DEPARTMENT OF STATE REVENUE

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Letter of Findings: 09-0591
Sales and Use Tax
For the Years 2005, 2006, 2007

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ISSUES

I. Use Tax – Public Transportation Exemption.

Authority: IC § 6-2.5-5-27; IC § 6-8.1-5-1; 45 IAC 2.2-5-61; Sales Tax Information Bulletin 12 (December 2009); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); State Dep't of Revenue v. Calcar Quarries, Inc., 394 N.E.2d 939 (Ind. Ct. App. 1979); National Serv-All, Inc. v. Indiana Dep't of State Revenue, 644 N.E.2d 954 (Ind. Tax Ct. 1994); Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue, 644 N.E.2d 960 (Ind. Tax Ct. 1994); 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); Indiana Waste Systems of Indiana v. Indiana Dep't of State Revenue, 633 N.E.2d 359 (Ind. Tax Ct. 1994.

Taxpayer protests the imposition of use tax on the purchase price of two trucks claiming they are subject to the public transportation exemption.

II. Tax Administration - Ten Percent Negligence Penalty.

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

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation that builds and services grain dryers and silos and recently expanded its business activity to include waste hauling and cement work. Taxpayer is a registered retail merchant.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer which credited overpayment of sales tax and proposed assessment of additional use tax, penalty and interest. The proposed use tax assessment included assessment of use tax on the purchase and repair of two "Quad" trucks that Taxpayer had purchased to haul waste. Taxpayer protested the assessment of use tax on the "Quad" trucks, which represented the largest item of tax, arguing they qualified for the public transportation exemption. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Use Tax – Public Transportation Exemption.

DISCUSSION

Taxpayer contracts with a broker ("Broker") who acts as Taxpayer's agent in securing waste from customers ("Customers") for transport by Taxpayer to landfills. Taxpayer claimed that two trucks it used to haul waste to the Landfill qualified for the public transportation exemption from sales and use tax.

The Department assessed additional use tax to Taxpayer because the Department's audit did not concur that two of Taxpayer's trucks qualified for the public transportation exemption from sales and use tax. First, the Department's audit treated Taxpayer like the waste haulers that picked up waste curbside described in a line of Tax Court cases that were deemed not to qualify for the public transportation exemption. Second, the Department's audit concluded that the income from waste hauling was one eighth of Taxpayer's overall income and therefore Taxpayer was not predominantly engaged in public transportation and therefore not subject to the exemption.

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(b), (c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

IC § 6-2.5-5-27 states the public transportation exemption from sales and use tax:

> 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.

45 IAC 2.2-5-61 elaborates on what qualifies as public transportation and states in relevant 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.

[...]

Sales Tax Information Bulletin 12 (December 2009), although not directly applicable to the years at issue, clarified the statute to reflect case law as follows:

To qualify for the exemption, the tangible personal property purchased must be predominately used in providing public transportation. The tangible personal property is predominately used in public transportation if greater than 50 [percent] of its gross income is derived from transporting people or property for hire. (Emphasis added).

Indiana courts have interpreted the public transportation exemption in a series of cases including State Dep't of Revenue v. Calcar Quarries, Inc., 394 N.E.2d 939 (Ind. Ct. App. 1979) (holding that the tangible personal property being transported must be the property of another); National Serv-All, Inc. v. Indiana Dep't of State Revenue, 644 N.E.2d 954 (Ind. Tax Ct. 1994) (holding that to be entitled to the public transportation exemption, a carrier must transport tangible personal property of another and for consideration); Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue, 644 N.E.2d 960 (Ind. Tax Ct. 1994) (holding that a taxpayer must use the tangible personal property predominately in public transportation in order to qualify for the exemption) (" Indiana Waste Systems II"); Panhandle Eastern Pipeline Co. v. Indiana Dep't of State Revenue, 741 N.E.2d 816 (Ind. Tax Ct. 2001) (holding that the public transportation predominant use exemption is an all or nothing exemption); Carnahan Grain, Inc. v. Indiana Dep't of State Revenue, 828 N.E.2d 465 (Ind. Tax Ct. 2005) (holding that it is the predominant use of the property that determines whether a taxpayer involved in multiple lines of business is entitled to the public transportation exemption, and not whether a taxpayer, as an overall business, is predominately engaged in public transportation). Several of these cases involved waste haulers specifically: Indiana Waste Systems of Indiana v. Indiana Dep't of State Revenue, 633 N.E.2d 359 (Ind. Tax Ct. 1994) (holding that garbage constituted property for the purposes of the public transportation exemption) (" Indiana Waste Systems I"); Indiana Waste II, 644 N.E.2d at 912 (Ind. Tax Ct. 1994) (holding that in the case of garbage haulers, unless the originators of the garbage specifically and by written agreement retain ownership of the garbage, the hauler becomes the owner of the garbage once the garbage is picked up curbside).

As stated above, Taxpayer contracts with Broker who acts as Taxpayer's agent in securing waste from Customers for transport by Taxpayer to landfills.

Taxpayer's primary arguments that it qualifies for the public transportation exemption are that (1) Taxpayer does not own the waste it hauls and is therefore transporting the property of another; (2) Taxpayer is paid by Broker (presumably meaning not by Customer); and (3) the trucks at issue are used predominantly in transporting the property of another, because the predominant use test is limited to the activities of its hauling operation and the use of the trucks therein and not the combined activities of Taxpayer's hauling and construction business.

As to the last point first, the Indiana Tax Court, and subsequently the Department, have made it clear that it is the predominant use of the property – in this instance the trucks – that determines whether a taxpayer involved in multiple lines of business could be entitled to the public transportation exemption, and not whether a taxpayer, as an overall business, is predominately engaged in public transportation. Carnahan Grain, 828 N.E.2d at 469; Sales Tax Information Bulletin 12 (December 2009). However, there are other criteria that Taxpayer must meet before it qualifies for the public transportation exemption.

As to the first and second points, Taxpayer argues that it is entitled to the public transportation exemption for the use of the "Quad" trucks because it uses them to transport sludge for Broker to an area landfill. Taxpayer explains that Broker contracts with Customers who are the originators of the waste and then hires Taxpayer to haul the waste. Taxpayer argues that it at no time owns the waste, but rather it is owned by Broker. Taxpayer states that these facts distinguish it from Indiana Waste Systems II, the case cited to above which establishes that a garbage hauler's ownership of the garbage is presumed once it is picked up curbside absent a written agreement that retains ownership of the garbage with its originators, in this case Customers. In order to prove this point, in its May 12, 2009, letter of protest, Taxpayer stated that its invoices are created and submitted to Broker, not Customer. Taxpayer also provided a copy of a "Master Broker/Carrier Agreement" that represents the agreement between Taxpayer and Broker ("Agreement").

The Agreement states the following:

WHEREAS Carrier represents that it is a CONTRACT carrier, having appropriate authority from any and all governmental agencies, is engaged in the business of hauling and transporting merchandise by motor vehicle and is desirous of retaining the services of Broker to obtain such goods and merchandise for transporting as are offered by Broker, and

WHEREAS Broker represents that it is actively engaged in the business of soliciting goods and merchandise for transportation on behalf of carriers and other providers for motor vehicle transportation.

[...]

1. Carrier hereby appoints and retains Broker as its agent for the solicitation and dispatch of merchandise available for transportation by motor vehicle with full power and authority to act in Carrier's behalf for the sole purpose of securing merchandise for transportation.

In a letter dated October 9, 2009, Taxpayer argues that the above quoted text from the Agreement demonstrates that "the agency relationship is limited to the transportation of the material not the material."

Taxpayer is correct. Broker is merely Taxpayer's agent in "solicitation and dispatch" of the waste Taxpayer hauls. Broker "solicits and dispatches" waste for Taxpayer to haul from Customers to the landfill. However, the Agreement is silent on the issue of the ownership of the material itself. There is no language in the Agreement that suggests Broker owns the waste. Therefore, the presumption stated in Indiana Tax Court case law that a waste hauler owns the material it picks up from Customers absent a written agreement that specifically retains ownership with Customers, also holds in this case. Indiana Waste Systems II, 644 N.E.2d at 961. The fact that Taxpayer is paid by Broker is not a determining factor in this case, since Broker is acting as a conduit for Taxpayer, essentially remitting to Taxpayer what it collects from Customers minus Broker's agent commission.

In the absence of a written agreement with Customers that specifically retains ownership of the waste with Customers, Taxpayer is presumed to be the owner of the waste and therefore does not qualify for the public transportation exemption as a threshold matter.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration - Ten Percent Negligence Penalty.

DISCUSSION

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1 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 penalty.

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 had reasonable cause, though its conclusions were erroneous, to argue that its facts distinguished it from case law. As required by 45 IAC 15-11-2(c) Taxpayer has shown that it had reasonable cause not to remit use tax on its use of the Quad trucks at issue.

FINDING

Taxpayer's protest is sustained, the penalty is waived.

CONCLUSION

Taxpayer's protest of the use tax assessment is denied. The penalty, however, is waived.

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