Received: 5/28/2024 5:03 PM

IN THE
INDIANA SUPREME COURT

Case No. _____

Penn Entertainment, Inc. (f/k/a Penn National Gaming, Inc.),	)	On Petition to Transfer from: Indiana Tax Court
Petitioner,	)	Tax Court Case No. 22T-TA-15
v.	)	Hon. John G. Baker, Special Judge
Indiana Department of State Revenue,	)	
Respondent.	)	

BRIEF OF *AMICI CURIAE* COUNCIL ON STATE TAXATION AND TAX FOUNDATION

Mark A. Loyd (Atty. No. 25996-10)
Stephanie M. Bruns (Atty. No. 34524-49)
Helen V. Cooper (Atty. No. 34420-39)
DENTONS BINGHAM GREENEBAUM LLP
3500 PNC Tower
101 South Fifth Street
Louisville, Kentucky 40202
(502) 587-3552

Attorneys for Amicus Curiae Council On State Taxation and Tax Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGES

CASES

TABLE OF AUTHORITIES
(continued)

PAGES

STATUTES

OTHER AUTHORITIES

BRIEF STATEMENT OF THE INTEREST OF AMICI CURIAE

The Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce. Today, COST has an independent membership of approximately five hundred multistate corporations engaged in interstate and international commerce, many of which conduct substantial business in Indiana and employ many Indiana citizens. COST's mission is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities, a mission it has pursued since its inception.

COST, over the past fifty-four years, has participated as amicus in numerous cases before the U.S. Supreme Court and state courts, including Indiana courts. Notably, COST has filed amicus briefs addressing Indiana tax issues in *Indiana Department of State Revenue v. Miller Brewing Company*, 975 N.E.2d 800 (Ind. 2012), and *Indiana Department of State Revenue v. Belterra Resort Indiana, LLC*, 935 N.E.2d 174 (Ind. 2010).

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to educate taxpayers and policymakers on tax policy. The Tax Foundation seeks to make information about government finance more accessible to the general public, and Tax Foundation analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. Because the Tax Foundation has experience pertaining to the definition and scope of the terms at issue

in this case, and because this Court's decision will significantly impact taxpayers and tax policy, the Tax Foundation has an institutional interest in this Court's decision.

Clear interpretations of statutes are paramount to fair and equitable tax administration and compliance. Clear and consistent application of statutes enacted by a state legislature is particularly important for multijurisdictional taxpayers, including COST members, who are required to know and follow the tax laws of multiple states (and their local taxing jurisdictions).

Guidance based on the meaning of a law's words promotes sound tax policy, which fosters certainty and predictability, reduces confusion, prevents unintentional non-compliance, and enhances fairness and equity in the tax system. By creating a transparent and understandable framework, clear interpretation of tax laws ensures that such laws serve their intended purposes while building and maintaining public trust in the tax system. This fosters voluntary compliance and promotes a stable economic environment for the states.

In the context of this case, the breadth of a statute is particularly important when determining whether taxes imposed by another state are subject to Indiana's add-back provision ("Add-back Provision"), Ind. Code § 6-3-1-3.5(b)(3). Specifically, that provision states:

> (b) In the case of corporations, the same as "taxable income" (as defined in Section 63 of the Internal Revenue Code) adjusted as follows: … (3) Except as provided in subsection (c), add an amount equal to any deduction or deductions allowed or allowable pursuant to Section 63 of the Internal Revenue Code for *taxes based on or measured*

> *by income* and levied at the state level by any state of the United States. (*Emphasis added*).

This Court's review is needed to clarify the application of Indiana's Add-back Provision for other states income taxes paid by multijurisdictional corporations.

SUMMARY OF THE ARGUMENT

The Indiana Tax Court incorrectly interpreted the Add-back Provision to include other taxes and fees not traditionally viewed as an "income tax." This overly broad application of the Add-back Provision is inconsistent with other states having similar add-back provisions for taxes imposed on or measured by net income. This Court should take this case and clarify which other state taxes are subject to the Add-back Provision to provide taxpayers and the Indiana Department of State Revenue ("Department") with clear guidance on the scope of that provision. If this Court fails to take this case, amici fear that the Department will cherry pick and administratively expand the taxes and fees imposed by other states that are subject to the Add-back Provision. The lack of clear guidance will broadly impact all Indiana taxpayers, not just those engaged in the gaming industry.

Amici fully supports Penn Entertainment, Inc. ("Penn") constitutional arguments, but the focus of this amici brief is on the statutory basis for this Court to review the Tax Court's decision and to address the application of I.C. § 6-3-1-3.5(b)(3) Add-back Provision, which should be restricted to other states taxes *based on or measured by income*, like other states' income tax provisions.

ARGUMENT

This Court should clarify what is an "income" tax imposed by another state and address the fallout from *Consolidation Coal Co. v. Indiana Department of State Revenue*, 583 N.E.2d. 1199 (Ind. 1991), which is contrary to the text of I.C. § 6-3-1-3.5(b)(3). Several states impose state-level gross receipts taxes, excise taxes, and fees that are **not** based on net income on corporations subject to Indiana's Adjusted Gross Income Tax ("AGIT") such that while the starting basis for the AGIT is IRC § 63, the full scope of the State law requiring the addition of other states' income taxes imposed at the state level is far from clear.

Amici acknowledges that other states' "net income" taxes are required to be added back to the Indiana apportioned tax base. The concern is that the Add-back Provision, based on the Tax Court's decision, is now broadened to pick up a multitude of taxes **not** based on "net income" that were **not** intended for inclusion by Indiana's Legislature. This Court should review the legislative intent of I.C. § 6-3-1-3.5(b)(3) and restrict the Add-back Provision to other states' income taxes imposed in a similar manner to Indiana's AGIT—a net income tax on corporations.

I. This Court should review and provide clear guidance on the application of *Consolidated Coal.*

Consolidation Coal clearly states that "the add back provisions at issue in this case are designed to describe the kind of tax to be added back – permitting the add-back of taxes based on income but not those such as property or excise taxes." *Consolidation Coal*, 583 N.E.2d at *1202. Yet, this Court complicated that clear rule in applying it to add back West Virgina's former Business and Occupation tax, a gross

receipts tax, characterizing it as "based on or measured by income." *Id*. This is problematic because that tax was a state gross receipts tax, unlike Indiana's AGIT which is imposed on net income. So, the application of the clear rule in *Consolidation Coal* created confusion and opened the door for the Department to add back other states' non-net income taxes (an apples versus oranges comparison) in contravention of I.C. § 6-3-1-3.5(b)(3).

Citing *Miles v. Department of Treasury*, 199 N.E. 372 (1935), the Court in *Consolidation Coal* looked at the predecessor tax to the AGIT, a gross income tax to conclude that the West Virginia tax was a "tax on income." 583 N.E.2d at *1201. However, the reference to the *Miles* decision only contributes to the confusion resulting from *Consolidation Coal*. *Miles* dealt with whether Indiana's former gross receipts tax was unconstitutional under Ind. Const. art. X § 1, a provision that requires uniform and equal rate of taxation for property taxes. The Court in *Miles* held that the State's former gross receipt tax was an "excise," and not a property tax.

> We conclude that the tax in question is an excise, levied upon those domiciled within the state or who derived income from sources within the state, upon the basis of the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income.

Miles, 199 N.E. at *379. Thus, while the *Consolidation Coal* Court held that excise taxes were excluded from the Add-back Provision, the *Miles* Court held that the State's former gross receipts tax was an excise tax in the context of Ind. Const. art. X § 1, not the other state income tax addback of I.C. § 6-3-1-3.5(b)(3).

This conundrum of which "excise taxes" are subject to the Add-back Provision highlights the need for this Court to review this case and eliminate the confusion, especially since *Consolidation Coal* is at odds with other states' treatment of gross receipts taxes.[1]

The Tax Court decision, requiring the add-back of certain non-net income taxes to Penn's AGIT tax base, confuses what types of "excise taxes" are required to be added back based on *Consolidation Coal* and what "excise taxes" are excluded from the Add-back Provision based on that same decision. Penn is not disputing it was required to add back other states taxes based on net income. It is justified, however, in questioning the Department's position, affirmed by the Tax Court, that the following fees and taxes targeted solely towards the gaming industry must be added back to its AGIT: 1) Illinois wagering tax based on adjusted gross receipts; 2) Maine gross slot machine income; 3) Massachusetts tax on gross gaming revenue; 4) Mississippi license fee based on gross revenue; 5) Missouri gaming tax based on gross receipts; 6) Nevada gaming license fee based on gross revenue; 7) New Mexico gaming license based on the net take of gaming receipts; 8) Ohio casino tax based on gross revenue; 9) Pennsylvania table game and slot machine taxes based on gross revenue; and 10) West Virgina gaming license tax based on adjusted gaming gross receipts.

---

[1] In 1993, New Jersey added an add-back provision like Indiana's that applied to its Corporate Business Tax (CBT); the New Jersey Tax Court held that a tax on petroleum products (Petroleum Gross Receipts Tax) and utility taxes paid by a taxpayer to North Carolina and South Carolina were not taxes measured by income subject to the State's add-back provision. *See Ross Fogg Fuel Oil Co. v. Director, Div. of Taxation*, 22 N.J. Tax 372 (NJ Tax Ct. 2005) and *Duke Energy Corp. v. Director, Div. of Taxation*, 28 N.J. Tax 226 (NJ Tax Ct. 2014), respectively.

See Penn Entertainment, Inc. v. Ind. Dep't of State Revenue, 230 N.E. 385, at *393-94 (Ind. T.C. 2024).

This Court's clarification of the application of *Consolidation Coal* and/or its limitation of the Add-back Provision solely to other states net income taxes would assist all taxpayers subject to the AGIT.

II. A proper statutory construction review is needed to address whether gaming excise taxes and fees are added back under the AGIT.

The Tax Court correctly noted that when confronted with a question of statutory construction, "[the court's] function is to determine and implement the intent of the legislature in enacting that statutory provision." *Penn Entertainment*, 230 N.E. at *391 (citing *DeKalb Cnty. E. Cmty. Sch. Dist. v. Dep't of Loc. Gov't Fin.*, 930 N.E.2d 1257, 1260 (Ind. Tax Ct. 2010)). However, in analyzing a tax statute, this Court and the Tax Court have previously made clear that there are different rules used for reviewing the statutory construction of a tax statute based on whether a tax exemption or tax imposition is addressed. For exemptions, "it is well-settled that tax exemptions are to be strictly construed against the taxpayer, and the taxpayer bears the burden of proving entitlement to the exemption." *Grand Victoria Casino & Resort, L.P., v. Ind. Dep't of State Revenue*, 789 N.E.2d 1041, at *1044 (Ind. Tax Ct. 2003) (quoting *Tri-States Double Cola Bottling Co. v. Indiana Dep't of State Revenue*, 706 N.E.2d 282, at *283 (Ind. Tax Ct. 1999)).

In contrast, when addressing a tax imposition statute, "[a]ny ambiguity in a tax-levying statute is construed against the State and in favor of the taxpayer." *State Bd. of Tax Comm'rs v. Jewell Grain Co.*, 556 N.E.2d 920, at *921 (Ind. 1990) (*State*

Dep't of Revenue v. Estate of Eberbach, 535 N.E.2d 1194 (Ind. 1989)). The Add-back Provision (I.C. § 6-3-1-3.5(b)(3)) is a tax imposition statute requiring any ambiguity to be construed against the State. In this case, the Tax Court failed to provide that analysis.[2]

Importantly, the Tax Court has previously found that the Add-back Provision had some ambiguity when it addressed whether a taxpayer had to add back Michigan's former Single Business Tax ("MSBT"). *First Chicago NBD Corp. v. Department of State Revenue*, 708 N.E.2d 631 (Ind. Tax Ct. 1999). When reviewing the Add-back Provision, the Tax Court noted the dilemma "that almost every tax could be construed as measured by income." *Id.* at *635. Appropriately, the Tax Court found the MSBT was not based on or measured by income.[3] *Id.*

This case provides a timely opportunity for this Court to provide taxpayers and the Department with clear guidance as to what taxes I.C. § 6-3-1-3.5(b)(3) requires corporations to add back because they come within the scope of income taxes paid to other states within the meaning of the statute. As noted in Professor Richard Pomp's Report:

> The logic of the add back treatment of the Illinois income tax (or any apportioned state income tax) does not extend to non-apportioned taxes. For example, sales taxes, use

---

[2] Properly following this type of analysis, the New Jersey Tax Court reviewed the legislative intent of its add-back provision and construed the add-back provision in favor of the taxpayer. *See Ross Fogg Fuel Oil*, *supra*, footnote 1.

[3] Other states such as California and Arizona have come to similar conclusions with the MSBT. *See Appeal of Dayton Hudson Corp. v. Franchise Tax Board*, 94-SBE-003 (Cal. S.B.E. Feb. 3, 1994); *see also* Notice 94-4 from Debra S. Petersen, Franchise Tax Board Legal Division, (Nov. 10, 1994) (on file with Cali. Franchise Tax Board); *see also* Ariz. Rev. Corp. Tax Rul. 95-1 (1995).

> taxes, excise taxes, license taxes, utility taxes and other similar taxes paid in Illinois are not apportioned. No reason exists to add them back. They are appropriate deductions for operating costs. From a policy and conceptual perspective, these costs are no different from a corporation's other costs of generating income that will be part of the Indiana pizza pie and apportioned to the State.[4]

This Court should clarify that I.C. § 6-3-1-3.5(b)(3) is limited to net income taxes (apportioned taxes).[5] A failure to review this case and issue clear guidance could result in the add back of other taxes and fees, such as sales taxes, especially if those taxes (similar to Indiana imposing its sales tax on "gross retail income;" Indiana Code §§ 6-2.5-1-5 & 6-2.5-2-2(a)) have any connection to the word "income" in their terminology.

Indiana is an associate member of the Multistate Tax Commission ("MTC"). The MTC's model act could be used as guidance on what state taxes based or measured by net income are subject to the Add-back Provision. While the MTC does not require states to uniformly adopt its model acts, it does provide those acts to promote uniformity and avoid duplicative taxation by states. The MTC compact definition section, Article II, provides that an "income tax" means "a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, one or more forms of which

---

[4] Expert Report from Richard D. Pomp, Alva P. Loiselle Professor of Law, Univ. of Conn. Sch. of L. to Ind. Tax Ct. (2023).

[5] *Ross Fogg Fuel Oil*, supra footnote 1, also provides helpful analysis on the purpose of adding back income taxes paid to other states.

expenses are not specifically and directly related to particular transactions." MTC, *Multistate Tax Compact*, https://www.mtc.gov/The-Commission/Multistate-Tax-Compact/#Article%20I (last visited May 28, 2024).

This Court should review this case and provide guidance that the Add-back Provision is limited to income tax payments consistent with the MTC Tax Compact definition of an "income tax."

CONCLUSION

Amici urges this Court to accept review of this case. Clear guidance is needed from this Court on when a corporation is required to add back income taxes paid to other states under I.C. § 6-3-1-3.5(b)(3).

Respectfully submitted,

/s/ Mark A. Loyd

Mark A. Loyd (Atty. No. 25996-10)
Stephanie M. Bruns (Atty. No. 34524-49)
Helen V. Cooper (Atty. No. 34420-39)
DENTONS BINGHAM GREENEBAUM LLP
3500 PNC Tower
101 South Fifth Street
Louisville, Kentucky 40202
(502) 587-3552

Attorneys for Amici Curiae Council On State Taxation and the Tax Foundation

WORD COUNT CERTIFICATE

I verify that this Brief contains no more than 4,200 words.

/s/ Mark A. Loyd
Mark A. Loyd (Atty. No. 25996-10)

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been served electronically upon the following counsel of record through the Indiana E-filing System (IEFS) this 28th day of May, 2024:

Todd Rokita, Attorney General
Thomas Lee Martindale, Deputy Attorney General
J. Derek Atwood, Deputy Attorney General
Office of the Attorney General
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, Indiana 46204-2770

Mark J. Richards
Jenny R. Bucheit
Matthew J. Ehinger
Joshua W. Schlake
ICE MILLER LLP
One American Square, Suite 2900
Indianapolis, IN 46282-0200

/s/ Mark A. Loyd
Mark A. Loyd (Atty. No. 25996-10)

DENTONS BINGHAM GREENEBAUM LLP
3500 PNC Tower
101 South Fifth Street
Louisville, Kentucky 40202