RECENT DEVELOPMENTS IN INDIANA TAXATION: SURVEY 2021

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INTRODUCTION AND REFERENCES USED IN THIS ARTICLE

The 122nd Indiana Generally Assembly, the Indiana Supreme Court, and the Indiana Tax Court all made changes to Indiana's tax laws in 2021. This Article discusses the major changes from December 1, 2020, to December 1, 2021. Whenever the term "GA" is used in this Article, it refers only to the 122nd Indiana General Assembly. The term "Supreme Court" refers to the Indiana Supreme Court, "Court of Appeals" to the Indiana Court of Appeals, and "Tax Court" or "Court" to the Indiana Tax Court. The term "IBTR" refers to the Indiana Board of Tax Review, "Department" or "DOR" to the Indiana Department of State Revenue, and "IRS" to the Internal Revenue Service. "IRC" refers to the Internal Revenue Code in effect at the time of this article's publication while "Indiana Code" refers to the Indiana Code in effect at the time of publication unless otherwise explicitly stated. "Section" or "subsection" refers to a section or subsection of the Indiana Code unless otherwise explicitly stated. "Public law" refers to legislation passed by the Indiana General Assembly and assigned a public law number. The term "PTABOA" refers to an Indiana county's Property Tax Assessment Board of Appeals.

I. INDIANA GENERAL ASSEMBLY TAX LEGISLATION

Indiana's regular sixty-one-day legislative sessions conducted in odd-numbered years normally produce more state and local tax legislative changes then do its shorter thirty-day sessions conducted in even-numbered years. The 2021 122nd GA did not vary from this. Though it did not effect major tax changes as it has in recent years such as eliminating the physical presence rule and requiring that remote sellers collect Indiana sales tax,[1] adopting economic nexus as the basis for asserting income taxes on remote businesses,[2] adopting market-based sourcing for taxing income derived from performing services or selling intangible products,[3] adopting market-place facilitator laws,[4] correcting

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1. IND. CODE § 6-2.5-2-1(d) (2021) (from the 2019 First Regular Session of the 121st General Assembly).
2. *Id.* § 6-3-2-2(a) (from the 2019 First Regular Session of the 121st General Assembly).
3. *Id.* § 6-3-2-2(f)(3) (from the 2019 First Regular Session of the 121st General Assembly).
4. *Id.* § 6-2.5-4-18 (adopting marketplace facilitator tax collection); *id.* § 6-2.5-1-21.7 (defining marketplace); *id.* § 6-2.5-1-21.9 (defining marketplace facilitator) (each from the 2019 First Regular Session of the 121st General Assembly).

the property tax appeal process,[5] or conforming Indiana to the IRS's centralized partnership audit regime authorized by federal Bipartisan Budget Act of 2015,[6] the 2021 GA passed several notable pieces of tax legislation. This legislation included changes to property taxes, sales and use taxes, income taxes, local taxes, excise taxes, and tax procedures, along with other areas of state and local taxation—changes important to Indiana taxpayers.

A. Property Taxes

Property tax legislation usually makes up the bulk of the GA's tax-related activities, but such was not the case in 2021—a year in which the GA focused on Indiana's recovery from the COVID-19 crisis. The GA did, though, address some property tax matters.

If a property owner transfers real property to a transferee in exchange for valuable consideration using a "conveyance document,"[7] the parties must complete a Sales Disclosure Form (State Form 46021)[8] and submit it to the county auditor.[9] County assessors examine the information for sales data necessary to making the annual adjustment or trending of property values.[10] Indiana exempts from property taxation tangible property owned or held in trust by a church or religious society and used for worship.[11] This property includes buildings used for worship, pews and furniture contained within such buildings, and tracts of land upon which such buildings stand.[12] The GA amended the exemption statute to provide that Sales Disclosure Forms submitted in conjunction with such tax-exempt property must include an attestation that the property will continue to be used by a church or religious society for the same exempt religious purposes.[13] The GA's amendment also provides that, if the

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5. *Id.* § 6-1.1-15-1.1 (from the 2017 First Regular Session of the 120th General Assembly).

6. *Id.* § 6-8.1-5-2(j) (from the 2020 Second Regular Session of the 121st General Assembly).

7. *Id.* § 6-1.1-5.5-2(a)(1) (defining a "conveyance document" as a document that transfers a real property interest for valuable consideration and includes, for example, a deed, a contract of sale, an agreement, a judgment, a lease that includes the fee simple estate and is for a period in excess of ninety years, a quitclaim deed serving as a source of title, or any other document presented for recording property).

8. *Id.* § 6-1.1-5.5-3(b). The Sales Disclosure Form (State Form 46021) is accessible at IN.gov, Department of Local Government Finance, https://www.in.gov/dlgf/assessments/sales-disclosure-form-information/ [https://perma.cc/7QLH-MPXX].

9. *Id.* § 6-1.1-5.5-3(b).

10. Annual Adjustment of Assessed Values Fact Sheet, Ind. Dep't of Local Gov't Fin. 1 (Sept. 2018), https://www.in.gov/dlgf/files/180901-Fact-Sheet-Annual-Adjustments.pdf [https://perma.cc/SV79-J986].

11. IND. CODE § 6-1.1-10-21(a) (2021).

12. *Id.*

13. Act of Apr. 29, 2021, Pub. L. No. 192-2021, § 2, 2021 Ind. Acts 1275, 1217-18 (codified at IND. CODE § 6-1.1-10-21(e) (2021)). This amendment applies to property transfers occurring after December 31, 2021.

county assessor reasonably questions the truth of this, it can request articles of incorporation or bylaws as confirmation or repudiation of the suspicion.[14] The county assessor must make this request in writing, including an explanation of its suspicion.[15]

The previous version of the Indiana Code's statute pertaining to application for a property-tax exemption[16] required that, for assessments occurring after the transfer, the new owner of the property had to reapply for the exemption if the exemption was granted because it was owned by a church or religious society using it for religious worship;[17] it was owned and used for educational, literary, scientific, religious, or charitable purposes;[18] or it was used by a fraternity or sorority,[19] had to reapply for the exemption.[20] The new owner did this by filing a certified exemption application with the appropriate county assessor.[21] The GA in 2021 modified this process, providing that the new church or religious society owning the property exempted because of its use for religious worship need not reapply for the exemption.[22] The exemption automatically transfers assuming that the new owners have not changed the property's use to an ineligible one.[23] This transfer of the exemption does not apply to property previously exempt for any of the other above-mentioned reasons (*e.g.*, using property for educational, literary, scientific, or charitable purposes) even if the new owner intends to use it in the same way. The owner must reapply for the exemption in those cases.[24]

The GA amended Indiana's Code regarding tax sales, prohibiting a person from bidding on or purchasing a tract at a tax sale if that person is delinquent in the payment of any personal property taxes or subject to an unresolved personal property tax judgment.[25] The GA also prohibited a business entity from bidding on or purchasing a tract at a tax sale when any such person: (i) formed the business entity; (ii) joined with another person or party to form the business entity; (iii) joined the business entity as a proprietor, incorporator, partner, shareholder, director, employee, or member; (iv) is an agent, employee, or board member of the business entity; or (v) is not an attorney at law but represents the

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14. *Id.*

15. *Id.*

16. IND. CODE § 6-1.1-11-4(e) (2021).

17. *Id.* § 6-1.1-10-21.

18. *Id.* § 6-1.1-10-16.

19. *Id.* § 6-1.1-10-24.

20. *Id.* § 6-1.1-11-4(e).

21. *Id.*

22. Act of Apr. 29, 2021, Pub. L. No. 192-2021, § 2, 2021 Ind. Acts 1275, 1217-18 (codified at IND. CODE § 6-1.1-10-21(e) (2021)). This amendment applies to property transfers occurring after December 31, 2021.

23. *Id.* This amendment applies to property transfers occurring after December 31, 2021.

24. *Id.*

25. Act of Apr. 19, 2021, Pub. L. No. 66-2021, § 2, 2021 Ind. Acts 746, 747-51 (codified as amended at IND. CODE § 6-1.1-24-5.3 (2021)).

business entity in a legal matter.[26] Each bidder on a tract of land at a tax sale must sign a statement acknowledging under oath that they do not owe delinquent taxes, special assessments, penalties, interest, costs directly attributable to a prior tax sale, amounts from a final adjudication in favor of a political subdivision, civil penalties imposed for the violation of a building code or county ordinance, or any civil penalties imposed by a county health department.[27] Bidders must also acknowledge under oath that they are not purchasing the tract on behalf of a person or business prohibited from bidding on or purchasing a tract sold at a tax sale.[28] Finally, bidders must acknowledge under oath that they understand that providing false information relating to a prohibited bid or purchase of a tract at a tax sale constitutes perjury, which Indiana classifies as a Level 6 felony.[29] Real property purchased by an ineligible person or business is subject to forfeiture.[30]

Indiana exempts all or part of real property from property taxation if improvements on that property were made for the purpose of providing housing to persons eligible under the federal low-income housing tax credit program.[31] Property owners wishing to avail themselves of this exemption, however, must agree to make payments in lieu of taxes (*i.e.*, pay PILOTS).[32] The GA added a new provision that permits a county to adopt an ordinance permitting the property owner's PILOTS to be deposited in the political subdivision's affordable housing fund and used for any legal purpose.[33]

Indiana's Enterprise Zones, like similar zones in other states, reward businesses with tax incentives for operating in economically challenged communities therefore attracting commercial investment to the communities and encouraging job growth. An Indiana Enterprise Zone expires after ten years.[34] The GA added a new subsection providing that, before the existing Enterprise Zone's expiration date, the fiscal body of the municipality where the Enterprise Zone is located may adopt a resolution renewing it for five years.[35] The fiscal body may do this regardless of how many times it has renewed the Enterprise Zone in smaller increments pursuant to other renewal subsections.[36] Businesses operating within this five-year renewed Enterprise Zone can seek only those tax incentives

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26. *Id.*

27. *Id.* § 4, 2021 Ind. Acts at 752-55 (codified at IND. CODE § 6-1.1-24-5.7 (2021)).

28. *Id.*

29. *Id.*

30. *Id.*

31. IND. CODE § 6-1.1-10-16.7(a) (2021); *see* 26 U.S.C. § 42 (for low-income housing credit statute).

32. IND. CODE § 6-1.1-10-16.7(a)(3) (2021); *see also id.* § 36-1-8-14.3(c) (defining the acronym PILOTS as payments in lieu of taxes).

33. Act of Apr. 19, 2021, Pub. L. No. 74-2021, § 3, 2021 Ind. Acts 793, 795-96 (codified at IND. CODE § 36-1-8-14.3 (2021)).

34. *See* IND. CODE § 5-28-15-10(a) (2021).

35. Act of Apr. 19, 2021, Pub. L. No. 83-2021, § 1, 2021 Ind. Acts 856, 858 (codified as amended at IND. CODE § 5-28-15-10 (2021)).

36. *Id.*

already permitted by the Indiana Code and its Enterprise Zone provisions.[37]

The GA also addressed the methods by which taxpayers can submit property tax payments to their county treasurer in a timely manner. The GA amended the Indiana Code to provide that the payment is deemed paid by the due date if sent by United States first-class mail and: (i) the envelope is addressed to the office of the county treasurer; (ii) the envelope has sufficient metered postage from a meter postage provider approved by the United States Postal Service; (iii) the metered postage is affixed to the envelope, bears the actual date of when it was affixed, and that date is on or before the due date; and (iv) the envelope is received by the county treasurer not later than five business days after the due date.[38]

The GA's amendment defines the "initial penalty period" for a delinquent property tax payment as after the property tax's due date by not more than 30 days.[39] The amendment provides that a taxpayer is subject to a penalty of five percent of the amount of delinquent taxes if they make the payment during this initial penalty period.[40] The amendment provides further that a taxpayer's property tax payment is deemed paid during this initial penalty period if the county treasurer receives the payment within that period.[41] It is also deemed paid during this initial penalty period if it was: (i) sent by first-class mail, (ii) addressed to the applicable county treasurer, and (iii) postmarked by the United States Postal Service on or before the 30th day after the due date, and (iv) the county treasurer received the payment no later than five business days after the thirtieth day after the due date.[42]

The amendment also provides rules regarding what constitutes a property tax payment deemed paid during the initial penalty period if the taxpayer remits the payment using: (i) a nationally recognized express parcel carrier; (ii) the United States registered, certified, or certificate-of-mailing systems; or (iii) the United States first-class metered mail system.[43] The amendment provides that, if a payment is mailed, received by the county treasurer after the initial penalty period, and has an illegible postmark, the taxpayer is deemed to have made the payment by the thirtieth day after the tax's due date if the taxpayer can show by reasonable evidence that the payment was mailed in a timely manner.[44]

Finally, the amendment provides that, if a taxpayer makes a delinquent property tax payment using the United States mail or express parcel carrier and the county treasurer does not receive it, the payment will be deemed paid within the initial penalty period if the taxpayer: (i) can show by reasonable evidence that

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37. *Id.*

38. Act of Apr. 22, 2021, Pub. L. No. 95-2021, § 1, 2021 Ind. Acts 946, 946-51 (codified as amended at IND. CODE § 6-1.1-37-10 (2021)).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

the payment was sent via United States mail or with the express parcel carrier on or before the thirtieth day after the tax's due date, and (ii) makes a duplicate payment within thirty days after being notified that the payment was not received.[45]

Indiana exempts a business' personal property located in a county from property taxes if its acquisition cost is less than a specified threshold amount.[46] Previously, the amount was $40,000, but the GA amended it to $80,000 effective January 1, 2022.[47] The GA amended the Indiana Code to provide that a taxpayer can file a property tax exemption application before September 1, 2021, along with supporting documents, claiming a property tax exemption if all or part of the property was used for educational, literary, scientific, religious, or charitable purposes[48] during any of the assessment years 2016 to 2020 even if the taxpayer did not previously claim an exemption for those years.[49] The GA's amendment defines a qualified taxpayer as a nonprofit organization that was incorporated on or after April 5, 1999, has articles of incorporation that were amended on April 26, 2017, and owns eligible property.[50]

B. State Gross Retail and Use Taxes

The GA created a new exemption from sales and use taxes for a public utility or power subsidiary that acquires a utility-scale battery energy storage system.[51] It defined these system as capable of storing and releasing greater than one megawatt of electrical energy for a minimum of one hour using either an AC inverter and DC storage or equipment which receives, stores, and delivers energy using batteries, compressed air, pumped hydropower, hydrogen storage (including hydrolysis), thermal energy storage, regenerative fuel cells, flywheels, capacitors, or superconducting magnets.[52] The systems do not include foundations or property used to directly or indirectly connect the system's AC invertor or DC storage to electrical energy production equipment or the customer's meter.[53]

The Indiana Code provides that a power subsidiary or public utility is a retail merchant making a retail transaction subject to sales and uses taxes when furnishing or selling electrical energy, natural or artificial gas, water, steam, or a steam heating service (*i.e.*, utility services) for commercial or domestic

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45. *Id.*

46. IND. CODE § 6-1.1-3-7.2(d) (2021).

47. Act of Apr. 29, 2021, Pub. L. No. 153-2021, § 1, 2021 Ind. Acts 1578, 1579 (codified as amended at IND. CODE § 6-1.1-3-7.2 (2021)).

48. *See* IND. CODE § 6-1.1-10-16 (2021).

49. Act of Apr. 8, 2021, Pub. L. No. 38-2021, § 112, 2021 Ind. Acts 297, 440-42.

50. *Id.*

51. Act of Apr. 29, 2021, Pub. L. No. 159-2021, § 4, 2021 Ind. Acts 1630, 1634-36 (codified at IND. CODE § 6-2.5-5-10.5 (2021)), effective May 1, 2021.

52. *Id.*

53. *Id.*

consumption.[54] The power subsidiary can receive a resale exemption certificate from a customer that uses the utility service in, for example, manufacturing, mining, production, processing, repairing, refining, recycling, oil extraction, mineral extraction, irrigation, or agriculture.[55] The GA amended the Indiana Code to provide that, unless revoked, an exemption certificate issued by the Department to a power subsidiary or public utility remains valid regardless of a one-to-one meter change (*i.e.*, swapping an old meter with a new or different one).[56] The amended provision also provides that a power subsidiary or public utility must maintain records sufficient to document this change.[57] Finally, in the event of the change, the provision permits the merchant to request that the Department reissue an exemption certificate with a new meter number.[58]

The GA created a new exemption for a contractor who purchases public safety equipment and materials for use predominately in public works construction or maintenance.[59] The provision defines "public safety equipment and materials" as well as providing examples of items that meet the definition (*e.g.*, barrels, barricades, temporary pavement markings, cones, rumble strips, and materials used to construct temporary traffic lanes, roads, and bridges) and those that do not (*e.g.*, hard hats, safety glasses, safety vests, pest control, and other personal protective equipment).[60]

The GA eliminated a requirement for some taxpayers paying sales and use taxes. Previously, the Indiana Code provided that, if the Department determined that a taxpayer's estimated monthly gross sales and use tax liability for the current year or its average monthly gross sales and use tax liability for the preceding year exceeded $5,000, the taxpayer must pay the monthly gross sales and use taxes due by electronic funds transfer or by delivering the payment to the Department in person or by overnight courier in the form of cashier's check, certified check, or money order.[61] The GA eliminated this requirement.[62]

The GA ended its work on sales and use taxes by making a few technical corrections, clarifications, and minor alterations that included the following:

- Replacing the word "changes" with "charges" in the definition of "gross retail income".[63]
- With regard to transactions for consumable materials, vapor products,

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54. *See* IND. CODE § 6-2.5-4-5(b) (2021).

55. *See id.* § 6-2.5-4-5(c)(1)(3).

56. Act of Apr. 29, 2021, Pub. Law No. 159-2021, § 7, 2021 Ind. Acts 1630, 1638-40 (codified as amended at IND. CODE § 6-2.5-8-8 (2021)), effective July 1, 2021.

57. *Id.*

58. *Id.*

59. *Id.* § 5, 2021 Ind. Acts at 1635-36 (codified at IND. CODE § 6-2.5-5-55 (2021)).

60. *Id.*

61. *See* IND. CODE § 6-2.5-6-1(e) (2020).

62. Act of Apr. 29, 2021, Pub. L. No. 159-2021, § 6, 2021 Ind. Acts 1630, 1636-37 (codified as amended at IND. CODE § 6-2.5-6-1 (2021)).

63. *Id.* § 3, 2021 Ind. Acts at 1634 (codified as amended at IND. CODE § 6-2.5-1-5(d)(2) (2021)).

and closed-system cartridges, clarifying that the gross retail income includes the closed-system cartridge tax or the electronic cigarette tax.[64]

- Providing that any person who removes, alters, defaces, or covers a sign posted by the Department that states no retail transactions or sales can be made at a retail merchant's location now commits a Class C infraction rather than, as previously mandated, the more serious B misdemeanor.[65]
- Providing that a retail merchant failing to notify the Department that a sign it posted has been removed, altered, defaced, or covered now commits a Class B infraction rather than, as previously mandated, the more serious Class B misdemeanor.[66]

C. State Income Taxes

Since Indiana is a static-conformity state, conforming its tax code to the IRC as of a certain date each year, the GA performed its annual task of updating that date. Effective January 1, 2021, the GA updated the definition of the IRC to mean the Code in effect on March 31, 2021, rather than the Code in effect on January 1, 2020.[67] It also incorporated the IRS's Treasury Regulations in effect on March 31, 2021, rather than those in effect on January 1, 2020.[68]

In 2021, the GA enacted legislation that significantly affected Indiana's partnership tax scheme. On December 22, 2017, President Donald J. Trump signed into law the *Tax Cuts and Jobs Act* ("TCJA").[69] This Act, among many other things, limited the amount of state and local income, property, and sales taxes that individual taxpayers could deduct for federal income tax purposes for tax years 2018 through 2025.[70] The TCJA limits an individual's deduction for the aggregate amount of state and local taxes paid during the calendar year to $10,000 ($5,000 in the case of a married individual filing a separate return).[71] This lessening of the federal deduction harmed those taxpayers who had benefited from state and local tax deductions that exceeded the new limits. A loophole in the new deduction limits was soon discovered. They applied only to personal income taxes, not taxes paid by businesses. Accordingly, business entities could deduct the state and local taxes they paid from federal taxation without any limitation. The problem with this loophole was that business entities such as

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64. Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 69, 2021 Ind. Acts 1788, 2058-59 (codified as amended at IND. CODE § 6-2.5-1-5(c)(3) (2021)), effective July 1, 2022.

65. Act of Apr. 29, 2021, Pub. L. No. 174-2021, § 3, 2021 Ind. Acts 1630, 2343 (codified as amended at IND. CODE § 6-2.5-9-7(a) (2021)), effective July 1, 2021.

66. *Id.* (codified as amended at IND. CODE § 6-2.5-9-7(c) (2021)).

67. Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 72, 2021 Ind. Acts 1788, 2085 (codified at IND. CODE § 6-3-1-11 (2021)), retroactively effective to January 1, 2021.

68. *Id.*

69. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

70. *Id.*

71. *See* Tax Cuts and Jobs Act § 11042(a), 131 Stat. at 2085-86 (codified at I.R.C § 164(b)(6)(B)).

partnerships and S Corporations do not pay state and local taxes; they are "pass-through" entities—that is, their earnings are "passed through" to the partners' or shareholders' personal tax returns, and the partners and shareholders pay those taxes. If, however, the state and local taxes normally passed through to the partners' or shareholders' personal tax returns were, in fact, paid at the business-entity level, the federal deduction limits for state and local taxes would not apply, and the business entity's deduction would be unfettered.

To make this loophole available to its residents, many states have adopted pass-through entity ("PTE") plans permitting entities such as partnerships and S Corporations to elect state and local taxation at the business-entity level.[72] The 2021 GA took the first steps in Indiana's adoption of its own PTE plan. The GA added section 15.1 to chapter 6-3-4.[73] It provides that the Department may prescribe procedures by which a pass-through entity resident in Indiana can elect to remit Indiana state and local taxes on behalf of partners, shareholders, and beneficiaries resident in Indiana as long as they withhold and remit those taxes on behalf of partners, shareholders, and beneficiaries not resident in Indiana.[74]

On November 2, 2015, President Barack Obama signed into law the *Bipartisan Budget Act of 2015* ("BBA").[75] In part, the BBA replaced the auditing and tax collection procedures for partnerships previously established by the *Tax Equity and Fiscal Responsibility Act of 1982* ("TEFRA"),[76] replacing the electing-large-partnership audit rules with a centralized partnership audit regime (also referred to as "the BBA") for tax years beginning January 2018.[77] For federal and Indiana income tax purposes, partnerships are flow-through entities, and no tax is initially paid; the taxable income, and other business tax attributes such as expenses and losses flow through and from the entity to the partners based on their shares in the partnership. The partners pay tax, if any, on their share of partnership income after reporting it on their own tax returns.

Under the BBA, however, any tax underpayments resulting from a federal tax adjustment to a partnership's informational tax reporting (*i.e.*, the IRS Form 1065) or its partners' actual individual tax reporting (*e.g.*, IRS Forms 1120 [C-

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72. *See, e.g.*, Bradley Wilhelmson & Raj Lapsiwala, *Passthrough entity taxes: The next workaround trend?,* THE TAX ADVISER (June 1, 2019), https://www.thetaxadviser.com/issues/2019/jun/passthrough-entity-taxes-workaround-trend.html [https://perma.cc/6JUV-7UTJ].

73. Act of Apr. 29, 2021, Pub. L. No. 159-2021, § 16, 2021 Ind. Acts 1630, 1671 (codified as amended at IND. CODE § 6-3-4-15.1 (2021)), effective July 1, 2021.

74. *Id.*; *see also* IND. CODE §§§ 6-3-4-12, -13, -15 (2017) (requiring that pass-through entities residing in Indiana withhold Indiana taxes for non-resident partners, shareholders, and beneficiaries and remit those taxes on their behalf to the Department.).

75. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (2015).

76. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982) (On September 3, 1982, President Ronald Reagan signed TEFRA into law, an Act intended to reduce the budget deficit through federal spending cuts, tax increases, and reform measures.).

77. *See IRS launches BBA centralized partnership audit webpage*, IRS (Sept. 1, 2020), https://www.irs.gov/newsroom/irs-launches-bba-centralized-partnership-audit-webpage [https://perma.cc/H8DU-GX53].

corp.] or 1040 [individual]) are calculated at the partnership level.[78] Accordingly, any resulting tax deficiency, interest, or penalties are assessed directly against the partnership in the year of audit.[79] In other words, under the new centralized partnership audit regime, the IRS assesses and collects any understatement of tax (*i.e.*, an imputed underpayment) at the partnership level. The 2021 GA continued the effort begun by the 2020 GA to conform Indiana's Code pertaining to partnership taxation with the IRS's centralized partnership audit regime.[80] It did this by adding Chapter 4.5 to Title 6, Article 3 of the Indiana Code,[81] which comprises Indiana's statutory conformity with the federal partnership audit and administrative adjustment rules. Some of the highlights from the new Chapter and the GA's efforts to conform Indiana with the BBA follow.

The new Chapter 4.5 provides that, if the Department conducts an audit or investigation of a partnership[82] that disagrees with the partnership's reporting of its tax attributes and adjusts or reallocates one or more of its tax attributes, the Department must issue a report of proposed partnership adjustments.[83] This must list: (i) the Department's adjustments to tax attributes and (ii) the allocation of the Department's adjustments to all directly affected partners.[84] If the report calls for a tax increase or tax refund for one or more of these partners, it is considered a proposed assessment of the partnership.[85] If it brings no increase in tax for one or more of these partners but identifies one or more of them as due a tax refund, the Department must issue a report of proposed partnership adjustments to the partnership.[86] Any tax refund arising from this report, however, must be sought individually by each affected partner subject to that partner's independently determined statute of limitations.[87]

The new Chapter provides that a report of proposed partnership adjustments is considered a proposed assessment of the partnership for purposes of an administrative protest to the DOR and appeals to the Tax Court and Supreme Court.[88] The new Chapter provides that a report of proposed partnership

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78. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (2015).

79. *Id.*

80. *See, e.g.,* Pub. L. No. 167-2020, § 41 (IND. CODE §§ 6-8.1-5-2(j)(1), (j)(2)(A)-(B), (j)(3)-(4) (2020)), effective retroactively to January 1, 2020) (allows the DOR to issue Indiana tax assessments against a partnership or its partners that correspond to IRS adjustments resulting from the IRS' application of its centralized partnership audit regime (*i.e.*, the BBA)).

81. Act of Apr. 29, 2021, Pub. L. No. 159-2021, § 18, 2021 Ind. Acts 1630, 1672-94 (codified at IND. CODE § 6-3-4.5 (2021)), effective July 1, 2021.

82. *See id.* § 9, 2021 Ind. Acts at 1659 (codified at IND. CODE § 6-3-1-19 (2021)) (defining "partnership" as "an entity subject to the requirements of Subchapter K of the Internal Revenue Code.").

83. *Id.* § 18, 2021 Ind. Acts at 1678 (codified at IND. CODE § 6-3-4.5-3 (2021)).

84. *Id.* (codified at IND. CODE § 6-3-4.5-3(b) (2021)).

85. *Id.* (codified at IND. CODE § 6-3-4.5-3(c)(1) (2021)).

86. *Id.* § 18, 2021 Ind. Acts at 1679 (codified at IND. CODE § 6-3-4.5-3 (2021)).

87. *Id.* (codified at IND. CODE § 6-3-4.5-3(d) (2021)).

88. *Id.* (codified at IND. CODE § 6-3-4.5-4 (2021)).

adjustments generally becomes final when the partnership or affected partner has exhausted all administrative or judicial appeals.[89] If the Department determines it must amend the report of proposed partnership adjustments and further adjust partnership tax attributes, it has 180 days to issue a final report including these adjustments.[90] For each day this report is delayed past 180 days, one day is added to the deadline by which the partnership or "tiered partner"[91] must act (*i.e.*, challenge the report or pay owed taxes) without being subject to tax assessment.[92] If the Department enters into a settlement with the partnership resolving all matters pertaining to the proposed partnership adjustments, the report of final partnership adjustments must be issued within 180 days of the settlement's execution.[93]

Chapter 4.5 requires a partnership issue a "partner level adjustments report" to its direct partners and the Department no later than 90 days after it is issued the report of final partnership adjustments.[94] If applicable, the partnership must pay any additional composite or withholding taxes within this same period.[95] The tiered partners generally have an additional 30 days from the date the they receive a partner-level adjustments report or other amended statement arising from it in which to provide amended statements to indirect partners and the Department.[96] They also receive this time to pay any additional composite or withholding taxes.[97] The partner owing taxes due to receiving the partner-level adjustments report has 90 days from the date of receiving it or a statement deriving from it to file an amended return and remit any taxes due.[98] A partnership can elect to pay a partner's taxes due as a result of the report.[99] The partnership must file notice of this election prior to the deadline for filing a protest (60 days in the case of an audited partnership) or the deadline for filing an amended return (in the case of a tiered partner).[100] A partnership that has previously elected to be taxed at the partnership level for a taxable year will be deemed to have already elected to pay at the partnership level any additional taxes owed due to the report of proposed

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89. *Id.* (codified at IND. CODE § 6-3-4.5-5(a) (2021)).

90. *Id.* § 18, 2021 Ind. Acts at 1678-79 (codified at IND. CODE § 6-3-4.5-5(b) (2021)).

91. *See id.* § 18, 2021 Ind. Acts at 1676 (codified at IND. CODE § 6-3-4.5-1(29) (2021)) (defining a "tiered partner" as "any partner that is a partnership or pass through entity."). Section 1 of the new Chapter 4.5 also provides numerous other definitions applicable to the new Chapter.

92. *Id.* § 18, 2021 Ind. Acts at 1679 (codified at IND. CODE § 6-3-4.5-5(b) (2021)).

93. *Id.* § 18, 2021 Ind. Acts at 1680 (codified at IND. CODE § 6-3-4.5-5(c) (2021)).

94. *Id.* (codified at IND. CODE § 6-3-4.5-6(a) (2021)).

95. *Id.* (codified at IND. CODE § 6-3-4.5-6 (2021)).

96. *Id.* § 18, 2021 Ind. Acts at 1672-74 (codified at IND. CODE § 6-3-4.5-1, -6 (2021)). (defining a "direct partner" as a person "that holds an interest directly in a partnership or pass through entity." and defining an "indirect partner" as a person holding an interest in a partnership through one or more pass-through partners (*i.e.*, entities). *See* Treas. Reg. § 301.6241-1(a)(4).

97. *Id.* § 18, 2021 Ind. Acts at 1681 (codified at IND. CODE § 6-3-4.5-6 (2021)).

98. *Id.* § 18, 2021 Ind. Acts at 1680 (codified at IND. CODE § 6-3-4.5-6(c) (2021)).

99. *Id.* § 18, 2021 Ind. Acts at 1680-81 (codified at IND. CODE § 6-3-4.5-6(d)(1) (2021)).

100. *Id.* § 18, 2021 Ind. Acts at 1681 (codified at IND. CODE § 6-3-4.5-6(d)(2) (2021)).

partnership adjustments.[101]

Chapter 4.5 provides that if, after receiving the partner-level adjustments report, the Department determines that a partner has not reported the proper amount of tax due, it will issue the partner a tax assessment.[102] For purposes of any assessment, protest, or litigation arising from a partner-level adjustments report, any adjustments to tax are deemed final.[103] If a partnership determines that it did not correctly report or allocate a tax attribute for a taxable year or receives a final federal adjustment determination, it must file an amended return with the Department.[104] The partnership must provide its direct partners with amended statements specifying the corrected, and properly allocated, tax attributes for the applicable tax year.[105] The partnership and affected partners must file their tax returns and pay any taxes due in the prescribed timely manner.[106] Tiered partners are given additional time to provide amended statements to indirect partners as well as remit any taxes due because of the adjustments.[107] A partnership can elect to pay any taxes associated with filing the amended partnership return.[108]

Chapter 4.5 provides that a partnership must file an amended return and provide amended statements to partners within 180 days of its receiving final federal adjustments.[109] A federal adjustment is:

> A change to an item or amount determined under the Internal Revenue Code or a change to any other tax attribute that is used by a taxpayer to compute state adjusted gross income taxes or financial institutions tax owed, whether that change results from action by the Internal Revenue Service, including a partnership level audit, or the filing of an amended federal return, a federal refund claim, or an administrative adjustment request by the taxpayer.[110]

The Department can enter into an agreement with the audited partnership or tiered partner determining how to compute taxes if the partnership elects to remit taxes at the partnership level.[111] The parties can agree to alternative reporting methods, filing deadlines, and payment deadlines.[112] The application to enter into such an agreement with the Department must be made before the deadline for the partnership to file an amended return related to federal adjustments for the taxable

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101. *Id.* (codified at IND. CODE § 6-3-4.5-6 (d)(4) (2021)).

102. *Id.* (codified at IND. CODE § 6-3-4.5-7(a) (2021)).

103. *Id.* (codified at IND. CODE § 6-3-4.5-7(b) (2021)).

104. *Id.* § 18, 2021 Ind. Acts at 1681-82 (codified at IND. CODE § 6-3-4.5-8(a) (2021)).

105. *Id.* (codified at IND. CODE § 6-3-4.5-8(a) (2021)).

106. *Id.* § 18, 2021 Ind. Acts at 1682 (codified at IND. CODE § 6-3-4.5-8(b) (2021)).

107. *Id.* (codified at IND. CODE § 6-3-4.5-8(b)(2) (2021)).

108. *Id.* (codified at IND. CODE § 6-3-4.5-8(c) (2021)).

109. *Id.* § 18, 2021 Ind. Acts at 1683 (codified at IND. CODE § 6-3-4.5-9(a) (2021)).

110. *Id.* § 18, 2021 Ind. Acts at 1673 (codified at IND. CODE § 6-3-4.5(8) (2021)) (defining "federal adjustments").

111. *Id.* § 18, 2021 Ind. Acts at 1687 (codified at IND. CODE § 6-3-4.5-11 (2021)).

112. *Id.* (codified at IND. CODE § 6-3-4.5-11 (2021)).

year in question.[113]

If an audited partnership elects taxation at the partnership level, the choice is irrevocable unless the Department determines otherwise.[114] The taxes the partnership pays at the partnership level are deemed taxes paid for the partnership's direct and indirect partners.[115] If, however, the Department determines that the partnership made an invalid election, the taxes paid on behalf of the partnership's direct and indirect partners will be treated as withholding taxes.[116]

Chapter 4.5 also provides that, if the Department audits a partnership, the partnership must appoint a representative.[117] If it has already appointed one in conjunction with an IRS audit, this person will continue in the role unless the partnership replaces him or her.[118] The Department can prescribe reasonable procedures controlling a partnership's selection of its representative according to qualifications mandated for the position.[119]

Finally, Chapter 4.5 provides that, if a partnership is required to provide statements to its partners but fails to do so in a timely manner, the Department can assess it for any taxes due from these partners.[120] The Department can compute those taxes using the highest applicable rate for the taxable year.[121] A partner may file a claim for a tax refund with regard to any tax overpayment the partnership remitted to the Department on his or her behalf.[122] The partner must file the claim by the later of two dates—the deadline for the partner's amended return or the deadline mandated by Indiana's general tax refund statute, Ind. Code § 6-8.1-9-1.[123] Before the expiration of any deadline mandated by the new Chapter, the Department can agree to extend it.[124]

The GA amended the Indiana Code to provide that, if, due to partner-level adjustments report, a partner is required to include an item of income, a deduction, or another tax attribute in its Indiana adjusted gross income ("AGI"), the item is deemed includible in the partner's federal AGI or federal taxable income regardless of whether the partner actually must report it for federal income tax purposes.[125] Items for which a valid election are made under Indiana's new federal partnership audit and administrative adjustment rules[126] are not

113. *Id*. (codified at IND. CODE § 6-3-4.5-11 (2021)).
114. *Id*. (codified at IND. CODE § 6-3-4.5-12(a) (2021)).
115. *Id*. (codified at IND. CODE § 6-3-4.5-12(b) (2021)).
116. *Id*. § 18, 2021 Ind. Acts at 1688 (codified at IND. CODE § 6-3-4.5-12(c) (2021)).
117. *Id*. (codified at IND. CODE § 6-3-4.5-13 (2021)).
118. *Id*. (codified at IND. CODE § 6-3-4.5-13 (2021)).
119. *Id*. (codified at IND. CODE § 6-3-4.5-13 (2021)).
120. *Id*. § 18, 2021 Ind. Acts at 1691-92 (codified at IND. CODE § 6-3-4.5-18(a) (2021)).
121. *Id*. (codified at IND. CODE § 6-3-4.5-18(a) (2021)).
122. *Id*. § 18, 2021 Ind. Acts at 1693 (codified at IND. CODE § 6-3-4.5-19 (2021)).
123. *Id*. (codified at IND. CODE § 6-3-4.5-19 (2021)).
124. *Id*. § 18, 2021 Ind. Acts at 1693-94 (codified at IND. CODE § 6-3-4.5-20(a) (2021)).
125. *Id*. § 8, 2021 Ind. Acts at 1659 (codified at IND. CODE § 6-3-1-3.5(i) (2021)).
126. *See* IND. CODE §§§ 6-3-4.5-6, -8, -9 (2021).

included in the partner's AGI or taxable income.[127] These items, however, are included in the partner's AGI or taxable income if the partnership made a valid election, and it is required to remit tax on those items.[128]

The 2021 GA made a few changes to Indiana's income tax code that did not involve partnerships and their partners. It added a provision that permits a person to claim an income tax credit equal to the amount of tax imposed on that income by a foreign country if the income is included in the person's Indiana adjusted gross income (AGI) due solely to an acceleration of the income inclusion for federal income tax purposes.[129] To claim the credit, the person will have to identify: (i) the foreign country in which the income is subject to tax, (ii) the amount of income included in Indiana AGI that the person derived from this country, (iii) the amount of tax the country imposed on the income (including any withholding or composite tax), as well as giving any other information the Department requires.[130] Furthermore, the DOR may impose limitations and conditions on claiming this credit, including reporting requirements and extensions of its statutes of limitations.[131]

The GA clarified when a taxpayer filing a combined return must report a federal income tax change. The GA amended an existing provision and provided that, when a taxpayer reporting a federal income tax alteration or modification files a combined return, the date on which the alteration or modification is made is considered the last day on which the alteration or modification occurs for any entity filing as part of the combined return.[132]

The GA tinkered with Indiana's net operating losses ("NOLs"), amending the Indiana Code to provide that NOLs for individuals do not include the portion of NOLs attributable to itemized deductions.[133] Also, for 2018 through 2020, an excess business loss disallowed for the taxable year is part of the NOLs for that taxable year.[134] Finally, modifications to the federal NOLs mandated by IRC § 172(d) are part of the Indiana NOLs computation if the specified adjustments to AGI under Ind. Code § 6-3-1-3.5 create a negative Indiana AGI.[135]

The GA also addressed corporate tax filings. It added a new provision requiring corporations with over $1,000,000 in gross receipts to electronically file

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127. Act of Apr. 29, 2021, Pub. L. No. 159-2021, § 8, 2021 Ind. Acts 1630, 1659 (codified at IND. CODE § 6-3-1-3.5(i)(1) (2021)), effective July 1, 2021.

128. *Id.* § 9, 2021 Ind. Acts at 1659 (codified at IND. CODE § 6-3-1-3.5(i)(2) (2021)).

129. *Id.* § 11, 2021 Ind. Acts at1661 (codified as amended at IND. CODE § 6-3-3-3(c) (2021)).

130. *Id.*

131. Act of Apr. 29, 2021, Pub. L. No. 159-2021, § 11, 2021 Ind. Acts 1630, 1661 (codified as amended at IND. CODE § 6-3-3-3(c) (2021)), retroactively effective to January 1, 2017.

132. Act of Apr. 29, 2021, Pub. L. No. 159-2021, § 28, 2021 Ind. Acts 1630, 1707 (codified as amended at IND. CODE § 6-5.5-6-6(b) (2021)), effective July 1, 2021.

133. Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 73, 2021 Ind. Acts 1788, 2087 (codified as amended at IND. CODE § 6-3-2-2.5(c)(1) (2021)), retroactively effective to January 1, 2020.

134. *Id.* § 73, 2021 Ind. Acts at 2088 (codified as amended at IND. CODE § 6-3-2-2.5(c)(3) (2021)).

135. *Id.* (codified as amended at IND. CODE § 6-3-2-2.5(d)(2) (2021)).

tax returns beginning with the 2022 taxable year.[136] It authorized the Department to provide exceptions to this new filing requirement and publish them in the Indiana Register.[137] The new provision provides that a corporate tax filing includes an amended return.[138]

Finally, the GA created new addbacks to and deductions from Indiana AGI, including:

- An addback for 2020 of the amount of unemployment compensation excluded from federal gross income under IRC § 85(c).[139]
- An addback for 2020 for above-the-line charitable contributions by individuals.[140]
- An addback for individuals beginning in 2020 for student loan payments from employers excluded from federal adjusted gross income.[141]
- An addback for the increased portion of meal expenses permitted for federal purposes (though amounts allowable pre-2021 continue to be permitted).[142]
- An addback for individuals, estates, and trusts starting in 2018 and ending in 2020 for excess business losses, permissible bonus depreciation, and other expenses to be deferred in certain cases.[143]
- An addback for individuals for certain student loans discharged and available for exclusion from federal adjusted gross income, along with a provision that permits the exclusion if the federal insolvency exception from income inclusion would otherwise apply.[144]
- A deduction against adjusted gross income for interest otherwise disallowed on student loan payments from employers excluded from federal adjusted gross income.[145]
- A deduction for 2020 and afterward for expenses disallowed because of claiming a federal employee retention credit.[146]
- A deduction for individuals for Indiana education scholarship account donations that are: (i) required to be included in federal adjusted gross

136. Act of Apr. 29, 2021, Pub. L. No. 159-2021, § 17, 2021 Ind. Acts 1630, 1671 (codified at IND. CODE § 6-3-4-16.3(a) (2021)), effective July 1, 2021.

137. *Id.* § 17, 2021 Ind. Acts at 1672 (codified at IND. CODE § 6-3-4-16.3(a) (2021)).

138. *Id.* (codified at IND. CODE § 6-3-4-16.3(d) (2021)).

139. Act of Apr. 29, 2021, Pub. L. No. 199-2021, § 3, 2021 Ind. Acts 2974, 2984 (codified as amended at IND. CODE § 6-3-1-3.5(a)(33) (2021)), retroactively effective to January 1, 2020.

140. Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 71, 2021 Ind. Acts 1788, 2066-67 (codified as amended at IND. CODE § 6-3-1-3.5(a)(26) (2021)), retroactively effective to January 1, 2020.

141. *Id.* (codified as amended at IND. CODE § 6-3-1-3.5(a)(27) (2021)).

142. *Id.* (codified as amended at IND. CODE § 6-3-1-3.5(a)(28) (2021)).

143. *Id.* § 71, 2021 Ind. Acts at 2068 (codified as amended at IND. CODE § 6-3-1-3.5(a)(29) (2021)).

144. *Id.* (codified as amended at IND. CODE § 6-3-1-3.5(a)(30) (2021)).

145. *Id.* (codified as amended at IND. CODE § 6-3-1-3.5(a)(30) (2021)).

146. *Id.* (codified as amended at IND. CODE § 6-3-1-3.5(a)(31) (2021)).

income, and (ii) used to pay for qualifying expenses.[147]

D. State Tax Liability Credits

The GA enacted legislation that created one new tax credit (*i.e.*, for foster care support), and amended five existing ones (*i.e.*, school scholarship, redevelopment, Hoosier business, venture capital investment, and the state-earned income tax). The foster care support credit is granted against "any state tax liability" to an entity that makes a monetary contribution to a qualifying foster care organization.[148] The credit equals 50% of the contribution made to an organization approved by the Department of Child Services.[149] The credit amount cannot exceed $10,000 for any taxpayer's taxable year.[150] A taxpayer can claim it only for those eligible taxable years in which it contributed money.[151] The credit applies only to tax years after December 21, 2021,[152] and expires on July 1, 2025.[153]

A "qualifying foster care organization" is an organization that: (i) is exempt from federal income taxes under IRC § 501(c)(3); (ii) provides foster care prevention services and programs as required by 42 U.S.C. § 671 (the state plan for foster care and adoption assistance) or direct assistance to individuals in the foster care system; (iii) spends at least 50% of its available revenue on qualified services given Indiana residents; (iv) affirms it will continue spending at least 50% of its revenue on these services; and (v) provides ongoing services to at least 200 Indiana residents.[154] The new chapter defines "foster care" as a child living in a residence licensed under article 27 of title 31 of Child Services' *Regulation of Residential Child Care*.[155] The credit is available to an individual, corporation, limited liability company, partnership, or other legal entity.[156]

Though the new chapter provides that the credit applies to "any state tax liability," it narrows state tax liability to Indiana's adjusted gross income tax and its financial institutions tax.[157] A person or business entity seeking this credit must file an application with the Department.[158] From July 1, 2021, through June 30, 2025, the total amount of credits for foster care support authorized by the

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147. *Id*. (codified as amended at IND. CODE § 6-3-1-3.5(a)(32) (2021)).

148. Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 91, 2021 Ind. Acts 1788, 2107-08 (codified at IND. CODE §§ 6-3.1-35.8-2, -3 (2021)), effective July 1, 2021.

149. *Id*. (codified at IND. CODE § 6-3.1-35.8-3 (2021)).

150. *Id*.

151. *Id*. § 91, 2021 Ind. Acts at 2109 (codified at IND. CODE § 6-3.1-35.8-6 (2021)).

152. *Id*. (codified at IND. CODE § 6-3.1-35.8-7 (2021)).

153. *Id*. (codified at IND. CODE § 6-3.1-35.8-8 (2021)).

154. *Id*. § 91, 2021 Ind. Acts at 2107 (codified at IND. CODE § 6-3.1-35.8-1(c) (2021)).

155. *Id*. § 91, 2021 Ind. Acts at 2106 (codified at IND. CODE § 6-3.1-35.8-1(a) (2021)).

156. *Id*. § 91, 2021 Ind. Acts at 2107 (codified at IND. CODE § 6-3.1-35.8-1(b) (2021)).

157. *Id*. (codified at IND. CODE § 6-3.1-35.8-1(e) (2021)).

158. *Id*. § 91, 2021 Ind. Acts at 2108 (codified at IND. CODE § 6-3.1-35.8-4(a) (2021)).

Department during a fiscal year cannot exceed $2,000,000.[159] Once the credits reach this amount, the Department can no longer approve applications.[160] Finally, if an entity is: (i) a business exempt from adjusted gross income tax due to being a pass-through entity, or (ii) a partnership that does not have any tax liability against which the credit can be applied, a shareholder or a partner of the business is entitled to apply the credit against its liability under the adjusted gross income tax.[161]

As for existing tax credits, the GA amended the school scholarship tax credit, increasing the threshold amount of credits awarded during a fiscal year to $17,500,000 for fiscal year beginning July 1, 2021 and $18,500,000 for fiscal year beginning July 1, 2022.[162] The limit returns to $16,500,000 for fiscal year 2023 and each of the following fiscal years.[163] The GA also amended the redevelopment tax credit, providing that an eligible taxpayer can claim the credit from the taxable year in which the taxpayer makes the qualified investment for the year for which the Indiana economic development corporation credits it.[164]

The GA also amended the tax credit for Hoosier business investment, providing that the Indiana Economic Development Corporation ("IEDC") may enter into a written agreement with an eligible taxpayer to accelerate to the current taxable year the excess amount of the tax credit that could otherwise be carried forward.[165] This credit does not apply to pass-through entities.[166] To be eligible for the credit, the taxpayer must commit to new capital investment in Indiana of at least $250,000,000 over a five-year period.[167] Also, as part of the written agreement entered into with the IEDC, the taxpayer must agree not to claim credits in excess of $170,000,000 of the total qualified investments it proposes to make.[168] If the tax credit exceeds a taxpayer's state income tax liability for the taxable year, the IEDC may permit the taxpayer per written agreement to accelerate to that same tax year the excess portion of the tax credit that could otherwise be carried forward to a subsequent tax year under subsection (a) of the Hoosier business investment tax credit provision.[169] The discounted part of the excess tax credit accelerated as determined by IEDC may be remitted to the shareholders, members, or partners of the pass-through entity as provided in the

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159. *Id*. § 91, 2021 Ind. Acts at 2109 (codified at IND. CODE § 6-3.1-35.8-5(a) (2021)).

160. *Id*. (codified at IND. CODE § 6-3.1-35.8-5(c) (2021)).

161. *Id*. § 91, 2021 Ind. Acts at 2108 (codified at IND. CODE § 6-3.1-35.8-3(c) (2021)).

162. *Id*. § 90, 2021 Ind. Acts at 2106 (codified as amended at IND. CODE §§ 6-3.1-30.5-13(5), (6) (2021)), effective July 1, 2021.

163. *Id*. (codified as amended at IND. CODE § 6-3.1-30.5-13(4) (2021)).

164. Act of Apr. 29, 2021, Pub. L. No. 159-2021, § 19, 2021 Ind. Acts 1630, 1695 (codified as amended at IND. CODE § 6-3.1-34-11(b)(1) (2021)), retroactively effective to January 1, 2021.

165. Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 88, 2021 Ind. Acts 1788, 2102 (codified as amended at IND. CODE § 6-3.1-26-15(g)(3) (2021)), effective upon passage.

166. *Id*. (codified as amended at IND. CODE § 6-3.1-26-15(g)(1) (2021)).

167. *Id*. (codified as amended at IND. CODE § 6-3.1-26-15(g)(2) (2021)).

168. *Id*. (codified as amended at IND. CODE § 6-3.1-26-15(g)(3) (2021)).

169. *Id*.; *see also* IND. CODE § 6-3.1-26-15(a) (2021).

written agreement.[170] The Hoosier business investment tax credit's eligibility for pass-through entities expires December 31, 2031.[171]

The GA amended the tax credit for venture capital investment, providing that, for a calendar year beginning after December 31, 2021, the maximum amount of these credits available to a qualified Indiana business equals the lesser of two amounts: 25% of the total investment capital provided the business in the calendar year or $1,000,000.[172] Businesses owned by women or members of a minority are treated differently. For them, in any calendar year beginning after December 31, 2021, the maximum amount of venture capital investment tax credit available equals the lesser of these two amounts: 30% of the total amount of qualified investment capital provided to the business in the calendar year or $1,500,000.[173]

The GA also defined a business's "substantial presence" in the state for purposes of claiming the tax credit for venture capital investment.[174] It provided that "substantial presence" means maintaining a company headquarters in Indiana or maintaining at least 75% of a company's total payroll in Indiana.[175] A company that receives investment capital from a qualified Indiana investment fund satisfies Indiana's substantial presence requirement if, within a year of receiving the capital, the company commits to relocating to Indiana either its headquarters or 75% of its total payroll.[176] A taxpayer making an investment in an Indiana investment fund cannot claim the tax credit before July 1, 2023.[177]

The GA also limited the total amount of tax credits for venture capital investment the IEDC can authorize in a calendar year. After December 31, 2021, the GA capped the total amount of these tax credits at $20 million, provided that not more than $7.5 million may be awarded for a proposed investment in an Indiana investment fund.[178] Prior to January 1, 2021, the total amount of venture capital investment tax credits that the IEDC may award in a calendar year remains $12.5 million.[179] The GA increased Indiana's earned income tax credit to an amount equal to 10% of the Indiana-modified federal earned income tax credit an individual claimed for a taxable year.[180] Until December 31, 2021, the percentage

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170. Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 88, 2021 Ind. Acts 1788, 2102 (codified as amended at IND. CODE § 6-3.1-26-15(g)(3) (2021)), effective upon passage.

171. *Id.*

172. *Id.* § 81, 2021 Ind. Acts at 2096-97 (codified as amended at IND. CODE § 6-3.1-24-8(d) (2021)), effective January 1, 2022.

173. *Id.* § 81, 2021 Ind. Acts at 2097 (codified as amended at IND. CODE § 6-3.1-24-8(e) (2021)).

174. *Id.* § 78 (codified at IND. CODE § 6-3.1-24-4.5(a) (2021)).

175. *Id.*

176. *Id.* (codified at IND. CODE § 6-3.1-24-4.5(b) (2021)).

177. *Id.* § 86, 2021 Ind. Acts at 2100 (codified as amended at IND. CODE § 6-3.1-24-12.5(g) (2021)).

178. *Id.* § 87, 2021 Ind. Acts at 2100 (codified at IND. CODE § 6-3.1-24-15(b) (2021)).

179. *Id.* (codified at IND. CODE § 6-3.1-24-15(a) (2021)).

180. Act of Apr. 29, 2021, Pub. L. No. 168-2021, § 1, 2021 Ind. Acts 168 (codified as amendment at IND. CODE § 6-3.1-21-6(a) (2021)), effective January 1, 2022.

is 9%.[181]

E. Local Taxes

The GA enacted new surtaxes and a registration fee when owners permanently registerer their qualifying trailers, as well as enacting numerous clarifications of existing sections in the Indiana Code. The GA enacted a new vehicle registration process that, after December 31, 2021, permits owners of trailers weighing 3,000 pounds or less to permanently register them.[182] The GA defines "permanent registration" as any certificate of registration or other indicator of registration issued by the Department's Motor Carrier Services Division.[183] The permanent registration does not expire unless the owner sells the vehicle or otherwise disposes of it.[184] The fee to permanently register a qualifying trailer is $82.[185]

The GA also enacted new surtaxes associated with an owner permanently registering a trailer weighing 3000 pounds or less. The first is an amount twice the surtax calculated pursuant to the County Vehicle Excise Tax.[186] The person registering the trailer pays this county surtax in lieu of the regular county vehicle excise tax.[187] The second surtax is an amount twice the surtax calculated pursuant to the Municipal Vehicle Excise Tax.[188] The person registering the trailer pays this new municipal surtax in lieu of the regular municipal vehicle excise tax.[189] The person must pay both new surtaxes if applicable according to his or her place of residence.[190]

The GA also enacted legislation that clarified various sections of the existing county and municipal motor vehicle excise taxes in light of its adopting the new vehicle surtaxes for permanently registered trailers. The following is a list of those clarifications:

- A county's vehicle excise tax is due each year at the time the vehicle is registered except as provided in the new provision regarding permanent

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181. Act of Apr. 29, 2021, Pub. L. No. 168-2021, § 1, 2021 Ind. Acts 2275, 2275 (codified as amendment at IND. CODE § 6-3.1-21-6(a) (2021)), effective January 1, 2022.

182. Act of Apr. 23, 2021, Pub. L. No. 114-2021, § 9, 2021 Ind. Acts 1187, 1192 (codified at IND. CODE § 9-18.1-5-13 (2021)), effective July 1, 2021.

183. *Id.* § 7, 2021 Ind. Acts at 1191 (codified at IND. CODE § 9-18.1-1-4.5 (2021)).

184. *Id.*

185. *Id.* § 9, 2021 Ind. Acts at 1192 (codified at IND. CODE § 9-18.1-5-13(d)).

186. *Id.* § 3, 2021 Ind. Acts at 1189 (codified at IND. CODE § 6-3.5-4-7.5(b) (2021)); *see* IND. CODE § 6-3.5-4-2 (2021).

187. Act of Apr. 23, 2021, Pub. L. No. 114-2021, § 3, 2021 Ind. Acts 1187, 1189 (codified at IND. CODE § 6-3.5-4-7.5(c) (2021)), effective July 1, 2021.

188. *Id.* § 6, 2021 Ind. Acts at 1191 (codified at IND. CODE § 6-3.5-10-8.5(b) (2021)); *see* IND. CODE § 6-3.5-10-2 (2021).

189. Act of Apr. 23, 2021, Pub. L. No. 114-2021, § 6, 2021 Ind. Acts 1187, 1191 (codified at IND. CODE § 6-3.5-10-8.5(c) (2021)), effective July 1, 2021.

190. *Id.* § 9, 2021 Ind. Acts at 1192 (codified at IND. CODE § 9-18.1-5-13 (2021)).

trailer registration (*i.e.*, Ind. Code § 6-3.5-4-7.5).[191]

- Except for someone who has permanently registered a trailer pursuant to Ind. Code § 6-3.5-4-7.5, a person may not register a vehicle in a county that has adopted the surtax without paying it to the Bureau of Motor Vehicles.[192]
- A municipality's vehicle excise tax is due each year at the time the vehicle is registered, except as provided in the new provision regarding permanent trailer registration (*i.e.*, Ind. Code § 6-3.5-10-8.5).[193]
- Except for someone who has permanently registered a trailer pursuant to Ind. Code § 6-3.5-10-8.5, a person may not register a vehicle in a municipality that has adopted the surtax without paying it to the Bureau of Motor Vehicles.[194]

The GA also imposed on the Department the requirement that, before October 1, 2023, and on or before October 1st of each following year, the Department must provide each Indiana county with a report pertaining to the fiscal year ending in the calendar year of the report's due date.[195] The report must state, as regards the county: (i) the number of taxpayers claiming on their tax returns the filing statuses single, joint, and married but filing separately; (ii) the number of returns filed by full-year Indiana residents and part-year residents; (iii) the amounts the Department billed county taxpayers for tax underpayments; (iv) the amounts the Department collected from county taxpayers for delinquent taxes; and (v) the amounts reported on the individual lines of the annual returns filed by or for county taxpayers.[196] The GA reminded the Department not to run afoul in preparing these reports of IRC § 6103 and the IRS's strictly enforced prohibition against the unauthorized disclosure of tax return information.[197] Accordingly, if amounts stated in the reports can reasonably lead to the identification of any taxpayer return information or cause the unlawful disclosure of any other tax return information, the GA permits the Department to redact the otherwise required amounts.[198]

F. Excise Taxes and Other Miscellaneous Taxes

The GA created two new tobacco products taxes. First, it created the "closed system cartridges tax," which is imposed on the distribution of closed-system cartridges in Indiana at the rate of 25% of the cartridge's wholesale price.[199]

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191. *Id.* § 1, 2021 Ind. Acts at 1182 (codified at IND. CODE § 6-3.5-4-2 (2021)).

192. *Id.* § 2, 2021 Ind. Acts at 1189 (codified at IND. CODE § 6-3.5-4-7 (2021)).

193. *Id.* § 4, 2021 Ind. Acts at 1189 (codified at IND. CODE § 6-3.5-10-2 (2021)).

194. *Id.* § 5, 2021 Ind. Acts at 1190 (codified at IND. CODE § 6-3.5-10-7 (2021)).

195. Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 96, 2021 Ind. Acts 1788, 2111 (codified at IND. CODE § 6-3.6-9-19 (2023)), effective July 1, 2023.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* § 108, 2021 Ind. Acts at 2124 (codified at IND. CODE § 6-7-2-7.5 (2022)), effective July

Distributors include persons selling closed system cartridges via the internet.[200] The tax is imposed at the time the distributor: (i) brings or causes closed system cartridges to be brought into Indiana for distribution, (ii) manufactures closed system cartridges in Indiana for distribution; or (3) transports closed system cartridges to retail dealers in Indiana for them to resale.[201] A consumer of these cartridges who purchases untaxed cartridges from an Indiana retailer or through an internet website, catalog, or other similar means is responsible for paying the tax.[202] The GA defines a "closed-system cartridge" as a sealed, prefilled, and disposable container of consumable material.[203] The container is inserted directly into a vapor product and is not intended to be opened or accessed through customary or reasonably foreseeable handling or use.[204]

Second, the GA created the "electronic cigarette tax," which is imposed on the retail sale of consumable material and vapor products in Indiana at the rate of 15% of the gross retail income received by the retail dealer for the sale.[205] The GA defines "consumable material" as any liquid solution or other material used in an "open-system container" that is depleted as the vapor product is used.[206] The term does not include closed-system cartridges as defined in the closed-system cartridges tax.[207] An open-system container is a refillable container of consumable material intended for use in a vapor product.[208] As before, the term does not include closed system cartridges as defined in the closed system cartridges tax.[209] The GA defines "vapor product" as: (i) a device such as an electronic cigarette that employs a mechanical heating element, battery, or electronic circuit, regardless of shape or size, that is used to produce vapor from consumable material that may or may not be sold as part of the device; (ii) any open-system container of a consumable material in a solution or other form that is intended to be used with or in a device described in number (i) above; or (iii) a disposable vapor device that is attached to a closed-system cartridge and intended for single use.[210] The term "vapor product" does not include closed-system cartridges as defined in the closed-system cartridges tax.[211] The person who acquires

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1, 2022.

200. *Id.*

201. *Id.*

202. *Id.*

203. IND. CODE § 6-7-2-0.5 (2022).

204. *Id.*; *see* Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 101 (codified at IND. CODE § 6-7-2-0.5 (2022)), effective July 1, 2022.

205. Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 119, 2021 Ind. Acts 1788, 2130 (codified at IND. CODE § 6-7-4-9 (2022)), effective July 1, 2022.

206. *Id.* § 119, 2021 Ind. Acts at 2129 (codified at IND. CODE § 6-7-4-2 (2022)).

207. *Id.*; *see* IND. CODE § 6-7-2-0.5 (2022).

208. Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 119, 2021 Ind. Acts 1788, 2129 (codified at IND. CODE § 6-7-4-5 (2022)), effective July 1, 2022.

209. *Id.* § 119, 2021 Ind. Acts at 2129-30.

210. *Id.* § 119, 2021 Ind. Acts at 2130 (codified at IND. CODE § 6-7-4-8 (2022)).

211. *Id.*

consumable material or vapor products in a retail transaction is liable for the tax on the transaction.[212] The tax is a separate amount added to the product's sales price.[213] A retailer is subject to the electronic cigarette tax if it has a physical presence in the state[214] or satisfies Indiana's remote seller's nexus requirements.[215] The GA applied Indiana's marketplace facilitator requirements[216] on retailers selling consumable material and vapor products on behalf of third parties or facilitating third-party sales.[217] Finally, the new chapter creating the electronic cigarette tax mandates registration requirements for dealers,[218] the return filing and tax remittance requirements,[219] directions for the state to deposit the taxes into the general fund,[220] and the criminal consequences for failing to register as a seller of consumable material or vapor products[221] or failing to remit the appliable taxes[222] in accordance with the new mandates.

The GA made two notable changes to the Indiana Code pertaining to miscellaneous Indiana taxes. First, the GA enacted an amendment exempting aviation fuel from the aviation fuel excise tax if it is placed into the tank of an aircraft owned by an aerial applicator certified by the Federal Aviation Administration to perform agricultural operations.[223] Second, the GA enacted legislation requiring that remote retailers collecting and remitting sales and use taxes under Indiana's remote seller's nexus provisions (*i.e.*, Ind. Code § 6-2.5-2-1(d)) must also collect taxes pertaining to: (i) waste tire management fees,[224] (ii) fireworks public safety fees,[225] and (iii) prepaid wireless service charges.[226]

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212. *Id*. (codified at IND. CODE § 6-7-4-9 (2022)).

213. *Id*.

214. *See* IND. CODE § 6-2.5-2-1(c)(1-3) (providing Indiana's traditional definition of physical presence in the state for sales and use tax purposes).

215. *See id.* § 6-2.5-2-1(d) (providing Indiana's post-*Wayfair* definition of physical presence for remote sellers).

216. *See id.* § 6-2.5-4-18 (deeming persons who facilitate retail sales on behalf of third parties as retail merchants subject to remitting Indiana's sales and use taxes on behalf of the third parties).

217. Act of Apr. 29, 2021, Pub. L. No. 165-2021, § 119, 2021 Ind. Acts 1788, 2131 (codified at IND. CODE § 6-7-4-9), effective July 1, 2022.

218. *Id*. (codified at IND. CODE § 6-7-4-10 (2022)).

219. *Id.* § 119, 2021 Ind. Acts at 2130 (codified at IND. CODE § 6-7-4-9 (2022)).

220. *Id.* § 119, 2021 Ind. Acts at 2133 (codified at IND. CODE § 6-7-4-13 (2022)).

221. *Id.* § 119, 2021 Ind. Acts at 2132 (codified at IND. CODE § 6-7-4-11 (2022)).

222. *Id.* § 119, 2021 Ind. Acts at 2132-33 (codified at IND. CODE § 6-7-4-12 (2022)).

223. Act of Apr. 29, 2021, Pub. L. No. 38-2021, § 49, 2021 Ind. Acts 297, 352 (codified at IND. CODE § 6-6-13-7 (2021)), effective July 1, 2021.

224. Act of Apr. 29, 2021, Pub. L. No. 159-2021, § 39, 2021 Ind. Acts 1630, 1733 (codified at IND. CODE § 13-20-13-7 (2021)), effective July 1, 2021.

225. *Id.* § 40, 2021 Ind. Acts at 1735 (codified at IND. CODE § 22-11-14-1 (2021)).

226. *Id.* § 42, 2021 Ind. Acts at 1739 (codified at IND. CODE § 36-8-16.6-10 (2021)).

G. Tax Administration Matters

The GA enacted some notable changes to the administration of taxes under the Indiana Code. It enacted legislation permitting the Department to issue a tax levy against unclaimed property apparently owned by a delinquent taxpayer.[227] The Department accomplishes this by filing a claim with the Office of the Indiana Attorney General ("OAG") pursuant to the newly Revised Unclaimed Property Act ('RUPA")[228] and doing so like any other claimant seeking to acquire unclaimed property held by Indiana.[229] That is, a claimant files a claim with the OAG,[230] providing evidence sufficient to satisfying the OAG that it owns the property. If the claimant convinces the OAG of this, the OAG must pay or deliver the property to the claimant.[231] The new RUPA and its sections expanding the Department's power to levy unclaimed property to collect unpaid taxes fail to clarify what constitutes the evidence the Department must present to the OAG as a claimant sufficient to convincing the OAG to pay or deliver the unclaimed property to the Department. Must the Department, like any other claimant, prove to the OAG's satisfaction that the delinquent taxpayer actually owns the unclaimed property the Department seeks to levy, or must the Department merely demonstrate to the OAG's satisfaction that it properly executed a delinquent tax warrant against a taxpayer owing delinquent taxes who supposedly owns the unclaimed property? If the GA does not resolve this uncertainty, litigation will likely result.

The GA enacted legislation that permits the Department to release the name and business address of a person issued a retail merchant's certificate and verify the certificate's active or inactive status.[232] In the early 2000s, the Department publicly provided this information via its website and in response to phone inquiries. It stopped this practice, fearing it might violate the confidentiality of taxpayer information—a violation that constitutes a crime in Indiana.[233] Despite this, it remains important for retail customers purchasing taxable goods or services from a seller to inquire as to the seller's status as an active or inactive Indiana retail merchant. A seller's inactive status suggests that the Department has revoked its retail merchant license due to a failure to remit sales taxes, a failure to file sales tax returns in a timely manner, or because of its owing delinquent taxes. Because a retail customer remains liable for sales taxes paid to

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227. Act of Apr. 29, 2021, Pub. L. No. 141-2021, § 6, 2021 Ind. Acts 1382, 1394-95 (codified at IND. CODE § 6 6-8.1-8-15 (2021)).

228. *Id.* § 20, 2021 Ind. Acts at 1402 (codified at the new chapter, IND. CODE § 32-34-1.5 (2021)).

229. *Id.*§ 6, 2021 Ind. Acts at 1394-95 (amending IND. CODE § 6 6-8.1-8-15 (2021)).

230. *Id.* § 20, 2021 Ind. Acts at 1435 (codified at IND. CODE § 32-34-1.5-48 (2021)).

231. *Id.* (adding IND. CODE § 32-34-1.5-49 (2021)).

232. Act of Apr. 29, 2021, Pub. L. No. 159-2021, § 34, 2021 Ind. Acts 1630, 1717 (codified at IND. CODE § 6-8.1-7-1 (2021)), effective July 1, 2021.

233. *See* IND. CODE § 6-8.1-7-3 (stating a person that improperly discloses confidential tax information commits a Class C misdemeanor).

a seller but not remitted to the Department, the customer is wise to ascertain a seller's status with the Department before engaging in a high-dollar retail transaction. The GA's new legislation again allows this.

The GA added the new Chapter 18 to the Indiana Code's tax administration provisions dealing with payroll service providers. The GA defines a "payroll service provider" as a third-party service provider authorized to, on behalf of a client with regard to the client's tax withholding and remittance duties: (i) prepare and file payroll tax returns; (ii) withdraw and hold in a bank account funds from the client's employee payroll; (iii) remit payroll tax payments, and (iv) take other reporting and compliance actions.[234] If a payroll service provider knowingly or intentionally fails to remit taxes it withheld pursuant to a contract with a client, it becomes responsible for the taxes and, therefore, personally liable for them along with any penalties and interest.[235] The person responsible for remitting the taxes collected by the payroll service provider who knowingly or intentionally fails to do so commits failure to remit taxes, a Class A misdemeanor, if the amount is less than $750.[236] The person commits a Level 6 felony if the amount withheld but not remitted is equal to $750 but less than $50,000[237] and a Level 5 felony if the amount is equal to or greater than $50,000.[238] The person responsible is defined as: (i) the officer or director of a payroll service provider, or (ii) an employee or other person affiliated with a payroll service provider who is responsible for collecting, accounting for, and paying withholding taxes on behalf of a client of the provider.[239] A payroll service provider must annually register with the Department.[240] Finally, the GA mandated that a contract between a client or employer and the payroll service provider must have a provision that states:

> If the payroll service provider fails to deposit a business client's employer withholding taxes when due, and the failure is caused by an error or omission of the payroll service provider and not by the business client, the payroll service provider shall be required to reimburse the business client for the business client's payment of any penalties or interest assessed by the department as a result of the failure.[241]

II. INDIANA TAX COURT DECISIONS

During this article's review period, December 1, 2020, to December 1, 2021, the Tax Court issued thirteen published opinions—ten concerning real property

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234. Act of Apr. 29, 2021, Pub. L. No. 97-2021, § 2, 2021 Ind. Acts 957, 959 (codified at IND. CODE § 6-8.1-18-1 (2022)), effective January 1, 2022.

235. *Id.* § 2, 2021 Ind. Acts at 961 (codified at IND. CODE § 6-8.1-18-6 (2022)).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* § 2, 2021 Ind. Acts at 959 (codified at IND. CODE § 6-8.1-18-2 (2022)).

240. *Id.* § 2, 2021 Ind. Acts at 959-60 (codified at IND. CODE § 6-8.1-18-3 (2022)).

241. *Id.* § 2, 2021 Ind. Acts at 960 (codified at IND. CODE § 6-8.1-18-5 (2022)).

tax, two concerning income tax, and one concerning an excise tax.[242] Each opinion is summarized below.

A. Real Property Tax

1. Meijer Stores Limited Partnership v. Boone County Assessor.[243]—The issue before the Tax Court was whether the IBTR erred in determining that the County Assessor properly increased the assessed value of a Meijer store for tax years 2014 through 2017 despite the company's argument that its sales comparisons, its valuation method, and the store's obsolescence demanded a reduction in assessed value.[244]

In Boone County, Indiana, Meijer Stores Limited Partnership ("Meijer") owned and operated a 194,380 square foot freestanding Meijer store.[245] Meijer constructed this retail store in 2014 and regularly improved it through the years.[246] Believing that the County Assessor assigned erroneously high values to the improvements for the tax years 2014 through 2018, Meijer first challenged them before the Boone County PTABOA, then before the IBTR.[247] Before the IBTR, the two parties presented appraisals estimating the Meijer store's market value-in-use according to all three approved valuation methods—that is, the sales comparison approach, the income approach, and the cost approach.[248] Unsurprisingly, Meijer's appraisal assigned a lower value to its property than the Assessor's.[249] The parties' appraisals had two notable differences. First, the comparable properties that Meijer used in its sales comparison and income approaches included so-called "dark box" properties.[250] That is, Meijer compared large, vacant, "dark" retail box stores to its non-vacant store to estimate comparable property's sales prices for purposes of the sales comparison approach and market rents for purposes of the income approach.[251] Second, Meijer further reduced its calculated value of the store using the cost approach by an estimate of the store's external and functional obsolescence.[252]

The IBTR rejected all three of Meijer's valuation approaches and determined that the Assessor's cost approach best reflected the Meijer store's market value-

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242. *See Indiana Appellate Decisions—Tax Court*, [https://perma.cc/A64W-YDMH] (last visited November 9, 2021).

243. 162 N.E. 3d 26 (Ind. T.C. 2020).

244. *Id*. at 1.

245. *Id*.

246. *Id*. at 27.

247. *Id*. at 28.

248. *Id*.

249. *Id*. at 29.

250. *Id*. at 17.

251. *Id*. at 34 (noting the "dark box controversy" centers on whether appraisers can use vacant properties as comparable when ascertaining a property's valuation via the various valuation approaches.).

252. *Id*. at 29.

in-use.[253] The IBTR valued the Meijer store at $12,798,000 for tax year 2016.[254] The parties had agreed before the hearing that the assessment for the other three tax years at issue would be determined by applying a predetermined trending formula to the IBTR's determination of the store's value for the 2016 tax year.[255] Meijer challenged the IBTR's decision to the Tax Court.[256]

Before the Tax Court, Meijer argued that the IBTR erred when it: (i) used a flawed market-segmentation analysis in rejecting Meijer's sales comparison and income approaches, (ii) determined that the Assessor's cost approach provided the most reliable valuation of the store because it inherently avoided the controversial practice of comparing vacant properties with a non-vacant one, and (iii) refused to deduct obsolescence from its valuation.[257]

Meijer's first argument referred to the IBTR's having depicted the store as a "mega warehouse store" and a "superstore."[258] The IBTR explained its characterization, noting that the store was 100% to 150% larger than other large discount or big box retail stores, sold both groceries and other items, and, because of its expanded inventory, possessed more loading docks and heating, ventilation, and air conditioning equipment and systems than large retail stores that did not carry groceries.[259]

Meijer argued that this characterization of its store constituted a market-segmentation analysis.[260] This type of analysis identifies markets and submarkets for the subject property and comparable properties and determines if the properties share the same markets and submarkets.[261] It is used to refute or support the claim of comparability of properties employed in determining valuation via both the sales comparison and income approaches.[262] Meijer asserted that a market-segmentation analysis must be performed pursuant to specific mandated requirements.[263] It argued that the IBTR engaged in a "contrived" market-segmentation analysis because it failed to comply with such an analysis's mandated requirements and identify any evidence to support its conclusions.[264]

The Tax Court rejected this argument. The Court noted that Indiana law authorized the IBTR to act as the trier of fact in property tax disputes and review the probative value of any appraisal reports submitted to it as evidence.[265] To

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253. *Id.* at 31.
254. *Id.*
255. *Id.* at 28.
256. *Id.* at 31.
257. *Id.* at 32.
258. *Id.* at 30, 32.
259. *Id.* at 30.
260. *Id.* at 32.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*

fulfill this function, Indiana law requires the IBTR to determine the evidence's relevance and probative weight.[266] The Tax Court held that Meijer's claim that the IBTR did an improperly performed market-segmentation analysis was wrong.[267] Through its analysis, the IBTR was, in fact, acting within its authority in weighing evidence to determine the evidence's reliability.[268] The IBTR simply used its characterizations of the Meijer store as a guide for weighing the reliability of the comparisons of comparable properties.[269]

The Tax Court also rejected Meijer's argument that the IBTR improperly relied on the Assessor's cost approach to determine the store's value.[270] Meijer argued that the IBTR had adopted the Assessor's cost approach because, as the IBTR said, doing so sidestepped problems or controversies associated with valuation methods premised on comparisons between comparable vacant and non-vacant properties.[271] Meijer asserted that this rationale constituted an abuse of discretion.[272] The Tax Court agreed that it had previously decided that valuation approaches could rely on comparisons between comparable vacant and non-vacant properties.[273] Nevertheless, the court held that, because sufficient evidence existed supporting the IBTR's reliance on the Assessor's cost approach and its rejection of the other valuation approaches, the IBTR acted reasonably, and the court could not disturb its findings.[274]

Meijer's third argument held that the IBTR failed to meaningfully consider any of the evidence, analysis, or arguments presented regarding obsolescence.[275] The Tax Court disagreed, detailing several examples of the IBTR's addressing and analyzing Meijer's obsolescence arguments and supporting evidence.[276] Because the Tax Court rejected all Meijer's arguments, it affirmed the IBTR's decision.[277]

2. DuSablon v. Kaufman.[278]—The issue before the Tax Court was whether the IBTR properly upheld the valuation of the taxpayer's residential property for the 2018 tax year.

Just outside Seymour, Indiana, Mathew and Vanessa DeSablon ("DuSablons") owned 10.28 acres of land they had purchased in December 2014

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266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at 33.
271. *Id.*
272. *Id.*
273. *Id.* (citing, *e.g.*, Switzerland Cnty. Assessor v. Belterra Resort Indiana, LLC, 101 N.E.3d 895, 905 (Ind. T.C. 2018), *review denied*; Stinson v. Trimas Fasteners, Inc., 923 N.E.2d 496, 501 (Ind. T.C. 2010)).
274. *Id.*
275. *Id.* at 34.
276. *Id.*
277. *Id.*
278. 160 N.E.3d 587 (Ind. T.C. 2020).

for $380,000.[279] For the 2018 tax year, the Jackson County Assessor assessed the DuSablons' property at $372,000 ($28,500 for land and $343,500 for improvements).[280] The DuSablons challenged the assessment to the Jackson County PTABOA, which reduced the assessment to $364,300 ($28,500 for land and $335,800 for improvements).[281] Still unhappy with the assessment, the DuSablons challenged it before the IBTR. During the hearing, the Jackson County Assessor conceded that she bore the burden of proving that the DuSablons' assessment, which had increased by more than 5% from 2017 to 2018, was correct.[282] The Assessor presented an appraisal report conforming to the Uniform Standards of Professional Appraisal Practice ("USPAP"), along with the testimony of its preparer, Richard Borges, an Indiana-certified general appraiser and member of the Appraisal Institute.[283] The report estimated the value of the DuSablons' property at $400,000 as of January 1, 2018.[284] Borges testified that he determined the property's value using a sales comparison approach that evaluated the sales of three comparable properties near the DuSablons' property.[285]

The DuSablons rebutted the Assessor's evidence, arguing that the assessment was the product of bias because: (i) the Assessor failed to correct mistakes on their property's record card, (ii) they had made no improvements to the property justifying a 17% assessment increase, (iii) the properties chosen by the appraiser as comparable to theirs were not, and (iv) the PTABOA ignored three properties with lower assessments that the DuSablons claimed were in fact comparable to their own.[286]

The IBTR upheld the assessment of the DuSablons' property.[287] It held that the Assessor used a generally accepted valuation methodology (*i.e.*, the sales comparison approach) to estimate the DuSablons' property value.[288] Borges testified that he had adjusted the sales prices of the comparable properties he used to account for any relevant differences between them and the DuSablons' property.[289] In the IBTR's judgment, the DuSablons' response to the Assessor's evidence amounted to nothing more than their disagreeing with it.[290] Finally, the IBTR held that the DuSablons failed to present any evidence establishing the

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279. *Id.* at 588.

280. *Id.* at 589.

281. *Id.*

282. *Id.*; *see also* IND. CODE § 6-1.1-15-17.2 (2016) (providing that, if an assessment of property increases by more than 5% from one year to the next, the Assessor bears the burden of proving the assessment correct.).

283. *DuSablon*, 160 N.E.3d at 589.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at 590.

288. *Id.*

289. *Id.*

290. *Id.*

proper valuation of their property—that is, a valuation different from the one offered by the Assessor.[291] The DuSablons appealed to the Tax Court.[292]

The Tax Court stated the issues before it "as whether the DuSablons: (i) successfully discredited Borges and his appraisal report" and (ii) offered their own evidence successfully arguing a reduction to their property's assessment.[293] With regard to the first issue, the DuSablons argued that they demonstrated the Borges's bias favoring the County Assessor and his prejudice against them when they elicited testimony that he had received two assessment reductions from the county for his own properties.[294] In other words, the DuSablons argued that, because the appraiser received a favorable reduction on his own assessments from the County Assessor, he was compelled to return the favor, helping the Assessor establish a higher value for the DuSablons' property.[295] Noting that the DuSablons did not object to Borges's credibility before the IBTR, the Tax Court said that, because they failed to explain how his two successful property tax appeals negatively affected his credibility as a witness, the DuSablons' assertion of bias amounted to nothing more than an unsubstantiated and unproven allegation.[296] Also, the DuSablons failed to explain how the "[IBTR] contravened any law when it determined that the Borges was a credible witness."[297]

As part of the first issue, the DuSablons also asserted that they discredited the appraisers' report by identifying numerous mistakes he made identifying and describing various features of the comparable properties and the DuSablons' property.[298] The Tax Court rejected this argument, stating that the DuSablons' examination of the appraiser before the IBTR demonstrated that they either did not understand his appraisal descriptions or merely disagreed with them.[299] Also, the Tax Court said that the appraiser testified that most of the individual physical features the DuSablons' claimed he misdescribed had little to no effect on his valuation of their property.[300]

Finally, the DuSablons asserted that they discredited the appraisal report by demonstrating that the properties used in the sales comparison approach were not truly comparable to their own property.[301] In rejecting this argument, the Tax Court noted that the DuSablons failed to assert this argument before the IBTR.[302] The Court could not hold that the IBTR failed to properly decide an issue that

291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 590-92.
295. *Id.* at 591.
296. *Id.*
297. *Id.* at 592.
298. *Id.*
299. *Id.* at 592-93.
300. *Id.* at 593.
301. *Id.*
302. *Id.* at 594.

was never presented to it.[303]

The Tax Court then turned to the second issue—whether the DuSablons offered their own evidence successfully arguing for a reduction in their property's assessment. The DuSablons argued that, because no improvements were made to the property between 2017 and 2018, there was no basis for a change in the assessment.[304] The Tax Court noted that the DuSablons misunderstood how a property's value changes, and that extrinsic factors—such as fluctuations in the sales market and adjustments to a mistaken undervaluation—can change a property's value, as can intrinsic factors like physical changes to the property.[305]

The Tax Court went on to say that, once the Assessor satisfied her burden by presenting evidence that supported her increase of the DuSablons' property's value and, accordingly, the property's assessment, the DuSablons' rebuttal needed to consist of more than merely asserting that the Assessor used an erroneous methodology.[306] They needed to present objectively verifiable evidence establishing their property's lesser value and the need for a lower tax assessment.[307] The Tax Court held that the DuSablons failed to do this.[308]

Also with regard to the second issue, the DuSablons submitted as evidence before the IBTR the property record cards for seven properties—that is their property's, the three used in the Assessor's appraisal, and three others.[309] They argued that: (i) the three properties used in the appraisal report were more valuable than theirs but assessed for less, and (ii) four of the properties were assessed for less than their recently recorded sales prices.[310] The Tax Court first noted that the appraisal report could not have relied on two of the three properties cited by the DuSablons because the properties had not been sold at the time of the appraisal.[311] The sales comparison approach rests on comparing a property to properties that have recently been sold.[312] The Tax Court also noted that merely saying one property is better than another constitutes nothing more than a subjective conclusions.[313] Indiana bases its property tax assessments on objectively verifiable evidence, not subjective conclusions.[314] The DuSablons needed to explain what, exactly, made the other properties superior to theirs and worth more at sale.[315] The Tax Court, however, did not reject the DuSablons' use

303. *Id.*
304. *Id.*
305. *Id.* at 594-95.
306. *Id.* at 595.
307. *Id.*
308. *Id.*
309. *Id.* at 596.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.* (citing Millennium Real Estate Inv., LLC v. Assessor, Benton Cnty., 979 N.E.2d 192, 196 n.3. (Ind. Tax Ct. 2020).
315. *Id.*

of the seven comparison properties for these two reasons. It did so for a different one.

The IBTR had interpreted the DuSablons' presenting the seven comparison properties as "a claim for relief based on a lack of uniformity and equality in assessments. . . ."[316] It rejected this claim, finding that the DuSablons' evidence did not prove they were entitled to an equalization adjustment.[317] The Tax Court upheld the IBTR's decision, holding that pursuant to the Indiana Department of Local Government Finance's regulations pertaining to ascertaining uniformity and equality or the lack thereof, the IBTR was correct in determining that the DuSablons' presentation of the four properties (*i.e.*, their own and the three other new ones) failed to demonstrate that their property was assessed and taxed at a higher percentage of market value-in-exchange than other properties in the township overall.[318] Accordingly, the Tax Court affirmed the IBTR's decision in its entirety.[319]

3. Elkhart County Assessor v. E R Carpenter Co., Inc.[320]—The issue before the Tax Court was whether the IBTR mistakenly reduced the County Assessor's valuation of real property by erroneously applying excess office space adjustments to the Assessor's valuation of the taxpayer's manufacturing facility.[321]

In Elkhart, Indiana, E R Carpenter Co., Inc. (Carpenter) owned three contiguous parcels of land totaling 43.25 acres, where it manufactured comfort cushion products.[322] Carpenter claimed that two parcels were over assessed for the 2012, 2015, and 2016 tax years, and one was also over assessed for the 2017 tax year.[323] The assessments of the parcels at issue totaled $17,514,200 for 2012, $18,056,100 for 2015, $17,020,400 for 2016, and $10,543,800 for 2017.[324] The parties agreed to limit the hearing before the IBTR to determining the values of the parcels for the 2012 and 2016 tax years.[325] The 2015 and 2017 values would be determined by a formula agreed on by the parties.[326] The parties also agreed that all three parcels at issue for 2015 and 2017 should be valued as one economic unit.[327]

At the hearing before the IBTR, Carpenter and the Assessor presented different valuations of the parcels, with Carpenter using the cost and the sales comparison approaches but not the income approach, while the Assessor used all

316. *Id.* at 597.
317. *Id.*
318. *Id.*
319. *Id.* at 598.
320. 163 N.E.3d 961 (Ind. T. C.), *trans. denied*, 169 N.E.3d 1115 (Ind. 2021).
321. *Id.* at 962.
322. *Id.* at 963.
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*

three approaches.[328] The IBTR held that the Assessor's valuations were more credible than Carpenter's.[329] It said, however, that the Assessor's estimates overvalued the facility by failing to adjust for its "atypical" office space.[330] As a result, the IBTR deducted from the manufacturing building's value the costs attributable to office spaces the Assessor had mistakenly included in its valuation.[331] After applying the pre-determined formula to its new 2016 estimate, the IBTR concluded that the market value-in-use of the three parcels together must not exceed $16,153,610 for 2012 (a reduction of $1,360,590), $14,966,585 for 2015 (a reduction of $3,089,515), $15,047,747 for 2016 (a reduction of $1,972,653), and $15,423,941 for 2017 (a reduction of $1,539,809).[332]

The Assessor challenged the IBTR's reduction of its assessment to the Tax Court, arguing that the IBTR acted arbitrarily and capriciously when it reduced the Assessor's valuations by applying the adjustments for non-existent excess office space.[333] This reduction, the Assessor argued, was not supported by the evidence.[334] Carpenter disagreed, arguing that the Assessor inflated the value of its manufacturing facility by ignoring the value of the extra office space that it had.[335]

The Tax Court agreed with the Assessor. It said that the IBTR provided no explanation for the values it claimed corresponded to the alleged extra office space, which it used to reduce the assessed value of the property.[336] The IBTR had used the Marshall Valuation Service ("MVS") cost schedules to calculate the adjustments it made to Carpenter's property. The Tax Court noted that the MVS does not authorize any automatic adjustment for atypical office space as it does for other items such as, for example, sprinklers and elevators.[337] The Tax Court noted that the MVS permits adjustments when buildings vary due to differing interior finishes.[338] These adjustments, however, cannot be made until the Assessor or appraiser thoroughly inspects the building and estimates how the interior finishes affect the buildings' quality.[339] The Tax Court determined that, because no evidence showed that the Assessor or appraiser inspected the property, the IBTR could not rely on the MVS as support for its lessened valuation.[340]

The Tax Court went on to determine that the IBTR provided no explanation

328. *Id.*
329. *Id.* at 964.
330. *Id.*
331. *Id.*
332. *Id.* at 965.
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.* at 966.
338. *Id.*
339. *Id.*
340. *Id.*

why it chose its method of calculating the atypical office space adjustment over others.[341] Finally, the Tax Court held that no evidence (*i.e.*, no witness testimony, no exhibits, no post hearing briefs, and no citation to authoritative source) was presented to or identified by the IBTR supporting the existence of any atypical office space that justified a reduction in the assessed value of the property.[342] The Tax Court concluded that, because no evidence existed supporting the IBTR's decision to consider the atypical office space and reduce the Assessor's assessment, the IBTR acted arbitrarily and capriciously.[343]

Finally, the Tax Court considered Carpenter's claim regarding its third parcel of land. It owned three parcels but challenged the assessment of only two, and the parties agreed that the two challenged parcels should be valued as one economic unit.[344] Despite this, the valuation of the parcels at issue included the third parcel. At the hearing before the IBTR, both parties' appraisers had testified, saying that the third parcel's value should be subtracted from the valuation.[345] Carpenter argued to the Tax Court that the IBTR's valuation of the parcels at issue must reflect this, and the IBTR's ignoring it constituted error.[346] The Assessor argued that Carpenter had waived this argument because it failed to file a petition for review independently asserting this issue.[347]

The Tax Court rejected the Assessor's argument, holding that Carpenter did not waive the issue; Carpenter, in fact, raised the issue in its response brief opposing the Assessor's original tax appeal.[348] Carpenter asserted the argument to the IBTR, but the IBTR failed to consider it in a meaningful manner.[349] The Tax Court held that the IBTR assigns relevance and weight to the evidence the parties present but cannot refuse to consider probative evidence or the parties' related arguments.[350] In other words, the IBTR cannot ignore any evidence or arguments pertaining to the disputed issues. The Tax Court said this is exactly what the IBTR did.[351] Accordingly, the Tax Court reversed the IBTR's decision and remanded the matter back to the IBTR to: (i) consider Carpenter's evidence and argument concerning removing the third parcel's value from the valuation of the parcels at issue, and (ii) adjust the Assessor's 2012 and 2016 valuations without using its adjustments for atypical office space.[352]

4. Hatke v. Potter.[353]—The issue before the Tax Court was whether a property

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341. *Id.*
342. *Id.* at 966-67.
343. *Id.* at 967.
344. *Id.*
345. *Id.* at 968.
346. *Id.* at 967.
347. *Id.*
348. *Id.*
349. *Id.* at 968.
350. *Id.*
351. *Id.*
352. *Id.*
353. 173 N.E.3d 728 (Ind. T.C. 2021).

owner deserved a property-tax exemption for her property subject to a flowage easement that allowed the U.S. government to periodically flood it and make it unusable to the owner.[354]

In Rockville, Indiana, Thelma Jean Hatke and her husband Richard ("Hatkes") own a house on .66 acres of lakefront land on Raccoon Lake.[355] The portion of their property abutting the lake (*i.e.*, .38 acres) is subject to a United States Army Corps of Engineers' flowage easement. This allows the Corps to flood the area when necessary in order to manage Raccoon Lake's water levels. The Hatkes must receive the Corps' approval to add any structures on the land subject to the flowage easement.[356] They can, however, mow and plant vegetation without the Corps' approval.[357]

For the 2019 tax year, the part of the Hatkes' property subject to the flowage easement was assigned an assessed value of $17,400.[358] The Hatkes filed a Form 136 "Application for Property Tax Exemption," claiming that this portion of their property should be exempt from taxation because the federal government controlled their use of it.[359] The Parke County PTABOA denied the exemption, and the Hatkes appealed the ruling to the IBTR.[360]

The IBTR denied the appeal and upheld the PTABOA's decision, stating that there was no provision in Indiana law exempting property from taxation because it is subject to a flowage easement.[361] The IBTR said that, with respect to privately owned property, the Indiana General Assembly had determined that an exemption is allowed only if the property is owned, occupied, and used "for educational, literary, scientific, religious, or charitable purposes."[362] The Hatkes provided no evidence that they used the property in any of these ways.[363] The Hatkes appealed the IBTR's decision to the Tax Court. The court upheld and affirmed the IBTR's decision because, as the Court said, the IBTR correctly interpreted and applied the applicable Indiana law pertaining to property-tax exemptions.[364]

The Tax Court also noted that, during argument before the Court, the Hatkes admitted that they had misunderstood the legal meaning of "exemption" in the context of property taxation.[365] The Hatkes said they now realized they needed to request an assessed valued discounted to zero and that this be recorded on their

354. *Id.* at 729.
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.* at 790-30.
365. *Id.* at 790 n. 2.

property's record card.[366] The Tax Court said that it could not consider this argument on appeal because, during the hearing before the IBTR, the Hatkes failed to offer into evidence any relevant documents (*e.g.*, the property's property record card) pertaining to this issue.[367]

5. Morris v. Hamilton County Assessor.[368]—The issue before the Tax Court was whether the IBTR properly determined that it did not have subject matter jurisdiction to consider and decide the petitioner's claims brought under Indiana's Uniform Declaratory Judgment Act.[369]

Eric S. Morris ("Morris") owned property in Hamilton County, Indiana located in an unincorporated area of Clay Township commonly known as Home Place, adjacent to the City of Carmel ("Carmel").[370] In July of 2014, Clay Township and Carmel entered into a written Interlocal Agreement in which they agreed, among other things, that Clay Township would establish and impose a uniform tax rate upon all of the taxable property throughout the Township for the purpose of refurbishing existing fire protection facilities and replacing others.[371]

In November 2018, Morris filed a small claims complaint against Clay Township in Hamilton Superior Court No. 4 alleging that the tax rate imposed was not uniform and that the Interlocal Agreement imposed taxes on unincorporated areas, thereby violating the Township's annual fire contract with Carmel.[372] Morris's complaint also stated that his claims were based upon "Incorrect Taxation."[373] In December 2018, Clay Township moved to dismiss Morris's complaint for lack of the Superior Court's having subject matter jurisdiction.[374] Seizing on Morris's statement in his complaint regarding "incorrect taxation," the township argued that, because the complaint asserted an allegation of "incorrect taxation," it principally involved the collection of a tax, a subject within the exclusive jurisdiction of the Tax Court.[375] Agreeing with the township, the Superior Court dismissed Morris's complaint.[376]

In February 2019, Morris filed an appeal with the Hamilton County PTABOA in which he sought relief pursuant to the Indiana Uniform Declaratory Judgment Act ("Act")[377] The Hamilton PTABOA denied the appeal, citing a lack of jurisdiction to issue a declaratory judgment.[378] In May 2019, Morris appealed the PTABOA's decision to the IBTR, which, after conducting an administrative

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366. *Id.*
367. *Id.*
368. 175 N.E.3d 875 (Ind. T. C. 2021).
369. *Id.*; *see also* IND. CODE § 34-14-1-1 (2021).
370. *Morris*, 175 N.E.3d at 876.
371. *Id.* at 876-77.
372. *Id.* at 877.
373. *Id.*
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.* at 878.

hearing on the matter, also denied the claim based on its lacking any jurisdiction to issue a declaratory judgment regarding Morris's claim and his failure to seek relief for any harm allegedly suffered due to property taxation.[379]

In December 2020, Morris initiated a small claims appeal to the Tax Court, challenging the IBTR's decision and, alternatively, arguing that the Tax Court had jurisdiction to issue a declaratory judgment pursuant to the Act.[380] The Tax Court upheld the IBTR's decision. The Court noted that the IBTR, as an administrative tribunal created and controlled by statute, had the authority to conduct an impartial review of all appeals from a determination by an assessing official or a county PTABOA concerning only: (i) the assessed valuation of tangible property, (ii) property tax deductions, (iii) property tax exemptions, or (iv) property tax credits.[381] The Tax Court held that Morris's appeals to the IBTR did not concern any of these four types of claims, rather they concerned Clay Township's acts of appropriating, accounting for, and spending monies with respect to the Interlocal Agreement between Clay Township and Carmel on the township's firefighting funds.[382] Also, the Tax Court held that Indiana's Uniform Declaratory Judgment Act did not authorize administrative tribunals to issue declaratory judgments pursuant to the Act.[383] The IBTR is an administrative tribunal, not a court of record.[384]

Regarding Morris's alternative argument, the Tax Court said it could not hear claims for declaratory judgment pursuant to the Act or any other claims unless it had subject matter jurisdiction over the case.[385] The Court then noted that it only "ha[d] subject matter jurisdiction over two types of cases: 1) original tax appeals and 2) actions for which jurisdiction has been otherwise specifically conferred upon it by statute."[386] In the context of property taxes, an original tax appeal is one that arises under the tax laws of Indiana and is an initial appeal of a final determination made by the IBTR.[387] Morris had stated he: (i) was challenging Clay Township's actual expenditures, not hypotheticals such as its budget; (ii) did not intend to litigate his tax rates even if they were implicated under his appeal; and (iii) was not appealing the assessed values assigned to his property during the 2016 through 2018 tax years.[388] The Tax Court held that, because Morris's appeal did not principally challenge the collection of a tax or a defense to the collection of a tax, his claims did not arise under the tax laws of Indiana.[389]

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379. *Id.*

380. *Id.*

381. *Id.* at 879 (citing IND. CODE § 6-1.5-4-1(a) (2021)).

382. *Id.*

383. *Id.* at 879-80 (citing IND. CODE §§ 34-14-1-1 to -16).

384. *Id.* at 880.

385. *Id.*

386. *Id.* (citing IND. CODE § 33-26-3-1; IND. TAX CT. R. 2; Diocese of Newton for the Melkites in the USA, Inc. v. Katona, 149 N.E.3d 1252, 1254-55 (Ind. T.C. 2020)).

387. *Id.* (citing IND. CODE § 33-26-3-1; IND. TAX CT. RULE 2(A)).

388. *Id.* at 881.

389. *Id.*

Accordingly, the Court could not exercise jurisdiction over it and issue a declaratory judgment pertaining to it.[390] The Court therefore affirmed the IBTR's decision.[391]

6. Convention Headquarters Hotels, LLC v. Marion County Assessor.[392]—The issue before the Tax Court was whether the Marion County Assessor's assessment of the taxpayer's partially completed hotel in downtown Indianapolis violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, its civil rights pursuant to 42 U.S.C. § 1983, the Property Taxation and Equal Privileges and Immunities Clauses of the Indiana Constitution, and Indiana's market value-in-use standard.[393]

Convention Headquarters Hotels, LLC ("Convention HQ") owns the JW Marriott in Indianapolis.[394] In 2010, while the hotel was still under construction, the Marion County Assessor ("Assessor") used a "percentage complete" factor to value the hotel and enclosed skyway at $71,716,700 and assigned the property an assessed value of $15,270,400.[395] Convention HQ challenged the property tax assessment. Neither the Marion County PTABOA nor the IBTR issued decisions regarding Convention HQ's challenge, merely sitting on the appeals for seven years.[396] The Convention HQ eventually filed an appeal with the Indiana Tax Court.[397]

Convention HQ asserted before the Tax Court that the Marion County Assessor's 2010 assessment of its partially completed hotel violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, its civil rights pursuant to 42 U.S.C. § 1983 (the "1983 Claim"), the Property Taxation and Equal Privileges and Immunities Clauses of the Indiana Constitution, and Indiana's market value-in-use standard.[398] The Assessor denied Convention HQ's claims and filed a counterclaim seeking to increase Convention HQ's 2010 assessment.[399] The Tax Court bifurcated the parties' claims and stayed all proceedings on their valuation claims until the constitutional claims were resolved.[400] The Assessor and the Convention HQ filed cross motions for summary judgement addressing the constitutional issues.[401]

In its motion for summary judgment, Convention HQ alleged that its right to equal protection guaranteed under the Fourteenth Amendment to the U.S.

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390. *Id.*
391. *Id.* at 882.
392. 175 N.E.3d 1212 (Ind. T.C. 2021).
393. *Id.* at 1217.
394. *Id.* at 1216.
395. *Id.*
396. *Id.* at 1216-17.
397. *Id.* at 1217.
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*

Constitution had been violated by the Assessor.[402] It asserted that from 2006 through 2019, the Assessor had pursued a practice, custom, or policy of selectively assessing certain partially complete commercial buildings, including its own, while not assessing others.[403] "Convention HQ designated a variety of circumstantial evidence (*e.g.*, property record cards, aerial photographs, and construction data), to show the Assessor's disparate treatment [of its property]."[404] It also designated construction data that showed some partially-complete buildings had zero-dollar values on their property record cards.[405] It argued that this evidence suggested that the Assessor did not assess these buildings until after they were completed.[406] Convention HQ argued that its evidence proved the Assessor assessed only seven partially-complete commercial buildings (including its own) from 2006 through 2019, while ignoring fifty-five others.[407] The Tax Court held that the Assessor created a genuine issue of fact that defeated Convention HQ's summary-judgment claim on this issue when the Assessor designated affidavits showing that all the properties were in fact assessed and explaining why some were assessed with zero-dollar values.[408]

Convention HQ also alleged that the Assessor violated its right to substantive due process guaranteed under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[409] It argued that the Assessor acted arbitrarily when it selected its partially complete commercial building for assessment but did not assess other similarly incomplete commercial buildings.[410] The taxpayer argued that the Assessor's arbitrary and therefore unreasonable actions were not substantially related to a legitimate state interest.[411] To support this argument, Convention HQ relied on the same evidenced it designated to support its equal protection claim.[412] The Tax Court held that the factual determination of whether the Assessor assessed some but not all the partially completed buildings of other taxpayers would determine the outcome of both Convention HQ's equal protection and substantive due process claims.[413] Since the factual determination would involve a question of fact for purposes of Convention HQ's equal protection claim, the Assessor raised a question of fact for purposes of this due process claim when it did so for purposes of the equal protection claim.[414]

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402. *Id.* at 1218.
403. *Id.*
404. *Id.* at 1219.
405. *Id.*
406. *See id.*
407. *Id.* at 1220.
408. *Id.* at 1220-21.
409. *Id.* at 1221.
410. *Id.*
411. *Id.*
412. *Id.* at 1221-22.
413. *Id.* at 1222.
414. *Id.*

The Property Taxation Clause of the Indiana Constitution provides that "the General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal."[415] Convention HQ contended that the Assessor's failure to assess the partially complete buildings of other taxpayers made Convention HQ bear a disproportionate share of the property tax burden in violation of the Property Taxation Clause.[416] The Tax Court held that, as it had explained regarding its analysis of the designated evidence offered by both sides regarding the equal protection claim, reasonable but conflicting inferences can be drawn from the evidence regarding whether the similarly situated properties were assessed.[417]

Finally, Convention HQ asserted that the Assessor violated the Indiana Constitution's Privileges and Immunities Clause. The Clause states that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."[418] As before, the Convention HQ asserted that the Assessor treated it in a disparate manner when it selected its partially complete commercial building for assessment but not others.[419] To prove this claim, the Tax Court said that Convention HQ must show that: (1) the Assessor's allegedly disparate treatment of its building was unrelated to inherent characteristics of Convention HQ's property that distinguish it from the group (*i.e.*, "class") of buildings that were not assessed, and (2) the preferential treatment (*i.e.*, not being assessed) was not uniformly applicable and equally available to all properties similarly situated.[420] As before, the Tax Court held that, because reasonable but conflicting inferences can be drawn from all the designated evidence regarding whether the similarly situated properties actually were assessed, a question of fact existed regarding Convention HQ's claim that the Assessor violated Indiana's Privileges and Immunities Clause.[421]

The Assessor filed its own motion for summary judgment. First, the Assessor argued that Convention HQ's constitutional claims were merely a disguised challenge to the Assessor's market value-in-use assessment.[422] It argued that Convention HQ's constitutional challenges attempted to bypass the principle that each tax year stands alone to recoup "every penny it paid on the taxes of its [hotel] in 2010, by arguing its assessed value should be zero based only on constitutional arguments."[423] The Tax Court disagreed. It noted that the resolution of Convention HQ's Indiana constitutional claims, as well as its federal

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415. *Id.* (citing and quoting IND. CONST. art. X, § 1(a)).

416. *Id.*

417. *Id.* at 1222-23.

418. *Id.* at 1223 (citing and quoting IND. CONST. art. 1, § 23).

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* at 1224.

423. *Id.*

constitutional claims, did not depend on the market value-in-use of similarly situated properties or a finding that the assessment of each similarly situated property, was correct.[424] Instead, the resolution of Convention HQ's claims depended on whether the Assessor, since the 2006 general reassessment, regularly assessed Marion County commercial properties with partially complete buildings.[425]

Convention HQ asserted that the Assessor violated its civil rights protected pursuant to the "1983 Claim."[426] In its counter motion for summary judgment, the Assessor claimed this claim failed because: "1) it was not timely filed, 2) [the Assessor] has absolute immunity, and 3) Convention HQ failed to meet the federal pleading requirements for bringing the 1983 Claim."[427] The Assessor had previously asked the Tax Court to determine that Convention HQ's 1983 Claim was time-barred.[428] The Tax Court noted it had determined the claim was not.[429] Because the Assessor presented neither new evidence nor argument regarding this timeliness argument, the Tax Court refused to revisit it.[430]

Officials acting in a judicial capacity are immune from a § 1983 claim seeking money damages.[431] The Assessor argued that Convention HQ's 1983 Claim failed because the Assessor's determination of real property's assessed value is a quasi-judicial function, thereby making the Assessor immune from liability in tax assessment matters.[432] The Tax Court noted that the Assessor failed to present any precedent involving the historical basis of immunity for county assessors.[433] Rather, the Assessor merely argued that it received immunity because it functioned in a quasi-judicial manner in exercising discretion and making decisions that are subject to appeal.[434] More importantly, however, the Tax Court rejected the Assessor's argument because government officials receive immunity only when sued for compensatory damages.[435] Convention HQ sued the Assessor seeking declaratory and equitable relief as well as attorney's fees, not compensatory damages.[436] Accordingly, the Tax Court held that the Assessor was not entitled to immunity.[437]

Finally, for a claimant to successfully assert a § 1983 claim against the

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424. *Id.*

425. *Id.*

426. *Id.* at 1217.

427. *Id.* at 1224-25.

428. *Id.* at 1225.

429. *Id.* (citing Convention Headquarters Hotels, LLC v. Marion Cty. Assessor, 132 N.E.3d 77, 82 (Ind. T. C. 2019)).

430. *Id.*

431. *Id.* (citing Montero v. Travis, 171 F.3d 757, 760 (2d Cir. 1999)).

432. *Id.* at 1226.

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

government, it must demonstrate more than its having suffered an injury inflicted solely by the government's employees or agents.[438] The claimant must demonstrate that the government injured it in executing its policy or following its practices.[439] Under federal law, in order to properly plead a § 1983 claim, the claimant must assert that the harmful constitutional violation was caused by: (i) the enforcement of express policies that cause a constitutional deprivation, (ii) a widespread practice that is so permanent and well settled as to constitute a "custom or usage" with the force of law, or (iii) a person with final policymaking authority who effected the deficient policy or custom with deliberate indifference.[440] The Tax Court noted that a § 1983 claim can be filed in either federal or state court.[441] Convention HQ chose to file its § 1983 in state court, specifically in the Tax Court.[442] Indiana's pleading requirements are different from the federal requirements. Indiana requires that the claimant's pleadings contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]"[443] The Tax Court held that Convention HQ's 1983 Claim satisfied Indiana's pleading requirements.[444] Accordingly, the Tax Court dismissed both parties' motions for summary judgment.[445] In a separate order, the Tax Court scheduled the parties' trial for December 7, 2021.[446]

7. Monroe County Assessor v. Strychalski.[447]—The issue before the Tax Court was whether the IBTR ruled correctly that two homeowners were entitled to an Indiana homestead deduction from property taxes when they received a homestead deduction on out-of-state property.[448]

"In 2014, Kim and Richard Strychalski [(the "Strychalskis")], a married couple, purchased a residential property in Unionville, Indiana."[449] Prior to purchasing the property, they lived at a house in Beach Park, Illinois.[450] "When they closed on the Illinois house, their attorney filled out the Illinois homestead exemption paperwork, putting it in [their] names."[451] In 2019, the Monroe County

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438. *Id.* at 1227.

439. *Id.*

440. *Id.* (citing Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658 (1978) (providing the pleading requirements for asserting a § 1983 claim in federal court)).

441. *Id.*

442. *Id.*

443. *Id.* (citing Kuhns v. City of Allentown, 636 F. Supp. 2d 418, 431 (E.D. Pa. 2009); Ind. Trial Rule 8(A)(1)).

444. *Id.* at 1228.

445. *Id.* at 1229.

446. *See Indiana Appellate Decisions—Tax Court*, public.courts.IN.gov, Convention Headquarters Hotels LLC v. Marion County Assessor (View Details) https://public.courts.in.gov/decisions?c=9550 (last visited Nov. 9, 2021).

447. 176 N.E.3d 267 (Ind. T.C. 2021).

448. *Id.* at 268-69.

449. *Id.* at 269.

450. *Id.*

451. *Id.*

Auditor ("Auditor") initiated a homestead audit and found the Strychalskis had claimed two homestead deductions for multiple years, one in Illinois and one in Indiana.[452] "The Auditor then issued a 'Homestead Standard Deduction Audit Questionnaire' seeking information from the Strychalskis for the 2015, 2016, and 2017 tax years."[453] "Kim Strychalski completed the questionnaire stating that: (i) they owned both [the Indiana and Illinois] properties, (ii) the Illinois property receives a deduction, (iii) they "lived at both the Indiana and Illinois sites, (iv) they filed Illinois, not Indiana tax returns, (v) they had Illinois driver's licenses, and (vi) they were registered to vote in Illinois."[454] "Based on those responses, the Auditor denied the Strychalskis' Indiana homestead deduction for each of the four years at issue."[455]

Pursuant to Ind. Code § 6-1.1-12-37(h), an individual or married couple may not have more than one homestead deduction in the same year.[456] Also, pursuant to Ind. Code § 6-1.1-12-37(a)(2)(A), (B)(i), and 50 Ind. Admin. Code 24-2-5 (2015), this single deduction pertains to "an individual's true, fixed, permanent home to which the individual has the intention of returning after an absence"—that is, the person's principal place of residence.[457] Accordingly, since the Strychalskis' principal place of residence was in Illinois, they could not claim an Indiana homestead deduction.[458]

The Strychalskis appealed the revocation to the Monroe County PTABOA, which denied their claim.[459] They then appealed to the IBTR. In their petition, they stated that their son owned the Illinois home, paid the property taxes, and got the homestead deduction.[460] At the hearing before the IBTR, the Strychalskis testified that the Auditor revoked their Indiana homestead deduction merely because of outdated Illinois documents indicating they had a second homestead deduction in Illinois.[461] The Strychalskis said the Illinois documents needed updating because they lived the majority of the year at their Indiana address.[462] The Monroe County Assessor ("Assessor") refuted this testimony, saying that the Auditor properly revoked the Strychalskis' Indiana homestead deduction because they had indicated on the questionnaire that their principal place of residence was Illinois and that they had two homestead deductions, one in Illinois and one in Indiana, during the years at issue.[463]

The IBTR reversed the PTABOA's decision and granted the Strychalskis the

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452. *Id.*
453. *Id.*
454. *Id.*
455. *Id.*
456. IND. CODE. § 6-1.1-12-37(h), effective July 1, 2020).
457. *Monroe Cty. Assessor*, 176 N.E.3d at 271-72.
458. *Id.* at 271 (quoting 50 Ind. Admin. Code 24-2-5 (2015)).
459. *Id.*
460. *Id.*
461. *Id.*
462. *Id.*
463. *Id.*

homestead deductions for each of the four years at issue.[464] The IBTR held that the Strychalskis used the Indiana property as their principal place of residence for the four years at issue, thereby qualifying it for the homestead deduction.[465] Although they were originally receiving an additional homestead deduction in Illinois, they had corrected this error.[466] The Assessor appealed the IBTR's decision to the Tax Court.[467]

The Tax Court agreed with the IBTR's finding that the Indiana property was the Strychalskis' principal place of residence.[468] It held that, though it would like to weigh the evidence differently than the IBTR (that is, in a manner consistent with the PTABOA's decision), it could not reweigh the evidence or judge anew the credibility of witnesses.[469] This function rests solely with the IBTR.[470] Accordingly, since the Assessor did not establish that the IBTR's decision negated the logic and effect of the facts and circumstances presented in the record or that the IBTR erroneously interpreted Indiana property tax law, the Tax Court could not disturb the IBTR's decision regarding this point.[471]

The Tax Court noted, however, the IBTR's holding that for the four years under appeal, the Strychalskis claimed two homestead deductions—one for the Illinois property and one for the Indiana property.[472] The Court also noted the IBTR's holding that the Strychalskis violated Indiana's homestead deduction law due to erroneous paperwork.[473] It said the IBTR made two inconsistent evidentiary findings regarding its holding regarding erroneous documents and the ownership of the Illinois property.[474] On one hand, the IBTR said that the Strychalskis' son was the owner of the Illinois property.[475] On the other, it said that the ownership of the Illinois property was unclear.[476] The IBTR did not provide any explanation or reasoning resolving this inconsistency.[477] It offered a conclusory finding unsupported by any evidence that the Strychalskis' son would have been entitled to the Illinois homestead deduction during the years at issue if he had sought it.[478] Accordingly, the Tax Court concluded that the IBTR's decision was unsupported by probative evidence, clearly negated the logic and effect of the factual evidence presented to it, and, therefore, constituted an abuse

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464. *Id.*
465. *Id.*
466. *Id.*
467. *Id.*
468. *Id.* at 272.
469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.* at 272-73.
473. *Id.* at 273.
474. *Id.*
475. *Id.*
476. *Id.*
477. *Id.*
478. *Id.*

of discretion.[479] The Tax Court concluded that Indiana law prohibits a taxpayer from using more than one homestead deduction, and that the evidence clearly demonstrated that the Strychalskis had two homestead deductions during the years under appeal.[480] The Court reversed the IBTR's decision, thereby denying the Strychalskis' Indiana homestead deduction for the four tax years at issue.[481]

8. Gilday & Assocs., P.C. v. Marion County Assessor.[482]—The issue before the Tax Court was whether the IBTR properly dismissed a person's administrative appeal for lack of standing to claim a property tax refund for property he acquired in a sheriff's sale.[483]

Paul Batties owned a home in Lawrence Township, Marion County, Indiana, which he used as his personal residence.[484] Batties entered into a residential mortgage loan transaction with Green Tree Servicing, LLC ("Green Tree"), which established an escrow account to pay property taxes.[485] During the tax years at issue, 2014 to 2017, Batties became delinquent on the loan.[486] Despite this, Green Tree continued paying the property taxes from the escrow account during the period at issue.[487] Also, during the period in question, the homestead deduction was removed from Batties' property for an unknown reason, thereby increasing the property taxes owed on it.[488] Eventually, Green Tree sought and received a mortgage foreclosure judgment that included all the property taxes that it had advanced on Batties' behalf.[489] James Gilday purchased the property at a sheriff's sale, paying $375,000.[490] The purchase price included the amount of Green Tree's mortgage foreclosure judgment (*i.e.*, $280,467.86).[491]

Believing he had paid all the property taxes for the years at issue when he purchased the property at the sheriff's sale, Gilday, on November 13, 2018, filed four Notices to Initiate an Appeal ("Form 130s") with the Marion County Assessor ("Assessor").[492] Gilday argued that he was entitled to a partial property tax refund because the property should have received homestead deductions during the tax years at issue.[493] On December 14, 2018, the Marion County PTABOA denied all of Gilday's Form 130s, and he appealed this negative

479. *Id.* at 275.
480. *Id.*
481. *Id.*
482. 176 N.E.3d 1000 (Ind. T.C. 2021).
483. *Id.* at 1001.
484. *Id.*
485. *Id.*
486. *Id.*
487. *Id.*
488. *Id.*
489. *Id.* at 1001-02.
490. *Id.* at 1002.
491. *Id.*
492. *Id.*
493. *Id.*

decision to the IBTR.[494]

After the parties filed various pleadings and requested written discovery, the IBTR issued a *sua sponte* motion and order.[495] The motion explained that because Gilday's pleadings indicated he neither owned the property nor paid its property taxes during the years at issue, he needed to establish that he had the statutory right to appeal the PTABOA's decision denying the tax refund.[496] Otherwise, the IBTR said it would dismiss Gilday's Form 131 appeals.[497]

In response to the IBTR's motion, Gilday argued that Indiana Trial Rule 12(B)(6)'s pleading requirements controlled the IBTR review of his Form 131 appeals.[498] Accordingly, the IBTR had to accept as true the factual allegations in those Form 131 appeals, that Gilday was the taxpayer who paid the property taxes for the years at issue by virtue of paying Green Tree's foreclosure judgment at the sheriff's sale.[499] Therefore, Gilday's Form 131 appeals were authorized by Indiana law expressly allowing taxpayers to appeal to the IBTR.[500] The Assessor rejected Gilday's argument, stating that the IBTR did not need to accept as true Gilday's factual allegations because they were legal conclusions requiring application of law to the facts.[501] In other words, the Assessor argued that, although Indiana's trial rules compelled the IBTR to accept as true the facts stated in Gilday's Form 131s, those procedural rules did not compel the IBTR to accept as true any legal inferences or conclusions Gilday derived from the facts. The Assessor explained that the facts asserted in Gilday's Form 131 appeals established Green Tree as the taxpayer, not Gilday.[502] The IBTR agreed with the Assessor and dismissed Gilday's Form 131 appeals.[503] The IBTR held the conclusion Gilday asserted in his Form 131s that he was a "taxpayer" for purposes of filing an appeal to the IBTR did not comport with its interpretation of the word "taxpayer" as used in the statute authorizing appeals to the IBTR.[504] Gilday appealed to the Tax Court.[505]

The Tax Court held that an allegation that a party lacks standing is properly filed under Ind. Trial Rule 12(B)(6).[506] The Court noted that the Indiana Supreme Court had previously ruled that the same standard of appellate review applies to the review of administrative proceedings. Therefore, the Tax Court concluded that it and the IBTR were required to accept as true all the facts alleged in

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494. *Id*. Gilday filed a Petition for Review of Assessment (Form 131) with the IBTR.
495. *Id*.
496. *Id*.
497. *Id*.
498. *Id*.
499. *Id*.
500. *Id*. at 1002-03 (referencing IND. CODE § 6-1.1-15-1.1 and IND. CODE § 6-1.1-26-1.1).
501. *Id*. at 1003.
502. *Id*.
503. *Id*.
504. *Id*. (referencing IND. CODE § 6-1.1-15-1.1).
505. *Id*.
506. *Id*. at 1004.

Gilday's Form 131 appeals, viewing them in the light most favorable to him, with every inference drawn in his favor.[507] The Court explained that in Gilday's Form 131 appeals, he asserted that he was the taxpayer who had paid the overstated property taxes.[508] The Tax Court ignored the IBTR's argument that the question of who constitutes a taxpayer for purposes of property tax appeal constitutes a legal question rather than a factual one. Instead, the Court concluded that Gilday's factual claim of being a taxpayer, if taken as true, was sufficient to show that he was authorized to pursue the refund claim related to the homestead deductions.[509] Accordingly, the Tax Court reversed the IBTR's decision and remanded the case back to the IBTR for further proceedings.[510]

9. Piotrowski BK #5643, LLC. v. Shelby County Assessor.[511]—The issue before the Tax Court was whether the IBTR issued a decision properly valuing a taxpayer's renovated property for the 2019 tax year.[512]

In Shelbyville, Indiana, Piotrowski BK #5643, LLC, ("Piotrowski") owned a fast-food restaurant.[513] The building housing the restaurant was built in 1987.[514] In 2016, Piotrowski renovated the restaurant, spending approximately $300,000.[515] For the 2017 tax year, the Shelby County Assessor ("Assessor") increased the assessment of Piotrowski's property, due to his improvements, from $466,700 to $623,200.[516] For the 2018 tax year, the Assessor increased the assessed value from $623,200 to $652,800.[517] Although Piotrowski did not appeal either the 2017 or 2018 assessment increases, in 2019, Piotrowski challenged these assessment increases before the Shelby County PTABOA.[518] The PTABOA denied Piotrowski's appeal, and Piotrowski sought review by the IBTR.[519]

Before the IBTR, Piotrowski argued that the Assessor over-assessed its building by failing to properly apply the depreciation tables contained in Indiana's Assessment Guidelines.[520] Piotrowski argued that, pursuant to those guidelines and given the building's age of 32 years, the Assessor should have applied an 80% physical depreciation adjustment to the assessment.[521] Instead, he argued the Assessor applied only an 10% physical depreciation adjustment to

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507. *Id.* at 1005.
508. *Id.* at 1006.
509. *Id.*
510. *Id.*
511. Piotrowski BK #5643, LLC. v. Shelby County Assessor, 177 N.E.3d 127 (Ind. T.C. 2021).
512. *Id.* at 129.
513. *Id.*
514. *Id.*
515. *Id.* at 129-30.
516. *Id.* at 130.
517. *Id.*
518. *Id.*
519. *Id.*
520. *Id.*
521. *Id.*

account for the building's improvements.[522] Piotrowski claimed that the Assessor's actions effectively deemed its 32-year-old building as three years old.[523] Piotrowski argued that the Assessor's age adjustment would have been permitted only if improvements added square footage to the building's original size.[524] Piotrowski's renovation had not done this.[525]

The Assessor responded, arguing that Piotrowski's suggested application of the Guidelines' depreciation schedules would not have accurately reflected the restaurant building's market value-in-use.[526] The Assessor noted that the building's extensive renovations effectively rendered it a brand-new building, thereby increasing the building's life expectancy and countering its physical depreciation.[527] The Assessor noted that Indiana's Assessment Guidelines gave the Assessor the discretion to compute a building's effective age, which impacted the amount of physical depreciation applied in determining a property's market value-in-use.[528]

The IBTR issued its opinion upholding the Assessor's assessment. It explained that, pursuant to Tax Court precedent, Piotrowski bore the burden of proof, and this required that Piotrowski do more than merely attack the methodology used by the Assessor.[529] Piotrowski's burden required it to present its own market-based evidence to demonstrate that the assessment did not accurately reflect its building's market value-in-use.[530] Because Piotrowski failed to do this, the case must fail.[531] Piotrowski challenged the IBTR's decision before the Tax Court.[532]

The Tax Court explained that Indiana's pre-2002 property tax system had focused on the methodology the Assessor used.[533] In other words, under the old system, a property's assessed value was deemed correct if the Assessor correctly applied the assessment regulations.[534] This system was one of form over substance. Post-2002, however, the Indiana General Assembly put substance over form, replacing the old property tax system with the new market value-in-use system, which focused on the external, objectively verifiable standard of market value-in-use to measure a property's assessment.[535] In 2011, the administrative regulations pertaining to property taxation incorporated all the editions of the

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522. *Id.*
523. *Id.*
524. *Id.*
525. *Id.*
526. *Id.*
527. *Id.*
528. *Id.*
529. *Id.*
530. *Id.*
531. *Id.*
532. *Id.*
533. *Id.* at 132.
534. *Id.*
535. *Id.*

Department of Local Government Finance's Real Property Assessment Manual ("Manual") and its *Real Property Assessment Guidelines* ("*Guidelines*").[536] A property tax regulation promulgated in 2011 provided that any "real property assessments must be assessed in accordance with the [Manual] and the [Guidelines]."[537] The Tax Court explained that Piotrowski relied on this regulation's verbiage, requiring that real property assessments be assessed "in accordance with" the *Manual* and the *Guidelines*, to claim that Indiana had returned to the pre-2002 system in which methodology prevailed and trumped objectively verifiable standards such as market value-in-use.[538]

The Tax Court held that Piotrowski misinterpreted the regulation.[539] The Court explained that the regulation clearly indicated that the *Manual* and *Guidelines* were intended to help Assessors in determining a property's market value-in-use using the cost appraisal approach.[540] Their mention was not, as Piotrowski argued, a mandate that Assessors follow any specific assessment methodology.[541] For this reason, the Tax Court upheld the IBTR's decision.[542]

10. Marion County Assessor v. Kohl's Indiana, LP.[543]—The issue before the Tax Court was whether the IBTR properly: (i) deemed a property's tenant as a taxpayer for purposes of perfecting a real property tax appeal to the IBTR; and (ii) reduced an assessment of a department store leased by that taxpayer.

Kohl's Indiana, LP ("Kohls") leased a single-story, 94,699 square foot retail building where it operated a Kohl's Department Store situated on a 6.22-acre parcel within the Fashion Mall Commons shopping center in Indianapolis, Indiana.[544] For the 2011 tax year, the property was assessed at $6,016,300, representing an increase of more than 20% from the prior year's assessment.[545] From 2011 through 2014, ownership of Fashion Mall Commons changed hands several times, changing the entity from which Kohls leased its building.[546] Also during this period, the assessment of Kohls' leased property continued to increase—to $7,793,500 in 2012 and $7,902,300 in 2013 and 2014.[547]

Believing that these assessments were too high, Kohls challenged them before the Marion County PTABOA and then the IBTR.[548] Before the IBTR, the Marion County Assessor ("Assessor") argued that in 2011, the property sold in

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536. *Id.* at 131 (citing 50 IND. ADMIN. CODE 2.3-1-2 (2002 Supp.) (repealed 2010) and 50 I.A.C. 2.4-1-2 (2011 & 2020).

537. *Id.* at 133 (citing 50 IND. ADMIN. CODE 2.4-1-1).

538. *Id.*

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.* at 135.

543. 179 N.E.3d 1 (Ind. T.C. 2021).

544. *Id.* at 4.

545. *Id.*

546. *Id.*

547. *Id.*

548. *Id.*

an arm's length transaction for $15.3 million.[549] The Assessor argued that this sales price alone justified the assessment increases.[550] To support this argument, the Assessor offered twenty-five separate exhibits and the testimony of three witnesses.[551] The Assessor also filed a motion to dismiss Kohls' appeal before the IBTR, claiming it lacked standing. The Assessor argued that Kohls could not seek review of the property's assessments because it did not own the property, it was not a taxpayer, and its lease did not authorize it to seek review of property taxes.[552] In addition to objecting to the IBTR's acceptance of the Assessor's exhibits into evidence, Kohls offered appraisals and testimony supporting them that demonstrated the property's assessments should be reduced to $4,050,000 for the 2011 and 2012 tax years and $4,100,000 for the 2013 and 2014 tax years.[553]

The IBTR ruled in Kohls' favor. First, it dismissed the Assessor's challenge to Kohls' standing, holding that the company had standing to appeal the property tax assessment.[554] Second, the IBTR held that Kohls' appraisal was the only probative evidence of the property's market value-in-use for each of the years at issue.[555] Accordingly, it reduced the assessment values to $4,050,000 for the 2011 and 2012 tax years and $4,100,000 for the 2013 and 2014 tax years.[556] The Assessor appealed the IBTR's decision to the Tax Court.[557]

Before the Tax Court, the Assessor argued that: (i) neither the law nor the evidence supported the IBTR's decision that Kohls had standing to seek review of the property's assessments for the tax years at issue, and (ii) the IBTR abused its discretion when it reduced the property's assessments by millions of dollars for each tax year at issue.[558] The Tax Court first dealt with the Assessor's argument about Kohls' standing. The Court noted that the statutes authorizing an appeal to the PTABOA and the IBTR (*i.e.*, "the authorizing statutes") both permitted only a "taxpayer" to perfect an appeal.[559] They failed, however, to define "taxpayer."[560] Accordingly, the Tax Court explained that it would first determine the meaning of the word "taxpayer."[561] Second, it would determine if Kohls fit that definition.[562]

In determining the meaning of the word "taxpayer" as used in the authorizing statutes, the Tax Court reviewed several sources. First, it examined two common

549. *Id.* at 5.
550. *Id.*
551. *Id.*
552. *Id.*
553. *Id.*
554. *Id.*
555. *Id.*
556. *Id.*
557. *Id.*
558. *Id.* at 6.
559. *Id.* at 7 (citing IND. CODE §§ 6-1.1-15-1(a)(1); 3(a)(1)).
560. *Id.*
561. *Id.*
562. *Id.*

dictionary definitions of taxpayer.[563] Second, it examined the statutes that specify which persons the Indiana General Assembly subjects to real property taxation or deem liable to pay it—the Court assuming that this category of persons should be the same persons the General Assembly intended as taxpayers for purposes of the authorizing statutes.[564] Third, it examined the notion of whether a person's merely paying a tax makes it a taxpayer by reviewing the long-standing precedent that a person who voluntarily pays a property tax on behalf of another, either in error or by mistake, cannot recover that payment.[565] Based on its examination, the Tax Court concluded that the word "taxpayer" as used in the authorizing statutes means "a person subject to, or liable to pay, the real property tax under Indiana Code section 6-1.1-2-4"—that is, Indiana's real property tax imposition statute.[566]

The Tax Court also examined whether Kohls satisfied its definition of a taxpayer. In order for a non-property owner, like Kohls, to be subject to, or liable for, Indiana's real property tax under its imposition statute, the person must demonstrate that: (i) it held, possessed, controlled, or occupied the subject property according to a lease on the relevant assessment dates, (ii) the terms of that lease required the person to pay the property taxes, and (iii) a memorandum of lease was recorded with the county recorder before January 1, 1998.[567] The Tax Court reviewed the administrative record and identified evidence establishing that Kohls satisfied each of the three mandated requirements and, therefore, was a taxpayer for purposes of perfecting a real property tax appeal to the IBTR.[568]

The Assessor also challenged the IBTR's reduction of its assessment, arguing that the IBTR assigned too little weight to several pieces of key evidence and too much to others.[569] Specifically, the Assessor asserted that Kohls' appraisal did not meet the requirements of the Uniform Standards of Professional Appraisal Practice Standards.[570] The Assessor also argued that Kohls' appraisal lacked probative value because its sales comparison approach contained two significant flaws—that is, Kohls' appraisal: (i) contravened Indiana's market value-in-use standard by using fee simple sales that, unlike leased fee sales, did not include any utility received by the owner or a similar user; and (ii) failed to adjust and explain why the properties it used in the sales comparison approach were

563. *Id*. Looking at *Webster's Third New International Dictionary's* and *Black's Law Dictionary's* definitions of the word "taxpayer," the Tax Court concluded that the term could be defined broadly as including a person who must pay a property tax without being subject to it or liable for paying it, or narrowly as the person that must pay a property tax because it is subject to or liable for the tax.

564. *Id*. at 8. (citing IND. CODE §§ 6-1.1-2-4(a)-(b); 6-1.1-22-10).

565. *Id*. (citing *e.g.*, McWhinney v. City of Logansport, 132 Ind. 9, 31 N.E. 449 (1892); Carr v. Stewart, 58 Ind. 581 (1877); Fed. Land Bank of Louisville v. Dorman, 112 Ind. Ct. App. 111, 41 N.E.2d 661 (1942)).

566. *Id*. at 9.

567. *Id*.

568. *Id*. at 11.

569. *Id*.

570. *Id*. at 15.

comparable to the subject property.[571] The Tax Court rejected both these arguments because the Assessor, in asserting them, ignored the IBTR's evidentiary and legal findings that corresponded to them.[572] Accordingly, the Assessor's arguments amounted to nothing more than an invitation to the Tax Court to reweigh the evidence in its favor—something Indiana law prohibits the Court from doing.[573]

During the hearing before the IBTR, the Assessor had offered into evidence an exhibit titled *Chart of Assessments of Kohl's Store Indiana Locations* that provided the location, size, and assessed value of the store in question.[574] Though the IBTR admitted the exhibit into evidence, it gave the exhibit no weight as part of its final determination.[575] The Assessor argued the IBTR committed error by ignoring the exhibit. The Tax Court disagreed. The Court held that to properly establish a property comparison, it had to be based on evidence that described the characteristics of the subject property, how those characteristics related to those of the comparable properties' characteristics, and how any differences between the properties affected their relative values.[576] Because the Assessor's exhibit failed to do any of this, explained the Tax Court, the IBTR properly ignored the exhibit in arriving at its final determination.[577]

Finally, the Assessor argued that the IBTR erred when it ignored the property's 2011 sales price of $15.3 million as evidence of its market value-in-use for each of the tax years at issue.[578] The Tax Court rejected this argument. It noted that the Assessor's own expert witness testified that, because a real property's sales price might reflect more than the property's value, it did not automatically equate to its market value-in-use; it might also reflect intangible qualities esteemed by the buyer.[579] The witness testified that these other values must be identified and set aside.[580] The witness said that he did not do this because he believed it was outside the scope of his engagement with the Assessor.[581] For this reason, the Tax Court held that the IBTR properly ignored the 2011 sales price because the evidence did not establish whether the sales price reflected more than the real property's value.[582] Accordingly, the Tax Court upheld the IBTR's decision in its entirety.[583]

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571. *Id.* at 15-16.
572. *Id.* at 16.
573. *Id.* at 15 (citing *e.g.*, Southlake Indiana LLC v. Lake Cty. Assessor, 135 N.E.3d 692, 696 (Ind. T. C. 2019)).
574. *Id.*
575. *Id.*
576. *Id.* at 17 (citing *e.g.*, Peters v. Garoffolo, 32 N.E.3d 847, 854 (Ind. T.C. 2015)).
577. *Id.*
578. *Id.*
579. *Id.*
580. *Id.*
581. *Id.*
582. *Id.*
583. *Id.* at 18.

B. Income Tax Cases

1. Tell City Boatworks, Inc. v. Indiana Department of State Revenue.[584]—The issue before the Tax Court was whether the DOR properly denied an alleged qualified research expense tax credit to a manufacturer of made-to-order vessels for its design and construction of four prototype vessels.

Tell City Boatworks, Inc. ("Tell City") operated a shipyard on the banks of the Ohio River in Tell City, Indiana, where it manufactured custom-made vessels.[585] Tell City claimed an Indiana income tax refund for tax year 2010 corresponding to its application of Indiana's qualified research expense tax credit for its design and construction of six prototype custom vessels.[586] In January 2015, Tell City effected this refund claim by filing an Indiana amended corporate income tax return for the 2010 tax year, claiming that it was entitled to a tax refund associated with its research activities.[587] The credit amount consisted of what Tell City alleged as qualified research expenses generated by the six projects, which included wages, supply costs, and contractor research costs.[588] In March 2016, the DOR denied Tell City's refund claim, explaining that the company failed to provide creditable evidence proving its expenses satisfied the criteria as research expenses.[589] In January 2018, Tell City challenged the DOR's decision before the Tax Court.[590] Of the six custom vessels for which Tell City claimed the credit before the DOR, only four were at issue before the Tax Court—that is, vessel projects 112, 107, 109, and 111.[591]

Indiana permits taxpayers to claim a qualified research expense credit against their Indiana adjusted gross income tax.[592] The phrase "qualified research expense" has the same meaning as the similar federal credit defined in the Internal Revenue Code, except the taxpayer must incur the expenses from research done in Indiana.[593] Eligible expenses include wages or costs paid to employees or contractors to perform "qualifying research."[594] Research constitutes "qualifying research" for purposes of Indiana's credit if it satisfies four distinct tests—that is, (i) the Section 174 Test, (ii) the Technological Information Test, (iii) the Business Component Test, and (iv) the Process of Experimentation Test.[595]

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584. 162 N.E.3d 603 (Ind. T. C. 2020).
585. *Id*. at 606-07.
586. *Id*. at 611.
587. *Id*.
588. *Id*.
589. *Id*.
590. *Id*.
591. *Id*. at 609-11.
592. *Id*. at 612 (citing IND. CODE § 6-3.1-4-2(a)).
593. *Id*. (citing IRC § 42(b)).
594. *Id*. at 613 (citing IRC §§ 42(b)(2)(A), -(2)(B), -(3)(A)).
595. *Id*. (citing IRC § 42(d)(1); Union Carbide Corp. & Subsidiaries v. C.I.R., 97 T.C.M. (CCH)

The Tax Court held that Tell City's project 112 failed the Business Component Test. The taxpayer did not provide any evidence establishing that it offered the Project 112 vessel for sale, lease, or license, or that it used the vessel in its trade or business—all necessary requirements mandated by the test.[596] Neither did Tell City prove that a third-party owner of project 112 assigned its construction contract to Tell City.[597] Accordingly, the project failed the Business Component Test; and therefore, did not constitute qualifying research for purpose of Indiana's credit.[598]

With regard to vessel projects 107, 109, and 111, the Tax Court held that all three satisfied the Section 174,[599] Business Component,[600] and Technological Information Tests.[601] All the projects, however, failed the Process of Experimentation Test. This test requires that substantially all the research activities constitute elements of a process of experimentation for a qualified purpose.[602] The "substantially all" element requires that eighty percent or more of the taxpayer's research activities for each business component, measured on a cost basis or other reasonable, consistently applied basis, constitutes a process of experimentation for a qualified purpose—that is, a purpose related to a new or improved function or the improved performance, reliability, or quality of a business component.[603] Because the Tax Court determined that Tell City's activities constituted ordinary construction work, it held that Tell City failed to meet its burden of proving by a preponderance of the evidence that at least eighty percent of its claimed research activities for projects 107,[604] 109,[605] and 111[606] constituted scientific experimentation. Accordingly, the Tax Court upheld in its entirety the DOR's denial of Tell City's tax refund claim.[607]

2. Express Scripts Inc. v. Department of State Revenue.[608]—The issue before the Tax Court was whether a taxpayer, a pharmacy benefit management company administering prescription drug and pharmacy benefits for health insurer clients, sourced its income for Indiana income tax purposes as a service provider, thereby not subjecting it to Indiana taxes, or as a seller of tangible goods, thereby

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1207, 2009 WL 605161, at *77 (T.C. 2009), *aff'd*, 697 F.3d 104 (2d Cir. 2012)).

596. *Id.* at 614.

597. *Id.* at 615.

598. *Id.*

599. *Id.* at 619.

600. *Id.* at 617.

601. *Id.* at 620.

602. *Id.* (citing IRC § 41(d)(1)(C)).

603. *Id.* (citing Union Carbide Corp. & Subsidiaries v. C.I.R., 97 T.C.M. (CCH) 1207, 2009 WL 605161, at *80 (T.C. 2009), *aff'd*, 697 F.3d 104 (2d Cir. 2012); Norwest Corp. & Subsidiaries v. C.I.R., 110 T.C. 454, 497 (T.C. 1998); IRC § 41(d)(1)(C); and Treas. Reg. § 1.41-4(a)(5)(ii), -(6)).

604. *Id.* at 624.

605. *Id.* at 625.

606. *Id.* at 625-26.

607. *Id.* at 626.

608. 170 N.E.3d 273 (Ind. T.C. 2021).

subjecting it to Indiana taxes.

This case raised an interesting state and local tax issue. The taxpayer, Express Scripts Incorporated ("Express Scripts"), a Delaware corporation, is a pharmacy benefit management company.[609] It administers the prescription drug/pharmacy benefits of its health insurer clients—that is, health maintenance organizations, health insurers, third-party administrators, employers, union-sponsored benefit plans, and government health programs.[610] Express Scripts negotiates contracts with over 60,000 local pharmacies (*e.g.*, CVS, Walgreens, Rite Aid) to provide drugs at a reduced rate to the health insurer clients' members or employees.[611] When a health insurer's member or employee fills a prescription at a designated pharmacy, Express Script pays the pharmacy the cost.[612] Express Script bills its health insurer clients a service charge that corresponds to the cost of the prescription.[613] This service charge is essentially reimbursement for the drug's cost plus the profit Express Scripts calls an administration fee.[614]

Express Scripts filed Indiana adjusted gross income tax returns for the years 2011 through 2013. It apportioned its income[615] in accordance with Indiana's statutory provisions applicable to service providers—that is, pursuant to a cost-of-performance activity apportionment methodology.[616] Pursuant to this approach,

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609. *Id.* at 275.

610. *Id.*

611. *Id.* at 276.

612. *Id.*

613. *Id.*

614. *Id.*

615. Companies that produce and sell goods in more than one state must pay state income taxes in those states. Each state uses an apportionment formula that, based on the multi-state company's activities in the state, determines how much of the company's taxable income the state is entitled to tax. Though there are variations, the general formula mirrors the model created by National Conference of Commissioners on Uniform State Laws when, in 1957, it approved the Uniform Division of Income for Tax Purposes Act (UDITPA). Historically, the formula considered three factors—that is, a company's payroll, property, and sales. These are expressed as fractions. The numerators of the three fractions represent, respectively, the company's state payroll, the property it owns inside the state, and the sales it makes in the state. The denominators of the three fractions are, respectively, the company's payroll, property, and sales both inside and outside the state. The quotients of the three fractions are expressed as three percentages. The percentages are averaged (*i.e.*, added, then divided by three) to create a single percentage. The company's entire income is multiplied by this percentage. The product equals the amount of a company's multi-state income subject to taxation by the state in question. For example, if Widget Co. has 50% of its property, 50% of its payroll, and 25% of its sales in State A, this state taxes 42% of Widget Co.'s taxable income (*i.e.*, [50 + 50 + 25] / 3). *See, e.g.*, Chris Atkins, *A Twentieth Century Tax in the Twenty First Century: Understanding State Corporate Tax Systems, Background Paper No. 49* (Wash. DC: Tax Foundation, Sept. 2005) (available at https://files.taxfoundation.org/legacy/doc s/4efb91276d95e6383a066e5d 02ad19f1.pdf) (providing a primer on corporate multistate taxation, nonbusiness income allocation, and business income apportionment).

616. *Express Scripts*, 170 N.E.3d at 276.

sales of services are sourced to the state where the service is performed, not where the customer receives the benefit.[617] Accordingly, Express Scripts determined that none of its revenue should be sourced to Indiana because the greater proportion of its income-producing activities occurred in a state other than Indiana.[618]

The DOR did not consider Express Scripts a service provider. Rather, after auditing Express Scripts, it held that the taxpayer engaged in retail sales of tangible products—prescription drugs.[619] Sales of tangible goods such as prescription drugs are sourced pursuant to a destination rule—that is, the sales of the tangible goods are sourced to the market state where the goods are destined.[620] State courts, including Indiana's, have held that, because the purpose of the sales factor used in income apportionment formulas is to measure the contribution of the market state, sales of tangible goods should be sourced to the place of ultimate destination—that is, where the ultimate customers reside.[621] Accordingly, the DOR determined that some of Express Scripts' revenue should be sourced to Indiana, thereby subjecting it to Indiana income taxation.[622] Express Scripts administratively protested the DOR's assessment and the DOR issued a Letter of Findings upholding the assessment.[623] Express Scripts filed its original tax appeal with the Tax Court in a timely manner.[624]

The state tax question posed by Express Scripts was whether it earned a portion of its taxable income attributable to its business activities in Indiana from selling tangible personal property or services.[625] If the former, the sales of tangible property were sourced to Indiana, and Express Scripts owed Indiana adjusted gross income tax. If the latter, the services were sourced outside Indiana, and Express Scripts owed the state no adjusted gross income tax.

The DOR filed a motion for summary judgment arguing that Express Scripts engaged in taxable sales of tangible property sourced to Indiana.[626] Unfortunately, the Tax Court did not have an opportunity to substantively resolve the interesting state tax question.[627] According to the Court, the DOR's legal representative, the Office of the Indiana Attorney General ("OAG"), bungled its motion for summary judgment, with the Court calling its evidentiary designations supporting the motion "incompetent."[628]

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617. *Id.* (referencing IND. CODE § 7 6-3-2-2(f)).

618. *Id.* (referencing IND. CODE § 7 6-3-2-2(e)(1)).

619. *Id.*

620. *Id.*

621. *See, e.g.*, Miller Brewing Co. v. Ind. Dep't of State Revenue, 955 N.E.2d 865 (Ind. T.C. 2011), *rev.*, 975 N.E.2d 800 (Ind. 2012).

622. *Express Scripts*, 170 N.E.3d at 276.

623. *Id.* at 276-77.

624. *Id.* at 277.

625. *Id.*

626. *Id.*

627. *Id.* at 280.

628. *Id.*

The OAG did not designate as evidence the Department's Proposed Assessment, a failure that prevented the Department's establishing the presumption of correctness of its assessment and administrative determination.[629] Neither did the OAG designate evidence it had discussed in its summary judgment briefs.[630] Regarding the documents the OAG did designate as evidence, it failed to specify in its argument where in those documents the tax court should look for the facts the DOR claimed supported its conclusion.[631] Also, the OAG failed to provide any explanation or analysis as to why the specifically designated facts were material and supported the Department's position.[632]

Finally, the OAG designated Express Scripts' Form 10-K filed with the Securities Exchange Commission and its Federal Tax Return.[633] In the 10-K, Express Scripts said it provided or delivered drugs to its customers.[634] In its federal tax return, Express Scripts used the drug prices it paid pharmacies to calculate the cost of goods sold.[635] These are documents one presents to an opponent in a deposition to get it to explain them in a way that supports your position. For example, it might prove challenging for a taxpayer performing this type of pharmaceutical service to explain how they incurred costs of goods sold for federal tax purposes. The Tax Court explained, however, that merely presenting these documents to the Court and asking it to draw from them the conclusions the OAG desired without any inculpatory testimony elicited from the taxpayer would not support a summary-judgment motion.[636] As a result of these errors on the OAG's part, the court denied the Department summary judgment and granted one to Express Scripts even though the taxpayer had not filed a motion seeking it.[637]

As an aside, because both the Tax Court and the Indiana Supreme Court have held that each tax year stands alone, and the doctrine of estoppel does not prevent the re-litigation in later tax years of tax disputes resolved by the Tax Court in a published opinion, the DOR could revisit this issue with Express Scripts for later tax years.[638] The only tax years of interest, however, would be 2014 through 2018 since, effective May 1, 2019, Indiana adopted its new market-based methodology for sourcing income derived from selling services. Pursuant to this new sourcing approach, income derived from selling services are sourced to the state where the customer received the service's benefit rather than where the service was performed.[639] This change likely subjects Express Scripts to Indiana taxation

629. *Id.* at 278.
630. *Id.* at 279.
631. *Id.* at 280.
632. *Id.*
633. *Id.*
634. *Id.*
635. *Id.*
636. *Id.* at 281.
637. *Id.* at 284.
638. *See, e.g.*, Miller Brewing Co. v. Ind. Dep't of State Revenue, 903 N.E.2d 64 (Ind. 2009).
639. *See* IND. CODE § 7 6-3-2-2(f)(3)(C) (retroactive to Jan. 1, 2019).

regardless of whether it classifies itself as a seller of services or of tangible property.

C. Excise Tax

1. B.L. Reever Transport, Inc., et al. v. Department of State Revenue.[640]—The issues before the Tax Court were whether: (i) the Tax Court had subject matter jurisdiction over the taxpayer's claim, and (ii) the taxpayer stated a claim upon which it could receive relief in conjunction with its challenging the DOR's denial of its claim for a refund of toll road taxes it paid while traveling on a toll road Indiana leased to a private company.[641]

B.L. Reever Transport, Inc., Charles Paar (d/b/a Sandman Services), and Leland Wilkins (d/b/a Lost River Trucking) are three small business motor carriers ("Motor Carriers") that haul property on Indiana's highways, including its toll roads.[642] They paid Indiana's motor carrier fuel tax ("MCFT") during the 2016 and 2017 tax years.[643] The Motor Carriers sought a tax refund for amounts they claimed corresponded to their travel on toll roads.[644] They claimed that the MCFT applied only to travel on highways and that, because toll roads are not publicly maintained, they are not highways for purposes of the MCFT.[645] The DOR denied the refund claim and Motor Carriers filed an appeal with the Tax Court in a timely manner.[646]

The Department filed a motion to dismiss pursuant to Ind. Trial Rule 12(B)(1) and (6) asserting that the Motor Carriers' tax petition failed to invoke the tax court's jurisdiction and the claim failed to be one for which relief could be granted.[647] The Tax Court rejected all of the DOR's arguments and refused to dismiss the Motor Carriers' tax appeal.[648]

Regarding the DOR's Ind. Trial Rule 12(B)(1) argument (*i.e.*, no subject matter jurisdiction), the Department argued that, at the administrative hearing before it, the Motor Carriers asserted their argument that the fuel they consumed traveling on the toll roads was exempt from the MCFT.[649] The Department issued a final determination rejecting this argument.[650] When the Motor Carriers filed their appeal with the Tax Court, however, they abandoned the argument they asserted administratively and claimed they were due a refund because the apportionment fraction calculated to determine the portion of the Motor Carriers'

640. 163 N.E.3d 968 (Ind. T.C. 2021).
641. *Id.*
642. *Id.* at 970.
643. *Id.*
644. *Id.*
645. *Id.*
646. *Id.*
647. *Id.*
648. *Id.* at 971.
649. *Id.*
650. *Id.*

fuel consumed in Indiana should have been calculated differently.[651] The DOR asserted that this new argument, administratively unreviewed by the Department, created a jurisdictional defect because the Motor Carriers had failed to appeal a final determination from the DOR that addressed the merits of their new claim.[652] In other words, the DOR argued in essence that the Motor Carriers failed to exhaust their administrative remedies before appealing to the Tax Court. The Tax Court rejected the DOR's argument. It noted that it reviewed a final determination issued by the Department *de novo* and was not bound by the evidence or legal arguments made to the Department at the administrative level.[653]

The DOR's Ind. Trial Rule 12(B)(6) argument (*i.e.*, a failure to state a claim subject to relief) had three parts. First, the DOR argued that Tax Court precedent existed holding that all fuel consumed by a carrier while traveling anywhere in the state—whether on toll roads or elsewhere—was subject to the MCFT, and thus, it was irrelevant whether a toll road is a highway.[654] The Tax Court rejected this argument, asserting that the DOR misunderstood the precedent on which it relied.[655] In the earlier case, the calculation of the MCFT had been at issue, not whether the taxpayer was subject to the MCFT based on the meaning of the word "highway."[656] The Motor Carriers' case presented a different issue—that is, whether toll roads leased to a private company continued to be "publicly maintained" as required by the definition of "highway."[657]

Second, the DOR argued that the Motor Carriers failed to make a legitimate claim because Court of Appeals' precedent held that a toll road was a highway for purposes of the MCFT.[658] The Tax Court rejected this argument, noting that the Court of Appeals' precedent was decided long before any Indiana toll roads were leased to a private company.[659] Accordingly, the Tax Court concluded that the Court of Appeals precedent did not constitute binding precedent in the matters asserted by the Motor Carriers.[660]

Third and lastly, the DOR argued that the doctrine of legislative acquiescence mandated the dismissal of the Motor Carriers' appeal.[661] The Department asserted that Tax Court precedent and its own regulations had, since 1984, provided that toll roads were highways for purposes of the MCFT.[662] Because the Indiana

651. *Id*. at 971-72 (citing IND. CODE § 6-6-4.1-4(b)).

652. *Id*. at 972.

653. *Id*. at 972-73.

654. *Id*. at 973 (citing Roehl Transp., Inc. v. Indiana Dep't of State Revenue, 653 N.E.2d 539, 542 (Ind. T.C. 1995)).

655. *Id*.

656. *Id*.

657. *Id*. at 973-74 (citing IND. CODE § 6-6-4.1-1(h)).

658. *Id*. at 974 (citing Area Interstate Trucking, Inc. v. Indiana Dep't of State Revenue, 574 N.E.2d 311, 312 (Ind. Ct. App. 1991)).

659. *Id*.

660. *Id*.

661. *Id*.

662. *Id*.

General Assembly had made no changes to the applicable law since 2006, when Indiana began leasing toll roads to private companies, it had acquiesced to this, and the issue raised in the Motor Carriers' appeal was settled.[663] The Tax Court rejected this argument as well. The Court again asserted that the laws and regulations to which the General Assembly had allegedly acquiesced all predated the 2006 lease of any toll roads to a private company.[664] Accordingly, this alleged acquiescence did not apply to the matters asserted by the Motor Carriers.[665] For all these reasons, the Tax Court denied the DOR's motion to dismiss.[666]

III. INDIANA SUPREME COURT DECISIONS

During this article's review period, the Indiana Supreme Court issued two decisions reversing Tax Court decisions issued in 2020. The summaries are below.

1. Muir Woods Section One Assn., Inc., et al. v. Marion County Assessor.[667]—The issue before the Supreme Court was whether the Tax Court correctly decided whether the Assessor's failure to properly apply an 80% discount mandated by both the 1995 Marion County Land Valuation Order and the 2002 Indiana Assessment Guidelines constituted an inherently subjective question challengeable only via filing a Form 131 "subjective appeal," rather than a Form 133 "objective" appeal, which the taxpayers filed.

Muir Woods Section One Association, Inc., Muir Woods, Inc., Spruce Knoll Homeowners Association, Inc., and Oakmont Homeowners Association, Inc., are all homeowners' associations ("HOAs") located in Marion County, Indiana.[668] On March 7, 2014, the HOAs filed one hundred and forty-one "Petitions for Correction of An Error" ("Forms 133") with the Marion County Auditor.[669] The HOAs asserted that the 2001, 2002, and 2003 property tax assessments on the HOAs' common areas were illegal as a matter of law because the land was so encumbered by restrictions that it had zero value.[670] On June 26, 2015, the Marion County PTABOA denied all the Forms 133s.[671] The HOAs appealed the PTABOA's decision to the IBTR.[672] The HOAs received leave from the IBTR to consolidate all their Forms 133 denied by the PTABOA.[673]

The HOAs reasserted their original argument raised before the PTABOA but also raised two new claims and an alternative one:

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663. *Id.*
664. *Id.*
665. *Id.*
666. *Id.*
667. 154 N.E.3d 877 (Ind. Tax Ct. 2020), *rev.*, 172 N.E.3d 1205 (Ind. 2021).
668. *Id.* at 1206.
669. *Id.*
670. *Id.*
671. *Id.*
672. *Id.*
673. *Id.*

(i) The common area land assessments had been levied against the wrong persons.
(ii) The resulting property tax liabilities had been charged more than once in the same year.
(iii) Alternatively, the Marion County Assessor failed to apply in calculating the property tax assessments a base rate discount mandated by both the 1995 Marion County Land Valuation Order and the 2002 Indiana Assessment Guidelines.[674]

Three years later, while the HOAs' claim was still pending before the IBTR, the HOA amended its consolidated form 133 to assert a fifth claim—that is, that they owed no property tax liability per the tax exemption for residential "common areas."[675]

On August 14, 2018, the Assessor filed a motion to dismiss the HOAs' Amended Form 133 appeal for failure to state a claim upon which relief could be granted.[676] It argued that none of the HOAs' claims entitled them to relief because the alleged assessment errors could not be corrected using the Form 133 procedure.[677] Without conducting a hearing, the IBTR granted the Assessor's request.[678] The IBTR held that, pursuant to tax court precedent, a Form 133 is used only to challenge assessment errors that can be corrected using objective criteria, not those requiring subjective judgment.[679] A form 130 was used for subjective issues. Based on tax court precedent, determining the value, or lack thereof, of encumbered common areas requires subjective judgment.[680] Accordingly, the IBTR concluded that all the HOAs' arguments required subjective judgment, including the argument that its common areas were exempted from property tax.[681] On July 29, 2019, the HOAs appealed to the Tax Court.[682]

The Tax Court reviewed all of the HOA's arguments. First, regarding the exemption statute, the Tax Court explained that the Indiana General Assembly enacted the exemption statute in 2015, twelve years after the assessments of the HOAs' common area properties. The Tax Court held that it did not matter whether determining if the exemption applied to the HOAs' common areas required the use of objective criteria. The statute did not state whether it was retroactively applicable.[683] The judicial interpretation of an exemption statute's prospective or retroactive applicability necessarily requires subjective judgment. This was evidenced by the parties' opposing interpretations regarding the

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674. *Id.*
675. *Id.* (citing IND. CODE § 6-1.1-10-37.5).
676. *Id.*
677. *Id.*
678. *Id.*
679. *Id.*
680. *Id.*
681. *Id.* (citing IND. CODE § 6-1.1-10-37.5).
682. *Id.*
683. *Id.*

exemption's application. Therefore, the HOAs could not assert the exemption's applicability to its common areas using a form 133 because that form requires challenges to assessment errors that can be corrected using only objective criteria. Accordingly, the Tax Court upheld the IBTR's decision regarding this issue.[684]

With respect to the multiple taxation issue, the HOAs argued that the taxes on its common area lands had been imposed more than once for the same year. The Tax Court said this argument did not challenge how the Assessor calculated the valuation of the common area land—a subjective question—but challenged how many times the HOAs paid tax on that land. The resolution of this claim would require a simple review of the property record cards and tax bills of the individual homeowners within each HOA community. This objective review would reveal if the Assessor had made an objective error. Accordingly, because the resolution of the question of double taxation required the use of objective criteria, form 133 was the proper method of asserting the challenge. Accordingly, the Tax Court reversed the IBTR's decision regarding double taxation and remanded the case to the IBTR to determine the validity of the challenge.[685]

Finally, regarding the application of the Land Order and Assessment Guidelines issue, the HOAs argued that the Marion County Assessor, in calculating the value of their common area property, had failed to apply an 80% base rate discount mandated by both the 1995 Marion County Land Valuation Order and the 2002 Indiana Assessment Guidelines. The HOAs asserted that, because Indiana law mandated that the Assessor apply this discount, the Assessor's failure to do so constituted an objective error capable of correction using the Form 133. The Tax Court disagreed. The Court held that, pursuant to Tax Court precedent, the assessment and valuation of real property is, and has always been, inherently subjective. For this reason, the Tax Court upheld the IBTR's decision regarding this issue.[686] It was this issue and the Tax Court's resolution of it that prompted the Supreme Court to accept the HOA's petition for review.[687]

The Supreme Court agreed with the Tax Court that the assessment and valuation of real property is, and has always been, inherently subjective. The Supreme Court said, however, that though the assessor's initial determination of a property's base tax rate was subjective, the application of a mandatory discounted tax rate was objective. That is, once the base tax is subjectively determined, common areas had to be valued at 20% of the base rate pursuant to the *1995 Marion County Land Valuation Order*. Whether a mandatory discount was applied was inherently objective—it was either applied, or it was not.[688] Accordingly, the Supreme Court upheld the Tax Court's disposition regarding the issues involving multiple taxation and the exemption statute but reversed the Tax

684. *Id.*
685. *Id.*
686. *Id.*
687. *Id.*
688. *Id.* at 1207.

Court's resolution of the discounted tax rate issue.[689]

As an aside, the Indiana General Assembly passed legislation in 2017 that significantly changed the property tax appeal process.[690] The new legislation eliminated the dueling form problem that existed in the past. The new process consolidated the so-called "subjective appeal" (previously governed by Ind. Code section 6-1.1-15-1 and initiated using Form 130/131) and "objective appeal" (previously governed by Ind. Code section 6-1.1-15-12 and initiated using Form 133) into a single proceeding.[691] An appeal begins with filing a *Form 130—Taxpayer's Notice to Initiate an Appeal*[692] with the local assessing official—that is, the County Assessor.[693] If the Assessor denies any portion of the challenge, it forwards the appeal to the PTABOA for review.[694] The PTABOA's decision can be appealed to the IBTR.[695] This appeal is initiated by filing a form 131 with the IBTR.[696] The IBTR's decision can be appealed to the Tax Court and an original tax appeal initiated by filing a petition in the Court and serving a written notice of appeal with the IBTR.[697] An appeal of the Tax Court's decision can be filed with the Supreme Court, which has discretion whether it will review the decision.[698]

2. Southlake Indiana, LLC v. Lake County Assessor.[699]—The issue before the Supreme Court was whether the Tax Court properly interpreted the phrase "burden of proof" used in the property tax statute governing review procedures before the IBTR to mean merely burden of production rather than burden of persuasion.[700]

Southlake Indiana, LLC ("Southlake"), owned the Southlake Mall in Hobart, Indiana.[701] In February 2014, the Ross Township Assessor ("Assessor") issued assessment notices retroactively increasing the assessed value of the property for tax years 2011 through 2014.[702] The Assessor had more than doubled the property's assessed value for all four years.[703] Southlake went before the Lake County PTABOA, which upheld the assessments.[704] Southlake appealed to the

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689. *Id.* at 1208.

690. *See* Pub. Law No. 232-2017, § 10 (enacting IND. CODE § 6-1.1-15-1.1).

691. *Id.*

692. The new Form 130 is available at *Department of Local Government Finance—Appeals Property Tax*, IN.gov, https://www.in.gov/dlgf/appeals-property-tax/.

693. *See* Pub. Law No. 232-2017, § 10 (enacting IND. CODE § 6-1.1-15-1.1).

694. *Id.*

695. *Id.*

696. *Id.*

697. *See* IND. CODE § 6-1.1-15-5(b)(1); Ind. Tax Court Rule 4(B).

698. *See* Ind. Appellate Rule 63.A.

699. 160 N.E.3d 1156 (Ind. T.C. 2020), *rev.*, 174 N.E.3d 177 (Ind. 2021).

700. *Id.* at 179.

701. *Id.* at 178.

702. *Id.*

703. *Id.*

704. *Id.*

IBTR, which determined that neither the Assessor nor Southlake had provided the correct assessment or proved the correctness of its proposed assessment.[705] Pursuant to Ind. Code section 6-1.1-15-17.2, when an Assessor increases the assessed value of a taxpayer's property by more than 5% above the previous tax year, the Assessor "*bears the burden of proving* that the assessment is correct."[706]

Because Indiana law placed the burden of proof on the Assessor, and the IBTR determined that the Assessor had failed to satisfy this burden, Southlake believed Ind. Code section 6-1.1-15-17.2 mandated that the IBTR reinstate the property's previously assessed values (*i.e.*, "§ 17.2's reversionary clause"). The IBTR, however, did not do this. Rather, it determined assessed values that neither the taxpayer nor Assessor or either party's testifying experts had offered at the hearing. The taxpayer appealed to the Tax Court.[707]

The Court affirmed the IBTR's determination, holding that the Assessor's failure to satisfy its burden pursuant to Ind. Code section 6-1.1-15-17.2 ("§ 17.2") did not mandate the triggering of § 17.2's reversionary clause and the reinstatement of the previous "assessed values."[708] The Tax Court offered a definition of the concept of "burden of proof" that confused the parties' continually shifting burdens of production with the Assessor's burden of persuasion mandated by § 17.2, and holding that the statute's use of "burden of proof" meant merely "burden of production."[709] In essence, the Tax Court held that, once each party's evidentiary presentations were at an impasse, neither one having established the certainty of its argument by a preponderance, the IBTR had the duty of resolving the impasse in any way it saw fit.[710]

The Supreme Court accepted review of the Tax Court's decision and noted that, because the Tax Court's opinion turned on the plain meaning of an unambiguous statute, it reviewed the Tax Court's opinion de novo.[711] The Supreme Court held that the Tax Court had offered a questionable definition of "burden of proof" that mistakenly interpreted it as merely a synonym for the term "burden of production."[712] The Supreme Court explained that the terms "burden of proof" and "burden of production" have different meanings.[713] The "burden of proof" (also called the burden of persuasion) is a party's duty to prove a disputed assertion or charge to a requisite degree of belief that a proposition of fact is true. In civil cases, including tax cases, a party's burden of proof (or persuasion) is usually "by a preponderance of the evidence."[714] In criminal cases, the

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705. *Id.* at 178-79.
706. *Id.* at 179 (emphasis added).
707. *Id.* at 178.
708. *Id.* at 180.
709. *Id.*
710. *Id.*
711. *Id.* at 179.
712. *Id.* at 180.
713. *Id.*
714. *See, e.g.*, Kempf v. Himsel, 516, 98 N.E. 200, 212 (Ind. App. 1951) (discussing the burden of proof or persuasion in civil cases); Tell City Boatworks, Inc. v. Ind. Dep't of State Revenue, 162

prosecution's burden of proof is "beyond a reasonable doubt."[715] The "burden of production," on the other hand, is a party's duty to introduce enough evidence on an issue to establish a *prima facie* case and have the issue decided by a judge or jury.[716]

In other words, said the Supreme Court, the Tax Court mistakenly interpreted "burden of proof" in § 17.2's reversionary clause synonymously with the burden of production, rather than correctly with burden of persuasion. The Supreme Court noted that the Indiana General Assembly used "burden of proof," not "burden of production" in § 17.2.[717] The Supreme Court held that the Tax Court's interpretation of the phrase "burden of proof" contravened § 17.2's plain language.[718] Accordingly, the Supreme Court decided to give effect to the General Assembly's specific wording and the wording's plain meaning and hold that the term "burden of proof" means more than "burden of production."[719] Because the IBTR determined that neither party met their burden of proof, the Supreme Court held that the Assessor failed to satisfy its burden of proof (or persuasion) and that § 17.2's reversionary clause mandated that Southlake's assessment revert to that of 2010.[720] For these reasons, the Supreme Court reversed the Tax Court's decision.[721]

N.E.2d 603, 623 (Ind. T.C. 2020) (discussing the burden of proof or persuasion in tax cases).

715. *See* IND. CODE § 35-41-4-1(a).

716. *Southlake*, 174 N.E.3d at 180; *see also* Peabody Coal Co. v. Ralston, 578 N.E.2d 751, 753-54 (Ind. Ct. App. 1991) (discussing the burdens of persuasion and production in general).

717. *Southlake*, 174 N.E.3d at 180.

718. *Id.*

719. *Id.*

720. *Id.* at 181.

721. *Id.*