⁹

Finally, Horrall argued that the statute making possession of marijuana criminal was void for vagueness.⁶⁰⁰ Statutes are required to be sufficiently definite so that an individual will know what conduct is legal or illegal, and the court held that the statute in question was "exceedingly clear."⁶⁰¹ Ultimately, the court found that Horrall was liable for the tax because he unlawfully possessed a controlled substance.⁶⁰²

An important aspect of this case is the fact that the court held, absent actual prejudice to a taxpayer, that no relief will be afforded when there is merely a slight factual error in a notice of proposed assessment. What the court will consider a "slight" factual error or what types of error actually prejudice a taxpayer were not determined in this case; these may become hurdles for future petitioning taxpayers.

J. Indiana Inheritance Taxes

In *Department of State Revenue v. Estate of Phelps*,⁶⁰³ Phelps, the decedent,

593. *Id.* (citing IND. CODE § 35-48-1-27 (1998)).

594. *See id.*

595. *Id.*

596. *See id.*

597. *See id.*

598. *Id.*

599. *Id.* at 1221-22.

600. *See id.* at 1222.

601. *Id.*

602. *Id.*

603. 697 N.E.2d 506 (Ind. Tax Ct. 1998).

died testate on December 3, 1994.⁶⁰⁴ By the terms of the decedent's last will and testament, the decedent's spouse received all tangible personal property and her interest in the marital home. The remainder passed by a residuary clause into a revocable trust.⁶⁰⁵ Under the trust, the spouse received \$200,000. The other assets were divided into two trusts, one marital and the other non-marital.⁶⁰⁶ The marital trust granted the surviving spouse an income interest for life, remainder to the children.⁶⁰⁷ The corpus of the trust could be invaded for the surviving spouse's care, comfort, or maintenance. On July 17, 1995, the estate filed an Indiana inheritance tax return, attaching the decedent's will and the trust agreement.⁶⁰⁸ On November 29, 1995, within the twelve-month period for which inheritance returns are due, the estate filed a second Indiana inheritance tax return, this time attaching a qualified terminable interest property ("QTIP") election.⁶⁰⁹

Indiana imposes an inheritance tax on certain transfers at death and the amount is based on the fair market value of the property.⁶¹⁰ Property passed to a surviving spouse is exempt from Indiana inheritance tax.⁶¹¹ However, the remainder interest (the value of the remainder to the children) is subject to Indiana inheritance taxation unless a QTIP election is filed within the proper time and in the proper form.⁶¹² The IDSR regulations provide the form with which an election must substantially comply.⁶¹³

In this case, the estate did not file a QTIP election on July 17, the date the estate filed its original inheritance tax return. Therefore, the court held that the estate did not make a proper QTIP election in filing the first inheritance return.⁶¹⁴ Although the second inheritance return did have a QTIP election attached to the return, by regulation a QTIP election "must be in writing, signed by a person authorized to make the election, and attached to the original Indiana inheritance tax return at the time it is filed."⁶¹⁵ Any mistake in making a QTIP election is treated as an irrevocable election not to treat the transaction as a QTIP transfer.⁶¹⁶

The IDSR argued that because the QTIP election was not "attached to the original inheritance tax return," the election was invalid. The estate, however, claimed that because the phrase, "attached to the original inheritance tax return," was not defined by statute or under the regulations, the court should apply the

604. *See id.* at 508.

605. *See id.*

606. *See id.*

607. *See id.*

608. *See id.*

609. *See id.* at 508-09.

610. *See id.* at 509 (citing IND. CODE §§ 6-4.1-2-1, 6-4.1-5-1.5 (1998)).

611. *See id.* (citing IND. CODE § 6-4.1-3-7(a) (1998)).

612. *See id.* (citing IND. CODE ANN. § 6-4.1-3-7(c) (1998)).

613. *See id.* at 510 (citing IND. ADMIN. CODE tit. 45, r. 4.1-3-5(b)(4) (1996)).

614. *Id.*

615. *Id.* (quoting IND. ADMIN. CODE tit. 45, r. 4.1-3-5(b)(3) (1996)).

616. *See id.* (citing IND. ADMIN. CODE tit. 45, r. 4.1-3-5(e) (1996)).

federal regulations applicable to QTIP elections.⁶¹⁷ Under the federal regulations, a second filing of an inheritance return could be used in making the QTIP election so long as the second return was filed within the time when the inheritance return could be filed, which the estate did in this case.⁶¹⁸ However, the IDSR pointed out that a QTIP election “cannot be made on an amended inheritance tax return.”⁶¹⁹ The estate countered, stating that it filed a supplemental inheritance tax return and not an “amended” inheritance tax return, arguing that a supplemental return is one filed before the due date of the return.⁶²⁰ However, the court found that the intent of the regulation, which has the force of law, was that failure to attach a QTIP election to the initial inheritance tax return must result in not treating the transfer as a QTIP transfer.⁶²¹ Though the court sympathized with the estate’s position, it held that the estate had failed to file a valid QTIP election.⁶²²

617. *See id.*

618. *See id.*

619. *Id.* (quoting IND. ADMIN. CODE tit. 45, r. 4.1-3-5(c) (1996)).

620. *See id.* at 511.

621. *Id.* (citing IND. ADMIN. CODE tit. 45, r. 4.1-3-5(e) (1996)).

622. *Id.*

