Indiana DOR Stays Active With Guidance and Initiatives During Pandemic

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Authors:

Daniel G. Mudd

Many areas of life have slowed down, and in some cases come to a complete halt, because of the COVID-19 pandemic. This slowing trend has generally included state and local tax administration and actions in most states, but that has not been the case for the Indiana Department of Revenue (IDOR) after releasing a flurry of initiatives and guidance of late, including: (i) rolling-out an aggressive new transfer pricing program, (ii) issuing important sales/use tax guidance for remote sellers, marketplace facilitators and bundled/unitary transactions, and (iii) announcing the launch of part-two of its modernized internal tax system, as well as the restarting of its billing and collection efforts after a brief pause due to COVID.

No Looking Back Now – Indiana Rolls Out Aggressive Transfer Pricing Initiative

In response to prior losses at the Indiana Tax Court, IDOR has publicly rolled-out a comprehensive transfer pricing initiative that has been years in the making, and includes several prongs such as the creation of a dedicated transfer pricing team in its audit division, contracting with an external economist and transfer pricing service (RoyaltyStat LLC), and the use of advanced pricing agreements (APAs) to help resolve these disputes on a going-forward basis. This public announcement came via its recent annual report.[1] However, IDOR previously made the Indiana tax community aware of the initiative through informal presentations with local tax practitioners in late 2019.

The need to beef up its audit forces and third-party transfer pricing expert is the result of the Indiana Tax Court consistently relying upon taxpayer's transfer pricing studies conducted by third-party vendors during recent cases[2] which the court believed was sufficient to establish arm's-length transactions/rates under IRC Section 482 and accompanying regulations (without any competing

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study/report from IDOR), and IDOR was unable to attack the involved intercompany transactions for corporate income tax purposes.

While Indiana is far from the first state to contract with external resources to help on transfer pricing issues (as Alabama, North Carolina, Louisiana, and other states also have contracts with RoyaltyStat and other similar experts/services), its initiative goes much further as it includes: increased training for its audit forces, developing subject matter experts (SMEs) on this topic who are assigned to each audit, and working closely with a "collaborative group of 13 states to share information regarding transfer pricing" to ensure it uses most up-to-date techniques, processes and (likely) sharing of information about cases. IDOR acknowledged in its 2019 presentation that after its loss in RAC East, rather than using forced combination when it believed that intercompany transactions distorted Indiana source income, it now must analyze whether a taxpayer's transfer pricing study complies with IRC Section 482 regulations, and specifically challenging a study's methodology, comparables, and profit level indicators. Therefore, even if a taxpayer has been diligent in obtaining a transfer pricing study (or studies) to set its rates/pricings, it should expect a fight on its hands with IDOR and other state taxing agencies looking to do the same thing.

Another component of IDOR's transfer pricing initiative is the use of APAs to resolve transfer pricing disputes which would cover two audit periods – or six years. Although IDOR has informally offered to use APAs to settle transfer pricing disputes the past few years, Indiana appears to be the first state to publicly announce a formal APA program, which many other states will be watching closely. While IDOR's APA program is based off the IRS' APA program, it will be different in many aspects. Although an APA can provide certainty to a taxpayer on these issues for multiple years, there will also be several subtle, though important, differences between a formal APA and standard settlement agreement/resolution. Taxpayers should work closely with a local tax practitioner to evaluate the pros and cons of both options.

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Keep Going – More Guidance for Remote Sellers, Marketplace Facilitators and Bundled/Unitary Transactions

Corporate income tax is not the only topic IDOR has been active in the past few months, as it also recently released two sales tax information bulletins on increasingly important and complicated topics – online/remote sales and bundled/unitary transactions.

Most recently, IDOR issued Information Bulletin #89 ("Bulletin #89"), which replaces the prior bulletin issued in June 2019, to provide updated guidance for remote sellers and marketplace facilitators, effective July 1, 2020,[3] including physical presence standards for retailers as part of Indiana Senate Enrolled Act (SEA) 408.

As a direct result of the *Wayfair* decision, Indiana began imposing its previously enacted statutory economic nexus test on retail merchants (instead of physical presence) on October 1, 2018. Additional legislation in 2019 was passed to apply these new economic nexus standards to marketplace facilitators (not just remote sellers using these platforms), effective July 1, 2019, requiring them to collect and remit sales tax on sales made into Indiana on behalf of their remote sellers. While most think of economic nexus in terms of sales/use tax, such standards and requirements also apply to other excise taxes like Indiana's food and beverage, county innkeeper, auto-rental and vehicle sharing taxes. For example, marketplace facilitators in Indiana include those that help facilitate other retail transactions such as the rental or furnishing of rooms, lodging or accommodations.

The Bulletin also instructs marketplace facilitators to not only include transactions made by itself, but also those it helps facilitate for other sellers, when determining whether Indiana's economic nexus thresholds (i.e., gross revenue over $100,000 or 200 separate transactions in Indiana) have been met. According to the Bulletin, Indiana does not require a remote seller (which can include wholesalers) to count its sales made via a marketplace facilitator's platform towards its own economic threshold calculations (assuming the facilitator has already met the thresholds and thus will account for such activities). The Bulletin also clarifies that economic thresholds include non-taxable sales, with an exception for *non*-taxable services which alone (i.e., no taxable property or

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services) will not trigger economic nexus even if it meets either of the thresholds. The Bulletin addresses several important topics, including what activities do and don't cause a company to be a "marketplace facilitator", how to register as a retail merchant, prohibiting class-action suits to protect such taxpayers from inadvertent overcollection, and providing limited liability relief to marketplace facilitators that failed to collect and remit sales/use in certain limited circumstances.

A month prior to Bulletin #89, IDOR released more sales tax guidance, this time concerning Indiana's treatment of bundled and unitary transactions, via Information Bulletin #94 ("Bulleting #94), which attempts to explain and harmonize both concepts under Indiana law.[4] Historically, IDOR applied the concept of "unitary transactions" in which tangible personal property and services were sold under a single, nonitemized price, but because Indiana is a signatory to the Streamlined Sales and Use Tax Agreement ("SSUTA") it also adopted the definition of "bundled transactions", a similar concept. Accordingly, both theories can apply to similar transactions, which has caused confusion for taxpayers, and difficulty for IDOR in administering same.

Bulletin #89 provides detailed definitions, requirements and exceptions for both unitary transactions and bundled transactions, and almost identifies the primary differences between the two concepts. For example, Indiana sales tax is measured by the "gross retail income" received by a retail merchant in a retail "unitary" transaction. A person is a retail merchant making a retail transaction when the person sells tangible personal property as part of a "bundled transaction." According to the Bulletin, if a transaction meets one of the exceptions to the definition of a bundled transaction, the transaction is also not considered to be a unitary transaction. IDOR asserts that the intent of the bundled transaction law was that if a transaction involving personal property and services (or some other combination of taxable and nontaxable goods or services) sold for a single price met one of the exceptions, it would not be considered a taxable transaction, which it believes follows the SSUTA Governing Board Rules and now Indiana law (SEA 408 (2020)). The Bulletin also provides several examples and

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circumstances which apply these two concepts for taxpayer's improved understanding.

Game On – IDOR Announces Launch of its Modernized Internal Tax System, and Lifting of its Temporary Relief on Tax Collections and Billing

IDOR's most recent news came in its August 12, 2020 announcement of the launch of the next stage of its new, modernized internal tax system which has been several years in the making and referred to as "Project NextDOR."[5] The four-year modernization project starting back in 2017 was needed to replace IDOR's outdated (25 year-old) legacy tax system with the new Indiana Tax System (ITS) which employs new state-of-the-art technology that will enable more efficient tax administration operations and enhanced service offerings. A major component of the ITS is a self-service e-portal for customers called INTIME—Indiana's Taxpayer Information Management Engine. This new e-portal will enable businesses and individuals to view account information and correspondence online, register tax accounts and pay taxes online. INTIME also replaces INtax and will support expanded return filing of business and corporate taxes. INTIME will also prove useful for practitioners who will have the ability to register for the system and import client lists from INtax to gain access to these accounts.

Although IDOR already rolled out the first part of ITS in September of 2019 for many types of taxes and industries (e.g., for aircraft, c-corps/s-corps/partnerships, financial institutions, non-profits and utility receipts), IDOR's recent rollout of Part 2 of the project is more robust as it includes new functionality for administering most Indiana business tax types (including sales/use, admissions, innkeeper, food and beverage, various vehicles, withholding, etc.). The final two stages of ITS is expected to come in 2021 and 2022, respectively. Stay tuned for more!

In addition to its Project NextDOR announcement, IDOR also recently announced that it will be restarting its prior collection, billing and protest operations after Indiana, like many states, provided substantial relief to corporate and individual taxpayers during the pandemic via the "Helping Hoosiers" initiative, including

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temporary extensions of deadlines to file returns, pay tax, file protest-related documents, as well as a hold on most collections efforts.[6] On July 30, 2020, IDOR announced that it is "working to get back on track" by restarting certain billing and collection actions, and provided its game plan for the next several months.[7]

During July, DOR began issuing notices and bills to taxpayers with outstanding tax liabilities for corporate, individual and special taxes due prior to March 2020, as well as proposed assessment notices for business and certain taxpayers that did not file required tax returns due from January to March 2020, and bills for any employers who did not file their WH-3 (withholding) forms due January 31, 2020. The temporary extension of time to protest a tax assessment (120 days) or request a protest rehearing (90 days) have gone back to the normal 60-day and 30-day windows, respectively. Tax collection efforts also begin to kick in gear through county sheriffs and DOR's third-party collection agency (UCB).

If that isn't exciting enough, DOR announced what else it has in store over the coming months, including:

- August: Resuming the normal time for providing records for an Offer in Compromise, and issuing proposed assessment notices for business and other taxpayers that did not file required tax returns for April – May 2020;
- September: Issuing tax bills for individuals with tax liabilities on their 2019 returns, proposed assessments notices for certain taxpayers that did not file required tax returns due in June 2020 and businesses with taxes due prior to March 2020, (and accompanying warrants issued/pursued), and notices and fees due for expired or expiring Registered Retail Merchant Certificates (RRMCs); and
- October: Issuing tax notices and bills for individual filers with discrepancies between their federal and Indiana AGI, for taxpayers that did not file required tax returns due in July 2020, and businesses that did not file expected tax returns for 2020. Involuntary collection actions (including levies) will also restart for certain cases.

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In the ever-changing world we live in due to the pandemic, 2020 is an especially important year to stay on top of changes in policies and new initiatives rolled out by state and local tax agencies as most jurisdictions are experiencing a significant revenue shortfall, with increased audit and collections being a sure bet they help fill this hole. Given this jam-packed calendar of events scheduled by the Indiana DOR for the coming months, taxpayers will be hoping that IDOR and other taxing agencies take a break for the holidays, which would be the best Christmas gift of all!

Daniel Mudd is a Member of Frost Brown Todd's Tax Law Practice Group, providing *Tax Law Defined*™

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[1] *See* FY 2019 Indiana Annual Report at 46, available at https://www.in.gov/dor/files/2019-annual-report.pdf.

[2] *See e.g.*, RAC East v. Ind. Dep't of State Revenue, 42 N.E.3d 1043 (Ind. T.C. 2015); Columbia Sportswear USA Corp. v. Ind. Dep't of State Revenue, 45 N.E.3d 888, 898 (Ind. Tax Ct. 2015) transfer denied, 50 N.E.3d 147 (Ind. 2016).

[3] *See* IDOR Information Bulletin #89, Sales Tax, June 2020 (eff. Jul. 1, 2020), available at https://www.in.gov/dor/files/reference/sib89.pdf.

[4] *See* IDOR Information Bulletin #94, Sales Tax, June 2020 (eff. upon publication), available at https://www.in.gov/dor/files/sib94.pdf.

[5] *See* IDOR website, Project NextDOR Update: Moving to INTIME, available at https://www.in.gov/dor/project-nextdor/ (last visited Aug. 12, 2020).

[6] *See* "DOR Announces 'Helping Hoosiers' COVID-19 Relief Services: Supporting Hoosier Taxpayers During the Health Emergency" (Mar. 31, 2020), available at https://calendar.in.gov/site/dor/event/dor-announces-helping-hoosiers-covid-19-relief-services/.

[7] *See* "DOR Working to Get 'Back on Track': Restarting certain billing and collections actions" (Jul. 30, 2020), available at https://calendar.in.gov/site/dor/event/dor-working-to-get-back-

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