DEPARTMENT OF STATE REVENUE

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Letter of Findings: 09-0610
Sales and Use Tax
For the Years 2006, 2007, 2008

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ISSUES

I. Use Tax – Imposition – Manufacturing Exemption.

Authority: IC § 6-2.5-1-3; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-3-2; IC § 6-2.5-5, et seq; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Gross Income Tax Division v. National Bank and Trust Co., 79 N.E.2d 651(Ind. 1948); Sales Tax Information Bulletin 60 (July 2006).

Taxpayer protests the imposition of use tax on some items claiming a manufacturing exemption.

II. Tax Administration – Negligence Penalty.

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

Taxpayer protests the imposition of penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation engaged primarily as a paving contractor, building, patching, and seal-coating streets, parking lots and driveways. Taxpayer purchases asphalt or hot mix asphalt from a sister corporation that is in the business of manufacturing asphalt or hot mix asphalt. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer. No adjustments were made for sales tax; however, Taxpayer was assessed additional use tax as well as penalty and interest. Taxpayer protested the assessment of use tax on two dump trucks used to deliver asphalt and the related penalty. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Use Tax – Imposition – Manufacturing Exemption.

DISCUSSION

Taxpayer protests the assessment of use tax on the purchase, repair, and operating costs of dump trucks (generally referred to as "dump trucks") it used to transport "hot mix asphalt" from the asphalt plant, its sister corporation, to the job site. Taxpayer argues that it is unitary with the asphalt manufacturer as supported by the definition of "person" in IC § 6-2.5-1-3; therefore, its dump trucks used to deliver the "hot mix asphalt" qualify for the manufacturer's equipment exemption from sales and use tax. Taxpayer refers to Sales Tax Information Bulletin 60 (July 2006) which states that "asphalt manufacturers are granted an exemption from the sales and use taxes for dump trucks used to transport 'hot mix asphalt' from their asphalt plant to the job sites."

The Department's audit states that "no exemption from sales and use tax is available for dump trucks to construction contractors who do not [themselves] produce 'hot mix asphalt.'" Sales Tax Information Bulletin 60, page 5.

As a preliminary matter, the Department notes that all tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. 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).

In accordance with IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on Indiana retail transactions unless a valid exemption is applicable. IC § 6-2.5-4-1 provides that a retail transaction involves the transfer of tangible personal property. Indiana imposes a use tax on tangible personal property stored, used, or consumed in Indiana when no sales tax was paid at the time of purchase. IC § 6-2.5-3-2. There are a number of statutory exemptions from the use tax, including a manufacturing equipment exemption. IC § 6-2.5-5, et seq. All exemptions must be strictly construed against the party claiming the exemption. Gross Income Tax Division v. National Bank and Trust Co., 79 N.E.2d 651, 654 (Ind. 1948).

Taxpayer rests its protest on the argument that it has a unitary relationship with its sister company, the asphalt manufacturer, and therefore Taxpayer's dump trucks and related equipment used to deliver hot asphalt mix to its construction sites qualify for the manufacturing exemption as explained in Sales Tax Information Bulletin 60.

Taxpayer refers to IC § 6-2.5-1-3's definition of "person" to buttress its argument that it and its sister company are "a single person" and therefore should be treated as an extension of each other, thus qualifying Taxpayer for the manufacturing exemption.

IC § 6-2.5-1-3 defines "person" as:

> "Person" includes an individual, assignee, receiver, commissioner, fiduciary, trustee, executor, administrator, institution, national bank, bank, consignee, firm, partnership, joint venture, pool, syndicate, bureau, association, cooperative association, society, club, fraternity, sorority, lodge, corporation, limited liability

company, Indiana political subdivision engaged in private or proprietary activities, estate, trust, or any group or combination acting as a unit.

(Emphasis added).

Taxpayer argues that it and its sister company, the asphalt manufacturer, qualify as "any group or combination acting as a unit" by demonstrating that the two corporations "posses[s] the three elements of unity" which it lists as: common ownership, common management, and common purpose/use/operation (in, for example, Taxpayer's letter dated December 29, 2009).

Taxpayer is importing traditional United States Supreme Court income tax "nexus" analysis, referred to as the "three unities." "Three unities" analysis is used to demonstrate that related corporate entities with presence inside and outside the state are "unitary" and therefore could be required to file a combined state adjusted gross income tax return to properly reflect the "unitary group's" apportioned income derived from a state. This "three unities" analysis treads a well worn path, none of which involves a state's sales and use tax exemptions.

More basically, the Department disagrees with Taxpayer's interpretation of IC § 6-2.5-1-3. The statute begins by listing typically recognized forms of entities - including Taxpayer's and the sister company's form, the corporation - that fit the definition of "person" and ends with a catch-all phrase intended to capture possible formations not included in the prior listing. The catch-all phrase "any group or combination acting as a unit" is preceded by the word "or" which signals that the statute is adding a descriptor, not allowing for a redefinition of the preceding forms listed in the statute.

Taxpayer and its sister company have chosen to exist as particular corporate forms since the 1980s. Taxpayer now wishes to pierce its own corporate veil to seek a sales and use tax advantage. There is nothing in IC § 6-2.5-1-3 defining "person" that allows a listed entity to change its status in order to seek a sales and use tax advantage.

Based on the above, the Department's audit correctly distinguished between Taxpayer and its sister company, the "hot mix asphalt" manufacturer and imposed use tax on the dump trucks and related equipment and operating costs.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. 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.

Taxpayer has, in this instance, demonstrated that it exercised ordinary business care and therefore had reasonable cause to not pay sales tax upon its purchase of the dump trucks and related equipment and operating costs.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

Taxpayer's protest of the assessment of use tax is denied. Taxpayer's protest of the negligence penalty is sustained.

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