DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 08-0729
Sales and Use Tax
For Tax Years 2005, 2006, and 2007

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ISSUES

I. Sales and Use Tax – Public Transportation Exemption.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-3-4; IC § 6-2.5-5-27; IC § 6-8.1-5-1; 45 IAC 2.2-5-61; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Panhandle Eastern Pipeline Co. v. Indiana Dep't. of State Revenue, 741 N.E.2d 816 (Ind. Tax Ct. 2001); Carnahan Grain, Inc. v. Indiana Dep't of State Revenue, 828 N.E.2d 465 (Ind. Tax Ct. 2005); Sales Tax Information Bulletin 12 (July 2007).

Taxpayer protests the assessments of use tax on various purchases of tangible personal property.

II. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer, an Indiana S corporation, purchases motor fuel from various terminals in Indiana and Kentucky (Suppliers), and then resells the fuel to gas stations (Customers). Pursuant to an audit, the Indiana Department of Revenue (Department) concluded that Taxpayer was not entitled to the public transportation exemption. The Department assessed Taxpayer use tax, interest, and penalty on the 2005, 2006, and 2007 purchases of tangible personal property, including parts for trucks as well as motor fuel, because Taxpayer did not pay the state gross retail tax (sales tax) at the time of the purchases. Taxpayer protests the assessments claiming that it was eligible for the public transportation exemption. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax – Public Transportation Exemption.

DISCUSSION

After the audit, the Department concluded that Taxpayer was not entitled to the public transportation exemption. The Department thus assessed Taxpayer use tax, interest, and penalty on the 2005, 2006, and 2007, purchases of tangible personal property because Taxpayer did not pay the sales tax at the time of the purchases. Taxpayer, to the contrary, claimed that it was eligible for the public transportation exemption.

All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. In general, all purchases of tangible personal property are subject to sales and/or use tax. An exemption from use tax is granted for transactions where sales tax was paid at the time of the purchase pursuant to IC § 6-2.5-3-4. Additionally, in certain circumstances, exemptions from sales and/or use tax are available, for example, a public transportation exemption under IC § 6-2.5-5-27.

IC § 6-2.5-5-27 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 Panhandle Eastern Pipeline Co. v. Indiana Dep't. of State Revenue, 741 N.E.2d 816 (Ind. Tax Ct. 2001), the court addressed the issue whether a taxpayer qualifies for the public transportation exemption. The court stated:

> The public transportation exemption provided by section 6-2.5-5-27 is an all-or-nothing exemption. If a taxpayer acquires tangible personal property for predominate use in providing public transportation for third parties, then it is entitled to the exemption. If a taxpayer is not predominately engaged in transporting the property of another, it is not entitled to the exemption. Id. at 819.

Four years later, in Carnahan Grain, Inc. v. Indiana Dep't of State Revenue, 828 N.E.2d 465 (Ind. Tax Ct. 2005), the court further explained the proper application of Panhandle Eastern Pipeline, as follows:

> If [] the property is used predominantly for third-party public transportation, then the taxpayer is entitled to the exemption. Conversely, if the property is not predominantly used for third-party public transportation (i.e., it is predominantly used to transport the taxpayer's own property), then the taxpayer is not entitled to the

exemption. Id. at 468.

Therefore, the public transportation exemption applies to a taxpayer only when the property is predominately used in public transportation of the property owned by someone.

In this instance, Taxpayer claimed that it was entitled to public transportation exemption because it transported fuel for Customers. Accordingly, Taxpayer must demonstrate that it was predominately engaged in the transport of the property owned by Customers.

45 IAC 2.2-5-61, in relevant part, further elaborates on the public transportation exemption:

(a) The state gross retail tax shall not apply to the sale and storage or use in this state of tangible personal property which is directly used in the rendering of public transportation of persons or property.

(b) Definition: Public Transportation. Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property **for consideration** by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; **however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.**

(c) In order to qualify for exemption, the tangible personal property must be reasonably necessary to the rendering of public transportation. The tangible personal property must be indispensable and essential in directly transporting persons or property. (**Emphases added**).

Sales Tax Information Bulletin 12 (July 2007), in pertinent part, also states:

I. Public Transportation Definition

"Public transportation" means the movement, transportation or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities and other specialized carriers performing public transportation service for compensation by highway, rail, air or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the appropriate federal or state regulatory authority. Even if a person or company operates under the appropriate authority, they also must transport people or property for consideration. That is to say, a public transportation provider must be compensated for transporting people or goods. The goods transported must be goods owned by someone other than the public transportation provider. To qualify for the exemption, a taxpayer must be predominately engaged in public transportation. A taxpayer is predominately engaged in public transportation if greater than 50 [percent] of its gross income is derived from transporting people or property for hire.

Sales Tax Information Bulletin 12 (July 2007).

During the course of the protest, Taxpayer provided various documents to demonstrate that Taxpayer was licensed by the Federal Motor Carrier Safety Administration (FMCSA) as a motor carrier with the classifications of "Interstate Hazardous Materials Carrier and For-hire Property Carrier." Taxpayer thus asserted that since it was licensed as a motor carrier with this classification, the public transportation exemption applied to its purchases of tangible personal property for its trucks. However, as mentioned above, the fact that a company possessed a FMCSA license itself was not sufficient to show that the property was used in public transportation unless Taxpayer was in fact engaged in the transportation of persons or property for consideration under 45 IAC 2.2-5-61(b).

After the hearing, Taxpayer submitted additional documentation to support its protest. Taxpayer claimed that its "freight income exceeds the 51 [percent] criteria per Information Bulletin #12." Taxpayer generated a summary report listing all its customers' names and the amount of the freight and fuel surcharges concerning each of the Customers for the total three years in question. Taxpayer, however, did not provide any documentation to substantiate the calculation of the gross income which Taxpayer considered to be derived from transporting fuel owned by each of the Customers for each year. Instead, Taxpayer's documentation showed that the Suppliers billed Taxpayer for the fuel which Taxpayer loaded onto its trucks. By paying for the fuel it had loaded onto its trucks, Taxpayer had taken possession of the fuel and, subsequently, became the owner of the fuel. Thus, Taxpayer transported the fuel owned by Taxpayer itself. Additionally, Taxpayer's invoices to Customers showed that Taxpayer billed Customers for the cost of fuel, freight, federal and state excise taxes, pre-paid sales tax, inspection fees, and fuel surcharges. Customers subsequently paid Taxpayer for the total costs stated in the invoices. Taxpayer's documentation indicated that Taxpayer sold its fuel to Customers rather than transported the fuel owned by Customers. Therefore, the Department is not able to conclude that Taxpayer is entitled to the public transportation exemption pursuant to Indiana statutes and case law.

In conclusion, Taxpayer bears the burden of proving the Department's assessments were incorrect. Taxpayer's documentation was insufficient to establish that Taxpayer was predominantly transporting the fuel

owned by someone other than Taxpayer for consideration.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the imposition of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

(1) fails to file a tax return;
(2) fails to pay the full amount of tax shown on the tax return;
(3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
(4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

45 IAC 15-11-2(b) further states:

"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 Department may waive a negligence penalty as provided in 45 IAC 15-11-2(c), in part, 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 did not provide sufficient documentation establishing that its failure to pay tax or timely remit tax was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest on the imposition of the negligence penalty is respectfully denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest on the imposition of income tax and the negligence penalty are respectfully denied.

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