

Letter of Findings: 07-0653
State Gross Retail Tax
For the Years 2004, 2005, and 2006

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ISSUES

I. Propane Storage Tank Rental – Sales/Use Tax.

Authority: [IC 6-2.5-5-8](#); *Tri-States Double Cola Bottling Co. v Department of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999); *Indiana Dep't of State Revenue v. Indianapolis Transit System*, 356 N.E.2d 1204 (Ind. Ct. App 1976); [45 IAC 2.2-5-15\(b\)](#); Black's Law Dictionary (7th ed. 1999).

Taxpayer argues that the Department erred in determining that taxpayer's purchase of propane storage tanks was subject to the state's gross retail tax. Taxpayer maintains that the tanks are leased to its customers and that it is not subject to the use tax assessment.

II. Ten-Percent Negligence Penalty.

Authority: IC § 6-8.1-5-1(b); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(4); IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#).

Taxpayer asks the Department to exercise its discretion to abate the ten-percent negligence penalty on the ground that taxpayer exercised reasonable business care.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation in the business of providing customers with propane gas. The Indiana Department of Revenue (Department) conducted an audit review of taxpayer's business and tax records and concluded that taxpayer owed additional gross retail tax. The taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Propane Storage Tank Rental – Sales/Use Tax.

DISCUSSION

During the years at issue, taxpayer purchased propane tanks and parts for those tanks without paying sales tax. The audit report found that taxpayer was in the business of "delivering gas to its customers and that the tanks were not leased to the customers." Therefore, the Department assessed the additional tax.

Taxpayer argues that it was not required to pay sales tax at the time it purchased the tanks based on the sales tax exemption provided under IC § 6-2.5-5-8 which states that "[t]ransactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business without changing the form of the property." The exemption is addressed also in [45 IAC 2.2-5-15\(b\)](#) which provides, as a general rule, that "[s]ales of tangible personal property for resale, rental, or leasing are exempt from tax if all of the following conditions are satisfied; (1) the tangible personal property is sold to a purchaser who purchases this property to resell, rent, or lease it; (2) The purchaser is occupationally engaged in reselling, renting, or leasing such property in the regular course of his business; and (3) The property is resold rented or leased in the same form in which it was purchased."

The issue is whether or not taxpayer purchased the propane tanks for the purpose of renting them to its customers.

Taxpayer enters into propane tank lease agreements with its customers. Taxpayer charges its customers \$1.00 to rent a propane tank. However, taxpayer points out that the \$1.00 charge is not the only cost which the customer pays. Customers who rent one of taxpayer's tanks pay a higher price for the propane delivered to those tanks. For example (and for illustration only) taxpayer charges customers who do rent one of the tanks \$1.00 for each gallon of propane delivered to a taxpayer-owned tank while it charges \$.90 for each gallon of propane delivered to a customer-owned tank. Taxpayer argues that the \$.10 differential is one portion of the "rental" price which customers pay for the privilege of acquiring the tank from taxpayer.

The lease agreement also requires each customer to "[p]urchase from [taxpayer] his entire requirements of liquefied petroleum gas during each calendar year." Customer also promises to allow taxpayer "free right of ingress and egress to the premises for all purposes reasonable [sic] necessary in the rendering of [taxpayer] service and grants to the Company the free right to store [taxpayer] equipment on these premises." If the customer decides to obtain fuel from another source, the taxpayer has the right to retrieve the tank from the customer's property. "In the event the Consumer discontinues the use of [taxpayer's gas] or default in the fulfillment of any of the terms of this agreement, the Company has the right to, remove said tank and system and cost of recovery of gas."

Taxpayer maintains that the customers have both actual and constructive possession of the tanks and states

that "the taxpayer is giving up actual possession of its tanks for valuable consideration and for a definite term and at the end of the term the taxpayer has absolute right to retake, control and use the tanks." Taxpayer's position is the customers and taxpayer exercise joint possession over the tanks with the taxpayer reserving the right to maintain the tank and the customer reserving the authority to discontinue the agreement.

The Indiana courts have provided guidance in determining whether a transaction between parties constitutes a lease agreement. In *Indiana Dep't of State Revenue v. Indianapolis Transit System*, 171 Ind. App. 289, 356 N.E.2d 1204 (Ind. Ct. App. 1976), the court of appeals stated that "[w]hether certain circumstances created a lessor – lessee... relationship between the parties is a matter of fact dependent on possession of and control over the property involved." *Id.* at 308, N.E.2d 356 at 1209. While finding that the Department's regulation did not contain a definition of "lease," the Tax Court in *Tri-States Double Cola Bottling Co. v Department of State Revenue*, 706 N.E.2d 282 (Ind. Tax Ct. 1999), concluded that a "lease" constituted the "transfer of a right to possession and use of goods for a term in return for consideration." *Id.* at 285.

The Department is unable to agree with taxpayer's assertion that taxpayer is in the business of leasing or renting propane tanks to its customers. Taxpayer is in the business of selling propane to its customers; the tanks are merely the means by which the taxpayer makes it possible for the customer to obtain and consume this fuel. The taxpayer is certainly entitled to recover from its customers the cost of providing the tanks by charging a premium on the price of the delivered fuel, but this additional cost is simply the price the individual consumer pays for having the fuel delivered. As stated in the lease agreement, "[T]he value of the agreement will be determined by the amount of propane actually purchased by the customer." Taxpayer's agreements with its customers do not constitute lease agreements because the customers do not come into "possession" of the tanks. "Possession" means the right to "exercise control over something to the exclusion of all others." Black's Law Dictionary 1183 (7th ed. 1999). The individual customer is not entitled to move the tanks or to allow another supplier to fill the tanks with the competitor's propane supply. Of course, the tanks are located on the customers' property, but that does not mean that the customers have "possession." Although the tank is located on the customer's property, taxpayer retains most of the rights to control the tank. Unlike an actual lease agreement, the customer does not acquire the usual rights to control the object of the lease. Instead the tanks are merely an extension of the agreement by which taxpayer provides propane to its customers with the customer assessed an additional cost for the use of the storage container which – by nature of the transaction – is necessarily located on the customer's property. The fact that the parties' agreement may be called a "lease" does not change the fact that taxpayer is not in the business of leasing propane tanks nor the fact that the customers are not interested in leasing propane tanks. Taxpayer's interest lies in selling its product to its customers and receiving compensation for the cost of doing so. The customers' interest is in obtaining that fuel; the object of the parties' agreement is the delivery, storage, and consumption of propane.

Under IC § 6-2.5-5-8, taxpayer is not "occupationally engaged" in the business of leasing storage tanks in the ordinary course of its business.

FINDING

Taxpayer's protest is respectfully denied.

II. Ten-Percent Negligence Penalty.

DISCUSSION

Taxpayer believes that it is entitled to abatement of the ten-percent negligence penalty because it had a reasonable cause for its position that it was exempt from paying sales tax when it purchased the propane tanks.

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(4) requires a ten-percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation [45 IAC 15-11-2](#)(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." *Id.*

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2](#)(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

Under IC § 6-8.1-5-1(b), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

The Department is prepared to agree that it had a "reasonable" cause to believe that it was not required to pay sales tax on the purchase price of the propane tanks.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer is denied as to the substantive issue of whether it was required to pay sales tax on the purchase price of the propane tanks. Taxpayer is sustained as to its protest of the negligence penalty.

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