ATTORNEYS FOR PETITIONER:
BENJAMIN A. BLAIR
DANIEL R. ROY
FAEGRE DRINKER BIDDLE & REATH LLP
Indianapolis, IN

R. GREGORY ROBERTS
ROBERTS LAW GROUP, PLLC
White Plains, New York

ATTORNEYS FOR RESPONDENT:
THEODORE E. ROKITA
ATTORNEY GENERAL OF INDIANA
KELLY S. EARLS
ZACHARY D. PRICE
COURTNEY L. ABSHIRE
DEPUTY ATTORNEYS GENERAL
Indianapolis, IN

IN THE INDIANA TAX COURT

EXPRESS SCRIPTS INCORPORATED,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cause No. 19T-TA-00018
	)	
INDIANA DEPARTMENT OF STATE REVENUE,	)	
	)	
Respondent.	)	

ORDER ON RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

FOR PUBLICATION
May 14, 2021

WENTWORTH, J.

Express Scripts Incorporated has appealed the Indiana Department of State Revenue's final determination assessing it with additional adjusted gross income tax (AGIT) and interest for the 2011, 2012, and 2013 tax years. The matter is currently before the Court on the Department's motion for partial summary judgment ("Motion"), which presents just one issue for resolution: whether Express Scripts, a pharmacy benefit management company, receives its Indiana income from the retail sale of prescription drugs or from the

provision of services. (See Resp't Mem. Supp. Partial Mot. Dismiss [or] Summ. J. ("Resp't Br.") at 4[1]; Hr'g Tr. at 10-12.). After reviewing all the designated evidence, the Court finds that Express Scripts receives its Indiana income from the latter. As a result, the Court denies the Department's Motion and grants summary judgment to Express Scripts.

FACTS AND PROCEDURAL HISTORY

Many health maintenance organizations, health insurers, third-party administrators, employers, union-sponsored benefit plans and government health programs (collectively, "health insurers") provide health insurance and medical benefits programs to their members or employees, "a standard part of which is a prescription drug or pharmacy benefit[.]" (See App. Pet'r Resp. Resp't Mot. Summ. J., Vol. II ("Pet'r Des'g Evid."), Ex. 2 ¶¶ 3-4.) While some of these health insurers administer the prescription drug/pharmacy benefit themselves, others outsource that function to a pharmacy benefit management company. (See Pet'r Des'g Evid., Ex. 2 ¶¶ 3, 5.)

One of the largest pharmacy benefit management companies in the United States is Delaware corporation Express Scripts. (Pet'r Des'g Evid., Ex. 1 ¶ 4, Ex. 2 ¶ 3.) In administering the prescription drug/pharmacy benefits of its health insurer clients ("Clients"), Express Scripts provides them "(i) wide access to a network of independent third-party retail pharmacies that provide discounted prescription drugs in most therapeutic categories, (ii) formulary design and implementation, (iii) concurrent drug interaction reviews, (iv)

[1] In conjunction with its motion for partial summary judgment ("Motion"), the Department filed a brief entitled "Memorandum in Support of [its] Partial Motion to Dismiss or for Summary Judgment." (See Resp't Mem. Supp. Partial Mot. Dismiss [or] Summ. J. ("Resp't Br.").) The Department subsequently clarified that it made a mistake in naming that document and that it is only seeking partial summary judgment in this case. (See Hr'g Tr. at 6 (stating that its Motion is "not a partial motion to dismiss, it is a partial motion for summary judgment").)

concurrent and retrospective drug utilization reviews, (v) claims processing and adjudication, and (vi) call center services[.]" (Pet'r Des'g Evid., Ex. 2 ¶ 9.) Clients pay a "Service Charge" to Express Scripts for the administration and management of their prescription drug/pharmacy benefits. (See Pet'r Des'g Evid., Ex. 2 ¶ 40.)

To provide its Clients' members or employees ("Members") with "wide access" to discounted prescription drugs, Express Scripts negotiated contracts with over 60,000 local pharmacies (e.g., CVS, Walgreens, RiteAid).[2] (Pet'r Des'g Evid., Ex. 2 ¶¶ 9, 12.) The contracts specify, among other things, that when filling a Member's prescription, the local pharmacy must charge a negotiated rate that reflects both the "Ingredient Cost" for the dispensed drug and a "Dispensing Fee." (Pet'r Des'g Evid., Ex. 2 ¶ 42.) Thus, in a typical scenario:

1) Member takes a prescription to local pharmacy to have it filled;

2) local pharmacy electronically notifies Express Scripts, which in turn:

    a) confirms the Member's eligiblity and coverage for benefits;

    b) performs a concurrent drug interaction/utilization review, alerting local pharmacy to any possible drug interactions; and

    c) informs local pharmacy of any co-payment amount it must collect from the Member.

3) Express Scripts pays local pharmacy the difference between the negotiated rate for the dispensed drug and the Member's co-payment.

[2] The local pharmacies are independent contractors and not representatives or agents of Express Scripts; thus, they maintain their own licenses and insurance, use their own inventory when filling prescriptions, and dispense prescriptions in accordance with applicable professional standards. (See App. Pet'r Resp. Resp't Mot. Summ. J., Vol. II ("Pet'r Des'g Evid."), Ex. 2 ¶¶ 12, 14.)

(See Pet'r Des'g Evid., Ex. 1 ¶ 12, Ex. 2 ¶¶ 23, 42.)

Express Scripts periodically bills its Clients its Service Charges. (See Pet'r Des'g Evid., Ex. 2 ¶ 42.) While the amount of the Service Charges billed varies from Client to Client, it always represents three components: (i) the Ingredient Costs of the prescription drugs dispensed by the local pharmacies during that period (reduced by the co-payments paid by Members to the local pharmacies); (ii) the local pharmacies' Dispensing Fees; and (iii) Express Scripts' administrative fee for that period. (See Pet'r Des'g Evid., Ex. 2 ¶ 41.) (See also Pet'r Des'g Evid., Ex. 3 at 42 ¶ 3.1 (indicating that Clients reimburse Express Scripts for what it paid to the local pharmacies).) As is relevant to this case, Express Scripts generated revenue from its Service Charges and from rebates it received from pharmaceutical manufacturers in return for including their drugs on Express Scripts' Clients' prescription drug formularies.[3,4] (See Pet'r Des'g Evid., Ex. 2 ¶¶ 24-25, 35-36, 38, 40.)

Having conducted business in Indiana during the years at issue, Express Scripts filed Indiana adjusted gross income tax returns for those years. (See Pet'r Des'g Evid., Ex. 1 ¶¶ 2, 13.) Express Scripts apportioned its income in accordance with Indiana's statutory provisions applicable to service providers. (Pet'r Des'g Evid., Ex. 1 ¶ 14 (referring generally to Indiana Code § 6-3-2-2(f)).) In doing so, Express Scripts "determined that none of its revenue . . . should be sourced to Indiana because the greater proportion of its income

[3] "A formulary is a list of generic and brand name prescription drugs covered by a pharmacy benefit plan." (Pet'r Des'g Evid., Ex. 2 ¶ 24.)

[4] Express Scripts shares with its Clients a portion of the rebates it receives from the pharmaceutical manufacturers. (Pet'r Des'g Evid., Ex. 2 ¶ 39.)

producing activities were incurred in a state other than Indiana." (Pet'r Des'g Evid., Ex. 1 ¶ 15.)

The Department subsequently audited Express Scripts and, in March of 2016, issued both an audit report and Proposed Assessments. (Pet'r Des'g Evid., Ex. 7 ¶¶ 11, 13, Ex. B.) The Department determined that Express Scripts was not a service provider because "[its] primary 'revenue stream' was attributable to buying, selling, and delivering prescription drugs in transactions which occurred within the state." (Pet'r Des'g Evid., Ex. 7 ¶ 15, Ex. A at 3-4.) Consequently, the Department determined that Express Scripts' receipts from its sale of prescription drugs should have been sourced to Indiana as required for sales of tangible personal property under Indiana Code § 6-3-2-2(e). (See generally Pet'r Des'g Evid., Ex. 7 ¶ 15, Ex. A at 4-12.)

Express Scripts timely protested the Proposed Assessments. After conducting an administrative hearing on the protest on September 6, 2016, the Department referred the matter back to its Audit Division. (Pet'r Des'g Evid., Ex. 7 ¶¶ 17-18.) On March 4, 2019, the Department issued a Letter of Findings that upheld the Proposed Assessments in their entirety. (Pet'r Des'g Evid., Ex. 7 ¶ 34, Ex. A at 12.)

On May 23, 2019, Express Scripts intiated an original tax appeal. On February 17, 2020, the Department filed its Motion.[5] The Court conducted a hearing on the Motion on

[5] The Department explains that it seeks partial summary judgment because a judgment in its favor would still not address the calculation of Express Scripts' income from its retail sales in Indiana. (See Resp't Br. at 3 (stating that "the proper calculation for [an] adjustment to account for the retail sales in Indiana is more a factual question which [] cannot be determined at this time").)

April 30, 2020. Additional facts will be supplied when necessary.

LAW

During the years at issue, all corporations were subject to an Indiana tax "on [the] part of the[ir] adjusted gross income derived from sources within Indiana[.]" IND. CODE § 6-3-2-1(b) (2011) (amended 2013). The computation of this liability "beg[an] with federal taxable income, to which [the] taxpayer ma[de] expressly enumerated adjustments under Indiana Code § 6-3-1-3.5(b)[.]" Indiana Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 581 (Ind. 2014). The corporate taxpayer doing business in more than one state then needed to determine what portion of its adjusted gross income was derived from sources within Indiana. See I.C. § 6-3-2-1(b). This determination required the corporation to apply the applicable allocation and apportionment rules set forth in Indiana Code § 6-3-2-2(a)-(k), referred to as the "Standard Sourcing Rules." See IND. CODE § 6-3-2-2(a)-(k) (2011) (amended 2015). See also Indiana Dep't of State Revenue v. Rent-A-Ctr. E., Inc., 963 N.E.2d 463, 465 (Ind. 2012).

Under the Standard Sourcing Rules in effect during the years at issue, a corporation's business income was apportioned between Indiana and other states by using a "sales factor," while its nonbusiness income was allocated to Indiana or another state. See I.C. § 6-3-2-2(a), (b)(5). The sales factor was "a fraction, the numerator of which [was] the total sales of the taxpayer in this state during the taxable year, and the denominator of which [was] the total sales of the taxpayer everywhere during the taxable year." I.C. § 6-3-2-2(e). Regardless of certain conditions of sale, sales of tangible personal property were Indiana sales included in the numerator of the sales factor if "the property [was] delivered or shipped to a purchaser that [was] within Indiana, other than the United States government[.]" I.C. §

6-3-2-2(e)(1). In contrast, receipts from the sales of services were deemed Indiana sales and included in the sales factor's numerator only if:

> (1) the income-producing activity [was] performed in this state; or
> (2) the income-producing activity [was] performed both within and without this state and a greater proportion of the income-producing activity [was] performed in this state than in any other state, based on costs of performance.

I.C. § 6-3-2-2(f).

This statutory framework apportions corporate income differently based on whether the income is received from the sale of tangible personal property or from the provision of services. Therefore, the dispositive issue in this case is whether, during the years at issue, Express Scripts' Indiana source income was from selling prescription drugs (i.e., tangible personal property) or from providing services.

STANDARD OF REVIEW

Summary judgment is appropriate only when the designated evidence demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). "'A fact is "material" if its resolution would affect the outcome of the case, and an issue is "genuine" if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences.'" Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014). See also Scott Oil Co. v. Indiana Dep't of State Revenue, 584 N.E.2d 1127, 1129 (Ind. Tax Ct. 1992) (stating that "[a] material fact is one which may be dispositive of the case" and that "[a] genuine issue is raised when a material fact is in dispute or when the reasonable inferences following from undisputed material facts conflict").

The party that moves for summary judgment bears the initial burden of demonstrating no genuine issue of material fact exists, "at which point the burden then shifts to the non-movant to 'come forward with contrary evidence' showing an issue for the trier of fact." Hughley, 15 N.E.3d at 1003. Indiana's Supreme Court has held that when the Department moves for summary judgment, it has made a prima facie case that no genuine issue of material fact exists regarding the validity of an unpaid tax by properly designating its Proposed Assessments. Rent-A-Ctr., 963 N.E.2d at 466-67 (explaining that once the Department designates the Proposed Assessments, "[t]he burden then shifts to the taxpayer to come forward with sufficient evidence demonstrating that there is, in actuality, a genuine issue of material fact with respect to the unpaid tax").

ANALYSIS

The Department has not designated its Proposed Assessments as evidence for purposes of its Motion.[6] (See Resp't Br.) Consequently, the Court first must determine whether the other evidence the Department has designated presents a prima facie case that there is no genuine issue of material fact. See, e.g., Elmer v. Indiana Dep't of State Revenue, 42 N.E.3d 185, 189-97 (Ind. Tax Ct. 2015) (explaining the evidentiary burden borne by the Department when it, as the respondent, moves for summary judgment).

[6] When the Department filed its Motion, it indicated it was also filing both a "Designation of Evidence" and a "Brief" in support thereof. (See Resp't Partial Mot. Summ. J. at ¶¶ 3-4.) Instead of filing a "Designation of Evidence" with its brief, however, it filed a "Notice of Exclusion of Confidential Information." (See Resp't Notice Exclusion Confidential Information ("Resp't Notice").) The Department's Notice of Exclusion lists the same exhibits that are cited in its "Brief," with the exception of one, Exhibit D. (Compare Resp't Notice with Resp't Br.) Consequently, the Court considers the Department's "Brief" includes its "Designation of Evidence." See, e.g., Filip v. Block, 879 N.E.2d 1076, 1081 (Ind. 2008) (explaining that for purposes of summary judgment, a party may choose the placement of its evidentiary designation; "[t]he only requirement as to placement is that the designation clearly identify listed materials as designated evidence").

The source of Express Scripts' income is a material fact that will determine the outcome of the case. As the party moving for summary judgment, the Department asserts its designated evidence conclusively shows that Express Scripts derived its income from its sale of prescription drugs. In support, the Department maintains that Express Scripts: (1) was not a mere conduit through which payment for the prescription drugs passed, but because it contractually set the price, it exercised a right, interest, and title in the prescription drugs sold to Members, and (2) it admitted that it sold prescription drugs. (See, e.g., Resp't Br. at 3-4; Resp't Reply Mot. Dismiss ("Resp't Reply Br.").)

1.

The Department first claims Express Scripts derived its Indiana income from selling prescription drugs to Members because "[it] d[id] not act as a [mere] conduit or agent between the [local] pharmacies and [the M]embers." (Resp't Br. at 8.) More specifically, the Department explains:

> For [Express Scripts'] receipts to be receipts wholly attributable to providing a service, [Express Scripts must have been] a simple conduit collecting from the insurance company the same amount that [wa]s charged by the [local] pharmacy stores for the prescription drugs provided to the [Members]. . . . That is not the case here. . . . [Express Scripts'] contracts demonstrate that it has a right to sell the prescription drugs to [the] Members at a mark-up that i[t] sets[.]

(Resp't Br. at 8.) (See also Resp't Br. at 3 (claiming that Express Scripts "bought prescription drugs from [the local] pharmacies, at a price it set[, and then] resold [them] to [the M]embers

at a price it set").)[7]

In support, the Department designated three contracts for the Court to review: one between Express Scripts and a Client ("Exhibit A"), one between Express Scripts and a local pharmacy ("Exhibit B"), and one between Express Scripts and a pharmaceutical manufacturer ("Exhibit C"). (See Resp't Br. 5.) Exhibits A and C, however, were not properly designated for consideration because the Department failed to provide any indication whatsoever where in those documents the Court was supposed to look for the facts the Department claims support its conclusion. (See Resp't Br.; Resp't Reply Br.) Accordingly, the Court will not consider either of those exhibits, each having over 20 pages (see Resp't Des'g Evid., Exs. A, C), on the off chance that it might find, on its own and undirected, some fact that supports the Department's claim. The Court is not required to search for specific facts on which the Department relies. Indeed,

> Trial Rule 56(C) requires that at the time it files a motion for summary judgment, "a party shall designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion." Because the Rule compels a party to identify the "parts" of any document upon which it relies, it may not designate various pleadings, discovery material, and affidavits in their entirety. Rather, "regardless of how concise or short the document is, in order to be properly designated, specific reference to the relevant portion of the document [i.e., the specific portion of the document that contains the material fact or facts upon which the moving party relies] must be made."

[7] The Court notes that in its brief, the Department makes a fleeting argument that Express Scripts sells prescription drugs because it "retains" manufacturer rebates. (See Resp't Br. at 8 (claiming merely that Express Scripts "should not be able to retain a rebate on the purchase of a prescription drug if it is indeed not purchasing the prescription and reselling the prescription drug to the ultimate consumer.")) Because the Department failed to designate any supporting evidence, develop this argument any further, or provide any citation to law to support it, (see Resp't Br.; Resp't Reply Mot. Dismiss ("Resp't Reply Br.")), the argument is waived.

Miller Pipeline Corp. v. Indiana Dep't of State Revenue, 995 N.E.2d 733, 735-36 (internal citations omitted). See also Rosi v. Business Furniture Corp., 615 N.E.2d 431, 434 (Ind. 1993) (explaining that on summary judgment, "[i]t is not within a [] court's duties to search the record to construct a claim or defense for a party").

With respect to the contract designated as Exhibit B, the Department specified the parts it wanted the Court to consider:

> In the . . . contract [Express Scripts] states its desire to contract with the [local p]harmacy, and for the [local p]harmacy to provide certain "Services" as defined in Section 1.4. See page 1 of Exhibit B. Further Section 3.9 shows that the [local p]harmacy agrees to [Express Scripts'] payments. Id. at p.5. All payments from [Express Scripts] to the [local p]harmacy are under Section 3, beginning on page 26 of Exhibit B. [Express Scripts] did not provide the Department with the "Rate Sheet" which would have the exact rates that [Express Scripts] has agreed to pay the [local] pharmacy, but a blank page is included on page 34 of the contract.

(Resp't Br. at 12 (emphases added).) Despite the specific page citations, however, this designation is also incompetent.

"A proper designation [of evidence] should also include an explanation as to why th[e] specifically designated facts are material." Miller Pipeline, 995 N.E.2d at 735-36. As seen in the above-quoted passage, however, the Department does not explain why Express Scripts' "stated desire to contract with local pharmacies to provide certain services" establishes that it is selling prescription drugs. Likewise, the Department does not explain why Section 3.9 of the contract, which merely states that the local pharmacy "will work with [Express Scripts] in good faith to carry out any and all of its obligations hereunder and shall . . . comply with all terms and conditions of the . . . Agreement," (see Resp't Des'g Evid., Ex. B at 5 ¶ 3.9), demonstrates that Express Scripts is selling prescription drugs. These

explanations are necessary because without them, the the Department's inference – i.e., that Express Scripts is selling prescription drugs – is not clear to the Court and therefore not reasonable. See, e.g., Hughley, 15 N.E.3d at 1003 (explaining that in summary judgment proceedings, inferences following from facts must be reasonable in the first instance).

The Department also concludes that Express Scripts sells prescription drugs because in its 203-page "Provider Manual," there are two provisions that state that 1) the local pharmacy is required to charge copayments and cannot waive them, and 2) Express Scripts will pay for the cost of vaccine drugs if they are covered under the Clients' plans. (See Resp't Br. at 12-13 (referring to Resp't Des'g Evid., Ex. E at 10, 13).) As with the discussion regarding Exhibit B supra, the Department's mere rescitation of such facts, without any accompanying analysis, does nothing to assist in convincing the Court that it has met its prima facie burden to show that Express Scripts was selling prescription drugs.

2.

The second reason the Department offers to demonstrate there is no genuine issue that Express Scripts derived its Indiana income from selling prescription drugs is that Express Scripts has repeatedly admitted as much. (See, e.g., Resp't Br. at 4, 10, 13-15; Resp't Reply Br. at 6-10.) In support, the Department relies on an excerpt from its 2011 Form 10-K filed with the Securities and Exchange Commission, the "stance [Express Scripts took] in other jurisdictions," and copies of Express Scripts' 2011-2013 federal income tax returns ("Forms 1120/1125-A"). (See Resp't Br. at 13-16.)

a) Form 10-K

The Department asserts that Express Scripts admitted its income was from sales of prescription drugs on its 2011 Form 10-K that was filed with the Securities and Exchange

Commission. Specifically, the Department refers to one sentence on page 5 of the Form 10-K that states "[o]ur revenues are generated primarily from the delivery of prescription drugs through our contracted network of retail pharmacies, home delivery and specialty pharmacy services and [Emerging Market] services." (See Resp't Br. at 14; Resp't Des'g Evid., Ex. I at 5.)

The quoted text states that Express Scripts' revenue was primarily from delivery of prescription drugs by retail pharmacies. (See Resp't Des'g Evid., Ex. I at 5.) The next paragraph on the very same page of the Form 10-K explains "[p]rescription drugs are dispensed to [M]embers of the health plans . . . primarily through networks of retail pharmacies[.]" (Resp't Des'g Evid., Ex. I at 5.) In addition, Express Scripts states that it "contract[s] with retail pharmacies to provide [the] prescription drugs to [M]embers of the pharmacy benefit plans we manage. In the United States, we negotiate with pharmacies to discount the price at which they will provide [those drugs.]" (Resp't Des'g Evid., Ex. I at 5 (emphases added).) None of the emphasized words describe a sale of goods, but instead, describe services. Indeed, nowhere in the designated portion of Express Scripts' Form 10-K does the text state that Express Scripts' revenue is from the sale of prescription drugs, focusing on facilitating delivery as its discrete service, not as a function of selling a good. (See Resp't Des'g Evid., Ex. I at 5.) Accordingly, the Court does not find the Department's inference is reasonable that Express Scripts' 2011 Form 10-K is a declarative admission that it receives its income from selling prescription drugs.

b) Express Scripts' Stance in Other Jurisdictions

The Department also contends that Express Scripts has taken a "stance in other jurisdictions" that constitutes an admission that it sold prescription drugs. (See Resp't Reply

Br. at 7, 10-11.) Specifically, the Department refers to the Washington Court of Appeals' decision in Express Scripts, Inc. v. Department of Revenue, 437 P.3d 747 (Wash. Ct. App. 2019), review denied, claiming that Express Scripts argued in that case – and therefore admitted – that it was the seller of prescription drugs. (See Resp't Reply Br. at 10-11.) The Department contends that Express Scripts "should be bound to the arguments that it makes[.]" (Resp't Reply Br. at 11.) (See also Hr'g Tr. at 28 (explaining "what [the Department is] using th[is] case for is [to show] that [Express Scripts] itself said in that case '[w]e are acting as a buyer of wholesale [goods] and as a reseller'").) The Department, however, has misread the Washington case.

In that case, the issue was whether Express Scripts' service charges were required to be included in computing its gross income for purposes of Washington's business and occupation tax ("B&O Tax").[8] See Express Scripts, Inc. v. Department of Revenue, 437 P.3d 747, 749 (Wash. Ct. App. 2019), review denied. Express Scripts argued that its service charge receipts should not be included in its gross income because they were "merely 'pass-through' funds moving from [the C]lients, through [Express Scripts], to the [local] pharmacies."[9] Id. In the alternative, Express Scripts argued that if the Court determined that its receipts from the service charges must be included in its gross income, they should

[8] The B&O Tax is an excise tax levied on gross income. See Express Scripts, Inc. v. Department of Revenue, 437 P.3d 747, 749 (Wash. Ct. App. 2019), review denied. Indiana's sales and use tax is an excise tax levied on gross receipts. See IND. CODE § 6-2.5-2-1(a) (2021).

[9] The court rejected this argument, explaining that "the compensation [Express Scripts] receives from its [C]lients . . . is an integral part of [its] business model for its [provision of its pharmacy benefit management] services." Express Scripts, 437 P.3d at 750 (emphasis added).

be taxed at the tax rate of a retailer and not that of a service provider. Id. at ¶ 35.[10] In addressing the alternative argument, the Washington court wrote:

> [Express Scripts] does not contend that it sells prescription drugs; [rather, Express Scripts'] argument is based on its contention that by subjecting [it] to the B&O tax for payments from its [C]lients . . . the Department treats [it] as if it were selling prescription drugs. . . . We disagree that the Department is treating [Express Scripts] as if it were selling prescription drugs. Rather, the Department assessed [Express Scripts'] B&O tax on the full amount of compensation [it] received from its [C[lients in exchange for [its provision of pharmacy benefit management] services. . . . We hold that the Department correctly imposed the B&O tax on [Express Scripts] as a service provider.

Id. at ¶¶ 35-37. Given that the Washington Court of Appeals expressly recognized that Express Scripts "does not contend that it sells prescription drugs," see id., the case does not support the Department's position in this case that Express Scripts has taken the stance in other jurisdictions that it sold prescription drugs.

c) Forms 1120/1125-A

Finally, the Department refers the Court to Express Scripts' 2011-2013 federal tax returns (Forms 1120) and associated schedules (Forms 1125-A), on which Express Scripts calculated and recorded deductions for "cost of goods sold" ("COGS"). (See Resp't Br. at

[10] This portion of the court's opinion was not published. See id. at 751, ¶¶ 25-57. As indicated in Washington's state rules:

> Unpublished opinions of the [Washington] Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding upon any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

Wash. GR 14.1(a).

13-14 (citing Resp't Des'g Evid., Exs. F, G, H).) The Department urges the Court to infer, as it has, that Express Scripts' federal reporting position constitutes an admission that, for purposes of Indiana's AGIT, it receives its income from selling prescription drugs. If this inference is reasonable, the Department will have demonstrated its prima facie case that there is no genuine issue of material fact and the evidentiary burden will then shift to Express Scripts to show that there is a genuine issue of material fact to be resolved at trial.

The Department's inference assumes that Express Scripts' reporting of COGS on its federal tax returns necessarily dictates its apportionment conclusions for purposes of Indiana's AGIT. Apportionment, however, is uniquely a state tax concept. See, e.g., Columbia Sportswear USA Corp. v. Indiana Dep't of State Revenue, 45 N.E.3d 888, 894 (Ind. Tax Court 2015) (explaining that the concepts of allocation and apportionment are found under Indiana's Standard Sourcing Rules), review denied; Hunt Corp. v. Indiana Dep't of State Revenue, 709 N.E.2d 766, 775 n.22 (Ind. Tax Court 1999) (demonstrating that the calculation of federal income tax liability does not "contain any reference to apportionment" and that the Department has recognized that "attribution of income to a particular state is of no concern in the federal taxation arena"). In light of this lack of conformity, the Department must explain why it is reasonable to infer that Express Scripts has admitted that it sells goods for Indiana apportionment purposes simply by reporting COGS on its federal tax returns. Instead, however, the Department has offered bare conclusions and non sequiturs as connective tissue, concluding, without explaining, that reporting COGS for federal income tax purposes "establishes that [Express Scripts] is buying the prescription drugs for resale." (See Resp't Br. at 13-14.) (See also Resp't Reply Br. at 7-9; Hr'g Tr. at 72-74.) Accordingly, without any accompanying explanation, the Department's inference that reporting COGS on

federal tax returns mandates Express Scripts' Indiana apportionment conclusions is no more than speculation or conjecture, and therefore is unreasonable and insufficient to meet its prima facie summary judgment burden. See Estate of Sullivan v. Allstate Ins. Co., 841 N.E.2d 1220, 1225 (Ind. Ct. App. 2006) (stating that "[a]n inference is not reasonable when it rests on no more than speculation or conjecture").

The Department has not made a prima facie showing that there is no genuine issue of material fact that would shift the evidentiary burden to Express Scripts to demonstrate an issue for trial. Consequently, the Department is not entitled to judgment as a matter of law. See T.R. 56(C).

Trial Rule 56(B)

"When any party has moved for summary judgment, the [C]ourt may grant summary judgment to any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party." T.R. 56(B). Although Express Scripts did not move for summary judgment, it asserts in response to the Department's Motion that it has designated its own "uncontroverted evidence . . . [that] conclusively establishes that [it] is providing a service and is therefore entitled to summary judgment." (Pet'r Br. at 2.) Specifically, Express Scripts designated the affidavits of its Managing Director of Tax and its Vice President of Finance who testified, under the penalties for perjury, that:

1) Express Scripts' Clients engage it to provide pharmacy benefit management services;

2) the Clients pay Express Scripts for providing those services;

3) Express Scripts does not purchase any prescription drugs to resell to either the local pharmacies or the Clients' Members;

4) Express Scripts never acquires possession of any prescription drugs that are sold to Members; and

5) Express Scripts never acquires title to any prescription drugs that are sold to Members.

(See, e.g., Pet'r Des'g Evid., Ex. 1 ¶¶ 6-7, 10, 14, Ex. 2 ¶¶ 6-7, 9, 17, 19-20, 23-34, 37, 45.)

In addition to this testimony, Express Scripts designated several of its contracts with its Clients to demonstrate that it generates income not by selling prescription drugs to Members, as the Department claims, but rather by providing services to its Clients. These contracts expressly indicate that Express Scripts provides its Clients with "[Pharmacy Benefit Management] Services," that the Clients agree to pay Express Scripts for those Services, and that Express Scripts never exercises control over the prescription drugs that the local pharmacies dispense to the Clients' Members. (See, e.g., Pet'r Des'g Evid., Ex. 3 at 35, 38-42; Ex. 4 at 160-67.) Moreover, these contracts do not establish privity of contract between Express Scripts and any other party other than its Clients, and therefore, they do not demonstrate that Express Scripts sells prescription drugs to its Clients' Members as the Department claims. (See, e.g., Pet'r Des'g Evid., Ex. 3 at 47-48; Ex. 4 at 172.) Finally, these contracts demonstrate that Express Scripts receives its income from providing the services of managing payments, and associated logistics, between its Clients and the local pharmacies. (See Pet'r Des'g Evid., Ex. 3 at 42-43; Ex. 4 at 167-68.)

The Department's attempt to rebut this evidence is perfunctory. It has done little more than assert that Express Scripts' position that it is a service provider is "clearly not true" followed by a rehashing of its initial conclusory arguments that the Court has determined are unpersuasive. (Compare generally Resp't Reply Br. and Hr'g Tr. at 72-79 with supra pp. 9-17.) Consequently, the Court holds that Express Scripts' unrebutted designated evidence

shows that there is no reasonable dispute - no genuine issue of material fact – that its income was derived from providing pharmacy benefit management services and not from selling prescription drugs during the years at issue.

The Court must now determine whether Express Scripts is entitled to judgment as a matter of law. Indiana's Standard Sourcing Rules establish what portion of a taxpayer's multistate income is subject to Indiana's AGIT based on the character of that income. See I.C. § 6-3-2-2(a)-(k); Rent-A-Ctr., 963 N.E.2d at 465. Here, Express Scripts has challenged the Department's Proposed Assessments of AGIT because they were based on the Department's incorrect characterization of Express Scripts' income as derived from selling prescription drugs. Indeed, Express Scripts claims its original Indiana tax returns for the years at issue were accurate because they complied with the statutory requirements for income derived from "other than sales of tangible personal property" (i.e., services). See I.C. § 6-3-2-2(f) (requiring receipts from the sales of services to be included in the Indiana sales factor's numerator if the income-producing activity was "performed both within and without this state and a greater proportion of the income-producing activity [was] performed in this state than in any other state, based on costs of performance"). To the extent Express Scripts' Indiana returns for the years at issue reported its Indiana tax base in accordance with Indiana Code § 6-3-2-2(f), the Court finds that Express Scripts is entitled to judgment as a matter of law.

CONCLUSION

For all of the aforementioned reasons, the Department's Motion is DENIED. In accordance with Trial Rule 56(B), the Court GRANTS summary judgment in favor of Express Scripts. The Court therefore remands the matter to the Department for action consistent with

this opinion.

SO ORDERED this 14th day of May 2021.

Martha Blood Wentworth, Judge
Indiana Tax Court

DISTRIBUTION:
Benjamin A. Blair, Daniel R. Roy, R. Gregory Roberts, Kelly S. Earls, Zachary D. Price, Courtney L. Abshire