Adopted Rejected

COMMITTEE REPORT

YES: 17
NO: 10

MR. SPEAKER:

*Your Committee on **Ways and Means**, to which was referred House Bill 1365, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill **be amended** as follows:*

Page 1, between the enacting clause and line 1, begin a new paragraph and insert:

"SECTION 1. IC 6-2.5-3-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2004]: Sec. 1. For purposes of this chapter:

(a) "Use" means the exercise of any right or power of ownership over tangible personal property.

(b) "Storage" means the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana.

(c) "A retail merchant engaged in business in Indiana" includes any retail merchant who makes retail transactions in which a person acquires personal property **or services** for use, storage, or consumption in Indiana and who: ~~maintains:~~

(1) **maintains** an office, place of distribution, sales location, sample location, warehouse, storage place, or other place of business which is located in Indiana and which the retail merchant maintains, occupies, or uses, either permanently or temporarily, either directly or indirectly, and either by ~~himself~~ **the retail merchant** or through ~~an~~ **a representative,** agent, or subsidiary; ~~or~~

(2) **maintains** a representative, agent, salesman, canvasser, or solicitor who, while operating in Indiana under the authority of and on behalf of the retail merchant or a subsidiary of the retail merchant, sells, delivers, **installs, repairs, assembles, sets up, accepts returns of, bills, invoices,** or takes orders for sales of tangible personal property **or services** to be used, stored, or consumed in Indiana;

(3) is otherwise required to register as a retail merchant under IC 6-2.5-8-1; or

(4) may be required by the state to collect tax under this article to the extent allowed under the Constitution of the United States and federal law.

(d) Notwithstanding any other provision of this section, tangible or intangible property that is:

(1) owned or leased by a person that has contracted with a commercial printer for printing; and

(2) located at the premises of the commercial printer;

shall not be considered to be, or to create, an office, a place of distribution, a sales location, a sample location, a warehouse, a storage place, or other place of business maintained, occupied, or used in any way by the person. A commercial printer with which a person has contracted for printing shall not be considered to be in any way a representative, an agent, a salesman, a canvasser, or a solicitor for the person.".

Page 3, between lines 33 and 34, begin a new paragraph and insert:

"SECTION 5. IC 6-2.5-8-10, AS AMENDED BY P.L.254-2003, SECTION 5, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2004]: Sec. 10. (a) A person that:

(1) makes retail transactions from outside Indiana to a destination

in Indiana;

(2) does not maintain a place of business in Indiana; and

(3) either:

(A) engages in the regular or systematic soliciting of retail transactions from potential customers in Indiana;

(B) enters into a contract to provide property or services to an agency (as defined in IC 4-13-2-1) or ~~an~~ **a state educational** institution ~~of higher education~~ (as defined in IC 20-12-0.5-1); ~~or~~

(C) agrees to sell property or services to an agency (as defined in IC 4-13-2-1) or an institution of higher education (as defined in IC 20-12-0.5-1); **or**

(D) is closely related to another person that maintains a place of business in Indiana or is described in clause (A), (B), or (C);

shall file an application for a retail merchant's certificate under this chapter and collect and remit tax as provided in this article. Conduct described in subdivision (3)(B) and (3)(C) occurring after June 30, 2003, constitutes consent to be treated under this article as if the person has a place of business in Indiana or is engaging in conduct described in subdivision (3)(A), including the provisions of this article that require a person to collect and remit tax under this article.

(b) A person is rebuttably presumed to be engaging in the regular or systematic soliciting of retail transactions from potential customers in Indiana if the person does any of the following:

(1) Distributes catalogs, periodicals, advertising flyers, or other written solicitations of business to potential customers in Indiana, regardless of whether the distribution is by mail or otherwise and without regard to the place from which the distribution originated or in which the materials were prepared.

(2) Displays advertisements on billboards or displays other outdoor advertisements in Indiana.

(3) Advertises in newspapers published in Indiana.

(4) Advertises in trade journals or other periodicals that circulate primarily in Indiana.

(5) Advertises in Indiana editions of a national or regional publication or a limited regional edition in which Indiana is

included as part of a broader regional or national publication if the advertisements are not placed in other geographically defined editions of the same issue of the same publication.

(6) Advertises in editions of regional or national publications that are not by the contents of the editions geographically targeted to Indiana but that are sold over the counter in Indiana or by subscription to Indiana residents.

(7) Broadcasts on a radio or television station located in Indiana.

(8) Makes any other solicitation by telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system.

(c) A person not maintaining a place of business in Indiana is considered to be engaged in the regular or systematic soliciting of retail transactions from potential customers in Indiana if the person engages in any of the activities described in subsection (b) and:

(1) makes at least one hundred (100) retail transactions from outside Indiana to destinations in Indiana during a period of twelve (12) consecutive months; or

(2) makes at least ten (10) retail transactions totaling more than one hundred thousand dollars ($100,000) from outside Indiana to destinations in Indiana during a period of twelve (12) consecutive months.

(d) **Subject to subsection (e),** the location in or outside Indiana of vendors that:

(1) are independent of a person that is soliciting customers in Indiana; and

(2) provide products or services to the person in connection with the person's solicitation of customers in Indiana:

(A) including products and services such as creation of copy, printing, distribution, and recording; **but**

(B) excluding:

(i) delivery of goods;

(ii) billing or invoicing for the sale of goods;

(iii) providing repairs of goods;

(iv) assembling or setting up goods for use by the purchaser; or

(v) accepting returns of unwanted or damaged goods;

is not to be taken into account in the determination of whether the person is required to collect use tax under this section.

(e) Subsection (d) does not apply if the person soliciting orders is closely related to the vendor.

(f) For purposes of subsections (a) and (e), a person is closely related to another person if:

(1) the two (2) persons:

(A) use an identical or a substantially similar name, trademark, or good will to develop, promote, or maintain sales;

(B) pay for each other's services in whole or in part contingent on the volume or value of sales; or

(C) share a common business plan or substantially coordinate their business plans; and

(2) either:

(A) one (1) or both of the persons are corporations and:

(i) one (1) person; and

(ii) any other person related to the person in a manner that would require an attribution of stock from the corporation to the person or from the person to the corporation under the attribution rules of Section 318 of the Internal Revenue Code;

own directly, indirectly, beneficially, or constructively at least fifty percent (50%) of the value of the corporation's outstanding stock;

(B) both entities are corporations and an individual stockholder and the members of the stockholder's family (as defined in Section 318 of the Internal Revenue Code) own directly, indirectly, beneficially, or constructively a total of at least fifty percent (50%) of the value of both entities' outstanding stock; or

(C) one (1) or both persons are limited liability companies, partnerships, limited liability partnerships, estates, or trusts, and their members, partners, or beneficiaries own directly, indirectly, beneficially, or constructively a total

of at least fifty percent (50%) of the profits, capital, stock, or value of one (1) or both persons.".

Page 9, between lines 34 and 35, begin a new paragraph and insert:

"**(g) An adjustment under subsection (a)(20), (b)(6), (c)(6), (d)(6), or (e)(4) is not required to the extent that:**

(1) the taxpayer establishes by clear and convincing evidence, as determined by the department, that the adjustment is unreasonable; or

(2) the taxpayer and the department agree in writing to the application or use of an alternative method of apportionment under IC 6-3-2-2(l).

SECTION 7. IC 6-3-1-20 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2004] (RETROACTIVE)]: Sec. 20. The term "business income" means:

(1) income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitutes integral parts of the taxpayer's regular trade or business operations; **and**

(2) all other income that the state is not prohibited from taxing under the Constitution of the United States or other federal law.".

Page 10, line 12, delete "any of the following:" and insert " **with respect to any taxpayer during all or any part of a taxable year, is:**

(1) a person or corporation that is a related entity;

(2) a person or corporation that is a component member (as defined in Section 1563(b) of the Internal Revenue Code);

(3) a person or corporation to or from which there is attribution of stock ownership in accordance with Section 1563(e) of the Internal Revenue Code; or

(4) a person, corporation, or partnership that, notwithstanding its form of organization, bears the same relationship to the taxpayer as a person or corporation described in subdivision (1), (2), or (3).".

Page 10, delete lines 13 through 37.

Page 11, between lines 28 and 29, begin a new paragraph and insert:

"SECTION 12. IC 6-3-1-38 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2004 (RETROACTIVE)]: **Sec. 38. As used in this chapter, "related entity" means:**

(1) a stockholder who is:

(A) an individual; or

(B) a member of the stockholder's family set forth in Section 318 of the Internal Revenue Code;

if the stockholder and the members of the stockholder's family directly, indirectly, beneficially, or constructively own a total of at least fifty percent (50%) of the value of the taxpayer's outstanding stock;

(2) a:

(A) stockholder; or

(B) stockholder's partnership, estate, trust, or corporation;

if the stockholder and the stockholder's partnership, estate, trust, or corporation directly, indirectly, beneficially, or constructively own a total of at least fifty percent (50%) of the value of the taxpayer's outstanding stock; or

(3) a:

(A) corporation; or

(B) party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Internal Revenue Code;

if the taxpayer directly, indirectly, beneficially, or constructively owns a total of at least fifty percent (50%) of the value of the corporation's outstanding stock.

The attribution rules of the Internal Revenue Code apply for purposes of determining whether the ownership requirements of this definition have been met.

SECTION 13. IC 6-3-2-2, AS AMENDED BY P.L.192-2002(ss), SECTION 71, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2004 (RETROACTIVE)]: Sec. 2. (a) With regard to corporations and nonresident persons, "adjusted gross income derived from sources within Indiana", for the purposes of this article, shall mean and include:

(1) income from real or tangible personal property located in this state;

(2) income from doing business in this state;

(3) income from a trade or profession conducted in this state;

(4) compensation for labor or services rendered within this state; ~~and~~

(5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property if the receipt from the intangible is attributable to Indiana under section 2.2 of this chapter; **and**

(6) any business income, regardless of whether it is described in this subsection.

In the case of nonbusiness income described in subsection (g), only so much of such income as is allocated to this state under the provisions of subsections (h) through (k) shall be deemed to be derived from sources within Indiana. In the case of business income, only so much of such income as is apportioned to this state under the provision of subsection (b) shall be deemed to be derived from sources within the state of Indiana. In the case of compensation of a team member (as defined in section 2.7 of this chapter) only the portion of income determined to be Indiana income under section 2.7 of this chapter is considered derived from sources within Indiana. In the case of a corporation that is a life insurance company (as defined in Section 816(a) of the Internal Revenue Code) or an insurance company that is subject to tax under Section 831 of the Internal Revenue Code, only so much of the income as is apportioned to Indiana under subsection (r) is considered derived from sources within Indiana.

(b) Except as provided in subsection (l) **and subject to subsection (o),** if business income of a corporation or a nonresident person is derived from sources within the state of Indiana and from sources without the state of Indiana, then the business income derived from sources within this state shall be determined by multiplying the business income derived from sources both within and without the state of

Indiana by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three (3). However, after a period of two (2) consecutive quarters of income growth and one (1) additional quarter (regardless of any income growth), the fraction shall be computed as follows:

(1) For all taxable years that begin within the first calendar year immediately following the period, the numerator of the fraction is the sum of the property factor plus the payroll factor plus one hundred thirty-three percent (133%) of the sales factor, and the denominator of the fraction is three and thirty-three hundredths (3.33).

(2) For all taxable years that begin within the second calendar year following the period, the numerator of the fraction is the property factor plus the payroll factor plus one hundred sixty-seven percent (167%) of the sales factor, and the denominator of the fraction is three and sixty-seven hundredths (3.67).

(3) For all taxable years beginning on or after January 1 of the third calendar year following the period, the numerator of the fraction is the property factor plus the payroll factor plus two hundred percent (200%) of the sales factor, and the denominator of the fraction is four (4).

For purposes of this subsection, income growth occurs when the state's nonfarm personal income for a calendar quarter increases in comparison with the state's nonfarm personal income for the immediately preceding quarter at an annualized compound rate of five percent (5%) or more, as determined by the budget agency based on current dollar figures provided by the Bureau of Economic Analysis of the United States Department of Commerce or its successor agency. The annualized compound rate shall be computed in accordance with the formula $(1+N)^4-1$, where N equals the percentage change in the state's current dollar nonfarm personal income from one (1) quarter to the next. As soon as possible after two (2) consecutive quarters of income growth, the budget agency shall advise the department of the growth.

(c) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the taxable year and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the taxable year. However, with respect to a foreign corporation, the denominator does not include the average value of real or tangible personal property owned or rented and used in a place that is outside the United States. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight (8) times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals. The average of property shall be determined by averaging the values at the beginning and ending of the taxable year, but the department may require the averaging of monthly values during the taxable year if reasonably required to reflect properly the average value of the taxpayer's property.

(d) The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the taxable year by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year. However, with respect to a foreign corporation, the denominator does not include compensation paid in a place that is outside the United States. Compensation is paid in this state if:

(1) the individual's service is performed entirely within the state;

(2) the individual's service is performed both within and without this state, but the service performed without this state is incidental to the individual's service within this state; or

(3) some of the service is performed in this state and:

(A) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this state; or

(B) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual is a resident of this state.

(e) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year. Sales include receipts from intangible property and receipts from the sale or exchange of intangible property. However, with respect to a foreign corporation, the denominator does not include sales made in a place that is outside the United States. Receipts from intangible personal property are derived from sources within Indiana if the receipts from the intangible personal property are attributable to Indiana under section 2.2 of this chapter. Sales of tangible personal property are in this state if:

(1) the property is delivered or shipped to a purchaser, other than the United States government, within this state, regardless of the f.o.b. point or other conditions of the sale; or

(2) the property is shipped from an office, a store, a warehouse, a factory, or other place of storage in this state and:

(A) the purchaser is the United States government; or

(B) the taxpayer is not taxable in the state of the purchaser.

Gross receipts derived from commercial printing as described in IC 6-2.5-1-10 shall be treated as sales of tangible personal property for purposes of this chapter.

(f) Sales, other than receipts from intangible property covered by subsection (e) and sales of tangible personal property, are in this state if:

(1) the income-producing activity is performed in this state; or

(2) the income-producing activity is performed both within and without this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

(g) Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in subsections (h) through (k).

(h)(1) Net rents and royalties from real property located in this state are allocable to this state.

(2) Net rents and royalties from tangible personal property are allocated to this state:

(i) if and to the extent that the property is utilized in this state; or

(ii) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(3) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year, and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(i)(1) Capital gains and losses from sales of real property located in this state are allocable to this state.

(2) Capital gains and losses from sales of tangible personal property are allocable to this state if:

(i) the property had a situs in this state at the time of the sale; or

(ii) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(3) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

(j) Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.

(k)(1) Patent and copyright royalties are allocable to this state:

(i) if and to the extent that the patent or copyright is utilized by the taxpayer in this state; or

(ii) if and to the extent that the patent or copyright is utilized by the taxpayer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(2) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(3) A copyright is utilized in a state to the extent that printing or

other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(l) If the allocation and apportionment provisions of this article do not fairly represent the taxpayer's income derived from sources within the state of Indiana, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(1) separate accounting;

(2) the exclusion of any one (1) or more of the factors;

(3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer's income derived from sources within the state of Indiana; or

(4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(m) In the case of two (2) or more organizations, trades, or businesses owned or controlled directly or indirectly by the same interests, the department shall distribute, apportion, or allocate the income derived from sources within the state of Indiana between and among those organizations, trades, or businesses in order to fairly reflect and report the income derived from sources within the state of Indiana by various taxpayers.

(n) For purposes of allocation and apportionment of income under this article, a taxpayer is taxable in another state if:

(1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or

(2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

(o) 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.

(p) 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) 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).

(q) Notwithstanding subsections (o) and (p), one (1) or more taxpayers may petition the department under subsection (l) for permission to file a combined income tax return for a taxable year. The petition to file a combined income tax return must be completed and filed with the department not more than thirty (30) days after the end of the taxpayer's taxable year.

(r) This subsection applies to a corporation that is a life insurance company (as defined in Section 816(a) of the Internal Revenue Code) or an insurance company that is subject to tax under Section 831 of the Internal Revenue Code. The corporation's adjusted gross income that is derived from sources within Indiana is determined by multiplying the corporation's adjusted gross income by a fraction:

(1) the numerator of which is the direct premiums and annuity considerations received during the taxable year for insurance upon property or risks in the state; and

(2) the denominator of which is the direct premiums and annuity considerations received during the taxable year for insurance upon property or risks everywhere.

The term "direct premiums and annuity considerations" means the gross premiums received from direct business as reported in the corporation's annual statement filed with the department of insurance.".

Page 17, after line 42, begin a new paragraph and insert:

"**(f) An adjustment under subsection (a)(1)(H) or (e) is not required to the extent that:**

(1) the taxpayer establishes by clear and convincing evidence, as determined by the department, that the adjustment is unreasonable; or

(2) the taxpayer and the department agree in writing to the

application or use of an alternative method of apportionment.

Page 18, line 21, delete "any of the" and insert " **with respect to any taxpayer during all or any part of a taxable year, is an entity:**

(1) that is a related entity;

(2) that is a component member (as defined in Section 1563(b) of the Internal Revenue Code);

(3) to or from which there is attribution of stock ownership in accordance with Section 1563(e) of the Internal Revenue Code; or

(4) that, notwithstanding its form of organization, bears the same relationship to the taxpayer as a person or corporation described in subdivision (1), (2), or (3).".

Page 18, delete lines 22 through 42.

Page 19, delete lines 1 through 5.

Page 19, between lines 38 and 39, begin a new paragraph and insert:

"SECTION 21. IC 6-5.5-1-12.8 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2004 (RETROACTIVE)]: **Sec. 12.8. As used in this chapter, "related entity" means:**

(1) a stockholder who is:

(A) an individual; or

(B) a member of the stockholder's family set forth in Section 318 of the Internal Revenue Code;

if the stockholder and the members of the stockholder's family directly, indirectly, beneficially, or constructively own a total of at least fifty percent (50%) of the value of the taxpayer's outstanding stock;

(2) a:

(A) stockholder; or

(B) stockholder's partnership, estate, trust, or corporation;

if the stockholder and the stockholder's partnership, estate, trust, or corporation directly, indirectly, beneficially, or constructively own a total of at least fifty percent (50%) of the value of the taxpayer's outstanding stock; or

(3) a:

(A) corporation; or

(B) party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Internal Revenue Code;

if the taxpayer directly, indirectly, beneficially, or constructively owns a total of at least fifty percent (50%) of the value of the corporation's outstanding stock.

The attribution rules of the Internal Revenue Code apply for purposes of determining whether the ownership requirements of this definition have been met.".

Page 20, line 9, delete "The" and insert "**IC 6-2.5-8-10, as amended**

by this act, and the".

Page 20, line 9, delete "applies" and insert "**apply**".

Renumber all SECTIONS consecutively.

(Reference is to HB 1365 as introduced.)

and when so amended that said bill do pass.

Representative Crawford