ATTORNEYS FOR PETITIONER:
FRANCINA A. DLOUHY
BAKER & DANIELS LLP
Indianapolis, IN

CRAIG B. FIELDS
MORRISON & FOERSTER LLP
New York, NY

ATTORNEYS FOR RESPONDENT:
GREGORY F. ZOELLER
ATTORNEY GENERAL OF INDIANA
JESSICA E. REAGAN
DEPUTY ATTORNEY GENERAL
Indianapolis, IN

IN THE INDIANA TAX COURT

AE OUTFITTERS RETAIL CO.,	)	
Petitioner,	)	
v.	)	Cause No. 49T10-1012-TA-66
INDIANA DEPARTMENT OF STATE REVENUE,	)	
Respondent.	)	

ORDER ON PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

NOT FOR PUBLICATION
October 25, 2011

FISHER, Senior Judge

AE Outfitters Retail Co. (AE Outfitters) appeals the final determination of the Indiana Department of State Revenue (Department) that assessed it with an adjusted gross income (AGI) tax liability for the tax years ending on July 31, 2004, July 30, 2005, July 29, 2006, and August 4, 2007 ("the years at issue"). The matter is before the Court on AE Outfitters' motion for partial summary judgment. The issue for the Court to decide is whether the Department must apply each of the methodologies listed in

Indiana Code sections 6-3-2-2(l) and (m) before it may compel a taxpayer to report its Indiana AGI liability using a combined income tax return under Indiana Code section 6-3-2-2(p).

FACTS AND PROCEDURAL HISTORY

The following facts are undisputed. AE Outfitters, a foreign corporation, sells specialty retail apparel to the public through several stores located in the United States, including Indiana. During the years at issue, AE Outfitters reported its Indiana AGI tax liability by filing corporate AGI tax returns.

The Department subsequently audited AE Outfitters and concluded that because its separate returns did not fairly reflect its Indiana income, it must report its Indiana AGI liability via a combined income tax return.[1] Accordingly, the Department issued eight proposed assessments to AE Outfitters, assessing it with a total AGI tax liability of $2,060,239.41, plus penalties and interest. AE Outfitters timely protested the proposed assessments. On October 29, 2010, the Department issued a Letter of Findings sustaining the proposed assessments and therefore the use of the combined return methodology.

On December 27, 2010, AE Outfitters initiated this original tax appeal. On March 3, 2011, AE Outfitters filed a motion for partial summary judgment. The Court held a hearing on the motion on September 15, 2011. Additional facts will be supplied as necessary.

[1] A "combined income tax return" is "any income tax return on which one (1) or more taxpayers report income, deductions, and credits on a combined basis with one (1) or more other entities." IND. CODE § 6-3-1-28 (2004). In this case, the Department required AE Outfitters to report its AGI liability with the following entities: AE Corporate Services Co., AEO Management Co., Retail Royalty Company, and Retail Commerce Company.

STANDARD OF REVIEW

Summary judgment is proper only when the designated evidence demonstrates that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). When, as here, the material facts are undisputed and the interpretation of a statute is at issue, such statutory interpretation presents a pure question of law for which summary judgment is particularly appropriate. See Sanders v. Bd. of Comm'rs of Brown Cnty., 892 N.E.2d 1249, 1252 (Ind. Ct. App. 2008), trans. denied.

ANALYSIS

The issue before the Court is whether Indiana Code section 6-3-2-2(p) requires the Department to apply each of the methodologies described under Indiana Code sections 6-3-2-2(l) and (m) before it may compel a taxpayer to report its Indiana AGI liability using a combined income tax return. During the years at issue, Indiana Code section 6-3-2-2(p) provided:

> Notwithstanding subsections (l) and (m), the department may not require that income, deductions, and credits attributable to a taxpayer and another entity not described in subsection (o)(1) or (o)(2)[2] be reported in a combined income tax return for any taxable year, unless the department is unable to fairly reflect the taxpayer's adjusted gross income for the taxable year through use of other powers granted to the department by subsections (l) and (m).

[2] Indiana Code § 6-3-2-2(o) provided:

> Notwithstanding subsections (l) and (m), the department may not, under any circumstances, require that income, deductions, and credits attributable to a taxpayer and another entity be reported in a combined income tax return for any taxable year, if the other entity is: (1) a foreign corporation; or (2) a corporation that is classified as a foreign operating corporation for the taxable year by section 2.4 of this chapter.

IND. CODE § 6-3-2-2(o) (2004) (amended 2006) (emphasis omitted).

IND. CODE § 6-3-2-2(p) (2004) (amended 2006) (emphases omitted) (footnote added).[3]

AE Outfitters contends that under Indiana Code section 6-3-2-2(p), the Department's ability to mandate the filing of combined income tax returns is limited by the requirement that it first determine whether a taxpayer's income could be fairly reflected through use of all of the other methodologies listed in Indiana Code sections 6-3-2-2(l) and (m). (See Oral Argument Tr. at 3-5; Pet'r Br. Supp. Mot. Summ. J. at 6-9.) The Department, on the other hand, asserts that under Indiana Code section 6-3-2-2(p), it need only apply any one of the methodologies in Indiana Code sections 6-3-2-2(l) or (m) before issuing a combined return mandate.[4] (See Resp't Resp. Opp'n Pet'r Mot. Summ. J. at 1-3, 5-6 (footnote added).) The Department is incorrect.

When presented with a question of statutory interpretation, this Court must first look to the plain language of the statute at issue to ascertain and then implement the legislature's intent. See RDI/Caesars Riverboat Casino, LLC v. Ind. Dep't of State Revenue, 854 N.E.2d 957, 963 (Ind. Tax Ct. 2006) (citations omitted), review denied;

[3] The legislature's 2006 amendment of Indiana Code § 6-3-2-2 has no bearing on the outcome of this matter, as Indiana Code section 6-3-2-2(p) was not amended. See Pub.L. No. 162-2006, § 25 (eff. Jan. 1, 2007), 2006 Ind. Acts 3223, 3262-3269.

[4] The Department also argues that AE Outfitters' motion should be denied for six other reasons: 1) it improperly seeks an advisory opinion; 2) it has improperly changed its legal position during these proceedings; 3) it "misstates" the legal issue and "omits" relevant facts; 4) it fails to show that the proposed assessments are incorrect and improperly seeks to shift the burden of proof thereon; 5) it fails to show that the Department did not comply with Indiana Code section 6-3-2-2(p); and 6) responding to the motion prejudices the Department, given the Court's recent holding in Rent-A-Center East, Inc. v. Indiana Department of State Revenue, 952 N.E.2d 387 (Ind. Tax Ct. 2011), appeal filed (Ind. 2011) and the Department's subsequent appeal of that matter. (See Oral Argument Tr. at 8-21; Resp't Resp. Opp'n Pet'r Mot. Summ. J. at 1-6.) The Court finds that AE Outfitters has not sought an advisory opinion, altered its legal position, misstated its own claim, or omitted facts relevant to that claim. Issues regarding the propriety of the proposed assessments, the burden of proof thereon, and the Department's compliance with Indiana Code section 6-3-2-2(p) are not presently before the Court. The Department incurred no prejudice in responding to this motion because AE Outfitters has not relied on this Court's holding in Rent-A-Center.

CNB Bancshares, Inc. v. Ind. Dep't of State Revenue, 706 N.E.2d 616, 618 (Ind. Tax Ct. 1999) (citations omitted). Generally, the statutory language itself is the best evidence of this intent. RDI/Caesars, 854 N.E.2d at 963 (citation omitted). Thus, when the statutory language is unambiguous, this Court may not construe the statute for purposes of either limiting or extending its operation. See CNB Bancshares, 706 N.E.2d at 618. "A statute is ambiguous if it is susceptible to more than one interpretation." Gundersen v. Ind. Dep't of State Revenue, 831 N.E.2d 1274, 1276 (Ind. Tax Ct. 2005) (citation omitted).

The statute at issue in this case, Indiana Code section 6-3-2-2(p), is not ambiguous. Indeed, the statutory language employed plainly conveys that the Department may not require a taxpayer to file a combined income tax return "unless [it] is unable to fairly reflect the taxpayer's adjusted gross income for the taxable year through use of other powers granted to [it] by subsections (l) and (m)." I.C. § 6-3-2-2(p) (emphases added). Accordingly, before the Department issues a combined return mandate, it must ascertain whether application of each of the following methodologies would result in an equitable allocation and apportionment of the taxpayer's income:

> (1) separate accounting;
>
> (2) the exclusion of any one or more factors, excepting the sales factor for tax years between January 1, 2007, and January 1, 2011;
>
> (3) the inclusion of any one (1) or more additional factors; or
>
> (4) the employment of any other reasonable method that would effectuate an equitable allocation and apportionment of the taxpayer's income.

See I.C. § 6-3-2-2(l) (as amended by Pub.L. No. 162-2006, § 25 (eff. Jan. 1, 2007), 2006 Ind. Acts 3223, 3262-3269). When two (2) or more organizations, trades, or businesses are owned or controlled directly or indirectly by the same interests, however,

"the department [must] distribute, apportion, or allocate the income derived from [Indiana] sources . . . between and among those organizations, trades, or businesses in order to fairly reflect and report the income derived from [Indiana] sources . . . by various taxpayers." See I.C. § 6-3-2-2(m).

CONCLUSION

Indiana Code section 6-3-2-2(p) requires that the Department apply all of the methodologies in sections 6-3-2-2(l) and (m) before it may require a taxpayer to report its AGI liability via a combined income tax return. Consequently, AE Outfitters' motion for partial summary judgment is GRANTED. The Court shall set a case management conference to discuss all remaining matters by separate order.

SO ORDERED this 25th day of October 2011.

Thomas G. Fisher, Senior Judge
Indiana Tax Court

DISTRIBUTION:

Francina A. Dlouhy, BAKER & DANIELS LLP, 300 N. Meridian Street, Suite 2700, Indianapolis, IN 46204

Craig B. Fields, MORRISON & FOERSTER LLP, 1290 Avenue of the Americas, New York, NY 10104

Gregory F. Zoeller, Attorney General of Indiana, By: Jessica E. Reagan, Deputy Attorney General, Indiana Government Center South, Fifth Floor, 302 West Washington Street, Indianapolis, IN 46204-2770