

**Letter of Findings: 08-0510
Sales and Use Tax
For the Year 2007**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Use Tax – Imposition – Public Transportation Exemption – Aircraft.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-3-2; IC § 6-6-6.5-8; IC § 6-2.5-5-27; Indiana Dept. of State Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003).

Taxpayer protests the imposition of use tax on some items.

II. Tax Administration – Imposition of Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

The Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a member of a limited liability company ("LLC"). LLC purchased an aircraft on October 20, 2007, for \$530,000. LLC applied for exemption from sales tax based on the claim that it leases the aircraft to a related entity ("Related") which uses the aircraft "exclusively in Public Transportation on Aircraft Charter Services Part 135 Certificate." Taxpayer listed his social security number on LLC's registration/exemption application in connection with the ownership information of the aircraft. At the time of application, LLC was not registered as an Indiana retail merchant. The Department denied LLC's application for exemption. Because Taxpayer listed his social security number on the registration/exemption application, Taxpayer was billed for the proposed use tax assessment on the purchase price of the aircraft. Taxpayer protested the denial of the public transportation exemption. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Use Tax – Imposition – Public Transportation Exemption – Aircraft.

DISCUSSION

The Department determined that Taxpayer should have paid sales or use tax on the purchase price of the aircraft. At the time Taxpayer/LLC applied for the exemption, LLC was not registered as a retail merchant, nor did LLC provide documentation that showed it was predominantly in the business of public transportation.

Taxpayer protested stating that the aircraft is exempt from sales and use tax because the aircraft is leased by LLC to Related which uses the aircraft "exclusively in Public Transportation on Aircraft Charter Services Part 135 Certificate."

Indiana imposes an excise tax at the time a taxpayer acquires an airplane. IC § 6-2.5-3-2 provides as follows:

(a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

(b) The use tax is also imposed on the storage, use, or consumption of a vehicle, an aircraft, or a watercraft, if the vehicle, aircraft, or watercraft:

(1) is acquired in a transaction that is an isolated or occasional sale; and

(2) is required to be titled, licensed, or registered by this state for use in Indiana.

IC § 6-6-6.5-8 requires the aircraft purchaser to pay sales or use tax shortly after the aircraft is sold or transferred in Indiana. "A person shall pay the gross retail tax or use tax to the department on the earlier of: (1) the time the aircraft is registered; or (2) not later than thirty-one (31) days after the purchase date." IC § 6-6-6.5-8(d).

The exemption to which Taxpayer refers is found at IC § 6-2.5-5-27, which states:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

In preparation for and after the hearing, Taxpayer provided documentation in support of its contention that LLC qualified for the public transportation exemption.

Taxpayer provided an addendum to LLC's lease agreement with Related that shows the rent payable to LLC to be \$300 per hour the aircraft is flown with Related responsible for all fuel and related expenses. The addendum to the lease agreement was created on the very day the hearing on Taxpayer's protest was held.

Taxpayer provided a brochure advertising Related's airplane charter services to business professionals. A sticker on the back of the brochure lists charges for two aircraft, one of which is the same model as LLC's aircraft.

Taxpayer provided Related's Hobbs readings for the aircraft documenting flights between January 10, 2008, and October 23, 2008, for a total of 261.6 Hobbs hours.

Taxpayer provided an aircraft insurance renewal quote to LLC and Related that describes proposed coverage of several aircraft including the one at issue.

Taxpayer provided a copy of the lease agreement, dated November 19, 2007, between LLC and Related. Taxpayer is the signator for both entities.

Taxpayer provided a registered retail merchant certificate issued 11/17/2006 to a different, now non-existent entity, not LLC. LLC remains an unregistered retail merchant.

Taxpayer provided a copy of Related's Part 135 certificate.

The Certificate for Public Transportation is in the name of Related. Related's Air Taxi Operator Registration lists this aircraft as one it will use in its operations.

Irrespective of whether or not Taxpayer has shown that Related is predominantly using the aircraft in public transportation, Taxpayer/LLC is merely leasing the aircraft – which represents its use of the aircraft - and is not therefore itself using the aircraft in public transportation. The registration/exemption application clearly notes that the applicant must submit a copy of the FAA Certificate for Public Transportation. LLC does not have a Part 135 Certificate, Related does. Taxpayer/LLC, therefore does not have standing to claim the public transportation exemption.

The Department is bound by the statute which states, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(c). Furthermore, exemption statutes are to be strictly construed against the taxpayer. Indiana Dept. of State Revenue v. Interstate Warehousing, 783 N.E.2d 248 (Ind. 2003).

Taxpayer/LLC has not met its burden to show that LLC qualifies for the public transportation exemption.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Imposition of Negligence Penalty.

DISCUSSION

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. 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 this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has not affirmatively established that its failure to pay sales or use tax on its purchase of the aircraft in question was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2](#)(c).

FINDING

Taxpayer's protest is respectfully denied.

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