DEPARTMENT OF STATE REVENUE

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Letter of Findings Number: 08-0656
Sales and Use Tax
For Tax Years 2005-07

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ISSUES

I. Sales and Use Tax–Public Transportation Exemption.

Authority: Gregory v. Helvering, 293 U.S. 465 (1935); Comm. v. Transp. Trading and Terminal Corp., 176 F.2d 570 (2nd Cir. 1949); Horn v. Comm., 968 F.2d 1229 (D.C. Cir. 1992); Carnahan Grain, Inc. v. Indiana Dep't of State Revenue, 828 N.E.2d 465 (Ind. Tax Ct. 2005); IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-27; IC § 6-8.1-5-1; 45 IAC 2.2-5-61.

Taxpayer protests the imposition of use tax and claims that it is eligible for the public transportation exemption.

II. Tax Administration–Negligence Penalty and Interest.

Authority: IC § 6-8.1-10-1; IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the imposition of a ten percent negligence penalty and interest.

STATEMENT OF FACTS

Taxpayer is an LLC in Indiana. Taxpayer filed several claims for refund of sales tax paid in different periods in 2007, stating that it was involved in public transportation because it transported the property of a related corporation ("Related") and was therefore eligible for the public transportation exemption. In the course of the refund investigation, the Indiana Department of Revenue ("Department") discovered several procedures it considered questionable and which led to the conclusion that Taxpayer was not eligible for the public transportation exemption. This conclusion caused the Department to conduct an audit of Taxpayer for the tax years 2005, 2006, and 2007. The Department's audit determined that Taxpayer had purchased several items without paying sales tax at the time of purchase and that Taxpayer was not in the business of public transportation. The Department therefore denied the refund claims and issued proposed assessments for use tax, ten percent negligence penalties, and interest for the tax years 2005, 2006, and 2007. Taxpayer protests the denial of refunds and the imposition of use tax, penalties, and interest. Taxpayer states that it is engaged in public transportation and is therefore eligible for the public transportation exemption from sales tax on the purchases at issue. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax–Public Transportation Exemption.

DISCUSSION

Taxpayer protests the imposition of use tax on purchases it made in the tax years 2005, 2006, and 2007. Taxpayer states that Related is in the business of providing specific services and installations at residential and business sites, while Taxpayer is involved in the transportation industry. Taxpayer believes that it and Related are two separate and distinct businesses and that it was hauling the property of Related, which therefore qualified it for the public transportation exemption. Taxpayer protests the factors listed by the Department in the audit report which contributed to the Department's determination that Taxpayer did not qualify for the public transportation exemption. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

In its audit report, the Department determined that Taxpayer did not qualify for the public transportation exemption and listed several factors leading to that determination. The first factor is that Taxpayer had only one customer, and that Related was that customer. Taxpayer is an LLC with a single member and the property in question belonged to the single member. Related was the single member in question. Also, Taxpayer and Related were in a unitary relationship and Related performed all managerial, accounting, and administrative tasks for both entities. There was no distinction between the two for income tax purposes, but they were treated as two distinct entities for sales tax purposes. The majority of the invoices included in the refund claims were billed to Related. The Department considered that these circumstances showed the two companies were not acting as separate companies. The second factor is that Taxpayer had no employees of its own. Taxpayer leased the vehicle drivers from Related. On a given work day, a single individual would start at Related's business as an employee of Related, would then drive to the worksite as an employee of Related who was leased as a driver to Taxpayer, and upon arrival would perform the work as an employee of Related. These individuals will be referred to below as "technician/drivers" where necessary. The audit report explained that there were no withholding activities by Taxpayer since Taxpayer leased the drivers from Related. The third factor is that, while Taxpayer claimed to designate vehicles only for installation jobs and other vehicles only for services jobs, Taxpayer provided no

computation for the percentage of time the technician/drivers allocated to service runs versus installation jobs. Therefore, the precise number of goods or persons being transported for each job is unknown and the Department was unable to determine if the claimed transportation activities were the predominant activities in question.

The fourth factor is that the primary technician/drivers' duties were the sale, installation, and service of Related's product. The driving of the vehicles was a minor part of the technician/drivers' duties. The fifth factor is that Taxpayer provided Related with monthly invoices for fleet charges, but that the charges were not based on market costs or on Related's percentage of profit. The sixth factor is that Taxpayer had no fuel/safety reports, log books, or freight bills. The seventh factor is that when Taxpayer was formed in 2004, all vehicles used for transportation were titled and licensed by Related, then leased to Taxpayer and driven by the drivers leased by Taxpayer from Related. Taxpayer gradually began to purchase and lease vehicles in its name. In 2007, all remaining vehicles were transferred from Related to Taxpayer, but no consideration was received by Related. Otherwise, title was transferred at the Bureau of Motor Vehicles ("BMV") while the transfer occurred only on Related's and Taxpayer's balance sheets. The eighth factor is that the administrative services agreement between Taxpayer and Related was signed by single individuals who worked for both corporations. The ninth factor is that Taxpayer did not have its own insurance policy, but was instead listed as an additional insured on Related's policy.

The audit report concludes that the documentation and transactions between Taxpayer and Related were only empty formalities which had no business substance. The Department therefore determined that, since there was no business substance, there was no business purpose for the arrangements between Taxpayer and Related. Without a business purpose, and with a significant tax advantage to Related and Taxpayer, the Department concluded that the transportation arrangements between Related and Taxpayer constituted a sham transaction.

The sales tax is imposed under IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

A complimentary use tax is imposed under IC § 6-2.5-3-2(a), which states:

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.

The public transportation exemption 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.

The exemption is further explained by 45 IAC 2.2-5-61, which states in part:

(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.

....

(Emphasis added).

Also, the Indiana Tax Court has addressed the application of the public transportation exemption. In Carnahan Grain, Inc. v. Indiana Dep't of State Revenue, 828 N.E.2d 465, 468 (Ind. Tax Ct. 2005), the court provided:

[I]f the property is not predominately used for third-party transportation (i.e., it is predominantly used to transport the taxpayer's own property), then the taxpayer is not entitled to the exemption.

(Emphasis in original).

Therefore, the property in question must be used predominantly for transporting the property of another for

consideration in order to qualify for the public transportation exemption.

In its first point of protest, Taxpayer states that it was transporting the property of another entity (Related). Taxpayer states that the fact that it had only one customer does not effect eligibility for the public transportation exemption. Taxpayer refers to a Revenue Ruling issued by the Department to an unrelated third party in 2006. In that ruling, the taxpayer who requested the ruling was a retailer who sold and delivered its product using company-leased trucks using employee drivers. The taxpayer was considering transferring its transportation operations to a for-profit, wholly-owned LLC which would operate as a for-hire transport company. The Department concluded that the transport company would be eligible for the public transportation exemption. Taxpayer believes that its situation is the same as the companies discussed in the Revenue Ruling.

The Department does not agree that the ruling supports Taxpayer's protest. Unlike the taxpayer at issue in the ruling, Related in the instant case is not simply a retailer. Related does sell tangible personal property, but also provides installation and servicing of its products. Also, unlike the LLC in the ruling, Taxpayer did not have separate accounting. Furthermore, revenue rulings apply only to the taxpayers to which they are issued. Since the ruling in question was not issued to Taxpayer, and since Taxpayer's fact situation is materially different from the situation in the ruling, the ruling affords Taxpayer no protection.

Taxpayer also refers to 45 IAC 2.2-5-61(b). Taxpayer states that there is no requirement that an entity claiming the public transportation exemption have more than one customer. Taxpayer is correct that there is no requirement that an entity claiming the public transportation exemption have a specific number of customers. However, a review of the audit report shows that the Department did not base its determination on Taxpayer's number of customers. Rather, the fact that Taxpayer had only one customer was mentioned as part of the larger discussion regarding the validity of Taxpayer's claim that it was in the transportation business at all. The audit report stated that Related was Taxpayer's only client and then discussed the close and often overlapping relationship between Taxpayer and Related. The fact that Taxpayer had only one customer is not in and of itself determinative, but the nature of Taxpayer's relationship with that one customer is relevant.

Next, Taxpayer protests the Department's apparent disregard of the fact that Taxpayer and Related are separate corporations. Taxpayer refers to several court cases which require that separate corporations be treated as separate corporations. As discussed above, the Department's audit report did not invalidate or disregard Taxpayer's separate status as an independent corporation. As explained in the audit report, the Department acknowledged Taxpayer's separate treatment for sales tax purposes.

The audit report also explained that the Department did not consider that Taxpayer was transporting any property since it had no employees or, for the first two years of the audit period, any equipment of its own by which it could transport property. The Department takes this opportunity to note that the audit report states that Taxpayer had no employees, not merely that Taxpayer had no employee drivers. In the course of the protest process, Taxpayer has not established that it had any employees at all. Taxpayer leased Related's employees, trucks, accounting services and all other indicia of operations. The Department concluded that the two companies were in reality one and the same. As discussed above, while the Department recognizes that Taxpayer is a separate corporation, this is only one factor in the overall evaluation of the claim for refund and assessment of liabilities. The two corporations can simultaneously be separate legal entities and still be operating as one entity.

Taxpayer's next point of protest is in response to the Department's notice of the lack of documentation regarding the precise number of goods and people transported. Taxpayer states that it provided a letter from its Certified Public Accountants which explained that each installation job carried property in a certain range of dollar value, while each service job carried property in another certain range of dollar value. In either case, Taxpayer states that the vehicles were transporting the property of another one hundred percent of the time, therefore qualifying for the public transportation exemption.

The Department notes that this letter contains no documentation supporting its statements. Therefore, the fact remains that Taxpayer has provided no documentation establishing the number of goods or people it claims to have transported. The Department is not convinced that a legitimate transportation company would not keep any records of what property it was transporting or when it transported that property.

Taxpayer's next point of protest is in response to the Department's observation that Taxpayer did not keep records of what percentage of the technician/driver's time was dedicated to which duties. Taxpayer protests that the focus is properly placed on the vehicles, not on the drivers. Taxpayer states that, while driving to the job site, the drivers dedicated one hundred percent of their time to driving and that federal regulations require Taxpayer to retain complete responsibility and control over the drivers as the employer while operating the transportation equipment, even when leasing the drivers. Taxpayer also states that those federal regulations do not make any exception when a driver generates more wages from a non-trucking company than a trucking company.

The Department notes that the drivers earn all of their wages from Related and none from Taxpayer. Taxpayer leases the drivers from Related and remits payment to Related, not to the drivers. As explained above, Taxpayer is not registered for withholding purposes and pays no salaries to any drivers. Nonetheless, the audit report's reference to this situation is for the purpose of explaining that the Department was not convinced that a legitimate transportation company, even if it was leasing the drivers, would not keep records of when its drivers were actually driving. This is particularly true in light of Taxpayer's reference to federal regulations requiring it to

retain control over the drivers as the employer during driving operations. Taxpayer has not provided any documentation establishing the times and/or places where the drivers it leased were operating.

Taxpayer's next point of protest is that the Department indicated that Taxpayer did not keep motor fuel reports, safety reports, log books, or freight bills. Taxpayer states that it operates vehicles of less than 10,001 pounds and is therefore not subject to any Indiana motor carrier fuel tax reporting or requirements to maintain driver safety logs. Again, while Taxpayer may not have reporting requirements as imposed by regulations, the Department is not convinced that a legitimate transportation company would not keep records of when it transported a customer's property or when it billed a customer for freight charges.

Taxpayer's next point of protest is that it believes that the Department considers that Related's payments were insufficient to qualify for the public transportation exemption. Taxpayer states that federal law prohibits states from regulating rates, routes, or services provided by an interstate for-hire motor carrier such as Taxpayer. The Department takes this opportunity to assure Taxpayer that it is not attempting to regulate rates, routes, or services in any way. Neither is the Department suggesting any such regulation. Rather, the Department has examined, and continues to examine, Taxpayer's rates as they relate to its claim for the public transportation exemption. For Indiana sales and use tax purposes, Taxpayer remains free to set any rate it sees fit to charge. Whether or not that rate is sufficient to qualify as an arm's-length rate as applicable to the public transportation exemption is a wholly separate question.

Taxpayer also states that the Department's claim that no money exchanged hands is erroneous. Taxpayer also states that it is irrelevant and refers to a Letter of Findings ("LOF") issued to an unrelated third party in which the Department determined that journal entries were an appropriate means by which to record intercompany payments between affiliates for sales and use tax purposes, notwithstanding no cash payments. After review, it is apparent that Taxpayer has misread the third-party LOF. The LOF merely states that the taxpayer in that case recorded sales in the selling party's accounts payable without ever demanding payment from the related purchasing party. The third-party LOF found that the sales still happened and that sales tax was due on those sales. While this is similar to the circumstances in the instant case, the result of the third-party LOF was that the Department found that two related taxpayers must maintain an arm's-length business approach when conducting business with each other for purposes of calculating Indiana sales tax. Therefore, the Department finds no support for Taxpayer's protest in its reference to the third-party LOF.

Taxpayer also points to what it believes are internal inconsistencies in the audit report. Taxpayer states that similar payment methods were used for the transportation fees and for delivery vehicle lease payments, yet the Department rejected the transportation fees as invalid while imposing sales tax on the lease payments. Taxpayer states that the Department cannot have its cake and eat it too. Taxpayer believes that, if the Department upholds the audit report's conclusion that the vehicle lease payments are valid and taxable, the Department must entirely abate the assessments for 2005 and 2006 since Taxpayer leased all of the vehicles for those years.

As explained before, IC § 6-2.5-2-1 provides that the sales tax is imposed on retail transactions made in Indiana and that the person who acquires property in a retail transaction is liable for the tax on the transaction. Therefore, the sales tax is a tax which is imposed on transactions. Each transaction constitutes a taxable event and is therefore subject to review on its own merits. The fact that the Department could review multiple transactions by a particular taxpayer and reach different conclusions regarding the taxability of the transactions is not in and of itself internally inconsistent.

In this case, the Department did state that no money exchanged hands between the two entities. The Department also explained that Taxpayer did not bill for freight or delivery charges and that Related did provide monthly invoices for vehicle leases, driver leases, and administrative fees. The amounts owed to Taxpayer and the amounts owed to Related were then netted. The Department determined that any legitimate business is paid for its services and does not offset transactions with another entity. The point of this paragraph in the audit report was not that there was insufficient consideration. The point was that the two parties were not acting as separate corporations, but rather were acting as a single entity using internal accounting methods. In light of Taxpayer's claim that it is a separate and independent entity transporting the property of another entity while the two entities use the accounting methods of a single entity, it appears that Taxpayer is the one trying to simultaneously have and eat its cake. Taxpayer's claim that the assessments for 2005 and 2006 must be abated is incorrect.

Taxpayer's next point of protest is that the audit report asserted that, starting in 2007, Related was leasing the vehicles back from Taxpayer. Taxpayer finds such an assertion "ludicrous" and explains that it provided the Department with ample information showing that the vehicles were transferred for no consideration in a Form 241 Title Name Change Procedure and that the transfer was approved by both the BMV and the Department of Revenue. Taxpayer believes that the Department's determination in light of this information indicates that it was unwilling to accept any information which did not fit into its "preconceived beliefs."

A review of the audit report reveals that the Department did not state that Related was leasing the vehicles from Taxpayer. Instead, what the report does say is that in 2007, Related transferred title on the vehicles to Taxpayer at the BMV and on Taxpayer's and Related's balance sheets, without any consideration given and no exchange of money. The Department then noted that Related subsequently started paying Taxpayer for the use of vehicles Related originally owned. Even when viewed in a light most favorable to Taxpayer, the fact remains

that Related arranged with Taxpayer for the use of vehicles Related originally owned. While this fact is not in and of itself determinative, this paragraph is included for the purpose of providing additional evidence that the two entities were acting as a single entity.

Taxpayer's next point of protest is that the Department noted that both signatories on the administrative services agreement and on the transportation agreement were individuals who simultaneously worked for both Taxpayer and Related. Taxpayer states that the agreements in question were properly entered into and were legally binding intercompany agreements. Taxpayer again states that the Department is internally inconsistent since it assessed sales tax on the lease agreements which were also signed by individuals who worked for both entities. Also, Taxpayer states that the Department cannot pick and choose which evidence to accept and reject simply to support its legal theory.

After review, the Department did not state that the agreements were valid or invalid. On the contrary, the Department's assessments are based on the recognition that Taxpayer did rent vehicles from Related. The audit report also stated that a single individual was the Chief Executive Officer ("CEO") for both entities. This is relevant since it has been established that Taxpayer had no employees of its own, was not registered for withholding purposes, and the signatory on the various agreements for Taxpayer was the CEO. It is clear that the Department's reference to the fact that individuals who worked for both entities signed the agreements was made in support of the Department's position that the two entities were acting as one entity.

Taxpayer's next point of protest is the Department's reference to the fact that Taxpayer did not have a separate insurance policy. Taxpayer states that, while the policy is in the name of Related, all requirements for Taxpayer to be an additional named insured were properly executed and that Taxpayer was therefore properly insured at all times. Taxpayer also objects to the Department's statement that the transportation agreement provides that liability for product loss or consequential damages rests with neither the carrier nor the shipper. The Department observed that motor carrier insurance is significantly more expensive than a common policy and that Taxpayer would have held the appropriate insurance if it was truly engaged in public transportation.

As with the other factors included in the audit report, it is clear that this paragraph was included for the purpose of supporting the Department's position that Taxpayer and Related were acting as a single entity. As discussed above, a single entity cannot transport its own property and qualify for the public transportation exemption. A review of the transportation agreement shows that the paragraph in question covers "Force Majeure" provisions in which both Taxpayer and Related agree that neither shall be liable to the other in the event of various catastrophic circumstances. The audit report concurrently considered the fact that Taxpayer and Related are on the same insurance policy and the provision that neither party would be liable to each other in the case of a Force Majeure event. Therefore, in the case of a catastrophic loss, neither party had the compensatory or protective measures in place against the other company involved in an arm's-length business contract which a legitimate transportation company would have. In the case of shipper liability or in the case of carrier liability, a single insurance policy covered the loss with no recourse for one company from the other. In the Department's determination it appears that the two entities were not acting at arm's-length. Therefore, the Department's reference to the lack of an independent insurance policy is intended to establish that the two entities were acting as one.

Taxpayer's next point of protest is that the Department disallowed some amounts of the refund claims since the purchases in question were for equipment which Related used in its operations. Taxpayer reviewed the refund claims and found only vehicle repair, fuel, and cellular phone purchases included in those claims. A review of the audit report shows that this is not what the Department stated. Rather, the audit report states that the majority of the invoices included Taxpayer's refund claim were billed to Related. The report also states that some of the invoices appear to be related to Related's services rather than transportation services. This is included in the overall discussion that Taxpayer and Related were operating as separate divisions of one entity instead of separate entities. Whether or not the invoices in question were for Related's equipment is not the point of the Department's observation. The inter-twined nature of Taxpayer's and Related's operations is the point.

A final point in the audit report which Taxpayer did not directly address is at the end of the explanation section of the audit report. The Department explained that the documents between Taxpayer and Related were only matters of form without business substance. The Department then explained that it believed that this was a "sham transaction." The previously discussed factors establish that, despite the agreements and forms set up between Taxpayer and Related, these two entities were in fact acting as one entity. There is no legitimate business purpose for the arrangements, but there is a significant impact on Indiana sales and use taxes. The "sham transaction" doctrine is long established both in state and federal tax jurisprudence dating back to Gregory v. Helvering, 293 U.S. 465 (1935). In that case, the Court held that in order to qualify for favorable tax treatment, a corporate reorganization must be motivated by the furtherance of a legitimate corporate business purpose. Id at 469. A corporate business activity undertaken merely for the purpose of avoiding taxes was without substance and "[T]o hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose." Id at 470. The courts have subsequently held that "in construing words of a tax statute which describe [any] commercial transactions [the court is] to understand them to refer to transactions entered upon for commercial or industrial purposes and not to include transactions entered upon for no other motive but to

escape taxation." Comm. v. Transp. Trading and Terminal Corp., 176 F.2d 570, 572 (2nd Cir. 1949), cert. denied, 338 U.S. 955 (1950). "[T]ransactions that are invalidated by the [sham transaction] doctrine are those motivated by nothing other than the taxpayer's desire to secure the attached tax benefit" but are devoid of any economic substance. Horn v. Comm., 968 F.2d 1229, 1236-7 (D.C. Cir. 1992).

The factors listed by the Department all support the conclusion that Taxpayer and Related's transportation arrangement was in fact a sham transaction. The arrangements were not entered into for a commercial or industrial purpose. Taxpayer had no employees, no vehicles for the first two years of the audit period, no drivers, no independent insurance policy, and no separate accounting. When Taxpayer did take title to the vehicles in 2007, it received those vehicles from Related for no compensation. Taxpayer has insufficient documentation to establish when it was supposedly transporting the property of another. Taxpayer has insufficient documentation establishing when its leased drivers were actually driving.

The terms of the transportation agreement and the shared insurance policy make it clear that neither Taxpayer nor Related were concerned about potential liabilities to each other as shipper and carrier, further supporting the Department's determination that the two legal entities were in reality acting as one entity. While some cash may have exchanged hands, other amounts were netted out in an internal accounting manner. These factors and others all support the Department's original conclusion that Taxpayer and Related were involved in a sham transaction and that Taxpayer was not transporting the property of another for consideration as required by IC § 6-2.5-5-27. Taxpayer's purchases and rentals do not qualify for the public transportation exemption. Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

II. Tax Administration–Negligence Penalty and Interest.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty and interest. As, provided by IC § 6-8.1-10-1(e), the Department may not waive interest. The Department refers to IC § 6-8.1-10-2.1(a), which states in relevant part:

If a person:

. . .

(3) incurs, upon examination by the department, a deficiency that is due to negligence;

. . .

the person is subject to a penalty.

The Department refers to 45 IAC 15-11-2(b), which 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.

45 IAC 15-11-2(c) provides in pertinent part:

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.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and so was subject to a penalty under IC § 6-8.1-10-2.1(a). As explained in Issue I, Taxpayer's actions were devoid of economic substance and were in fact a sham transaction. Taxpayer has not affirmatively established that its failure to pay the deficiency was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer's protest is denied.

CONCLUSION

Taxpayer's protest is denied on Issue I regarding refund of sales tax and imposition of use tax. Taxpayer's protest is denied on Issue II regarding imposition of negligence penalties and interest.

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