

Letter of Findings Number: 09-0773
Sales Tax
For Tax Years 2006-07

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ISSUES

I. Sales and Use Tax—Public Transportation Exemption.

Authority: 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 sales tax and denial of refund on purchases which it states are eligible for the public transportation exemption.

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 is a corporation in Indiana. Taxpayer filed several claims for refund of sales tax paid in different periods in 2006 and 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 facts 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 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 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. Sales and Use Tax—Public Transportation Exemption.

DISCUSSION

Taxpayer protests the denial of sales tax refunds for 2006 and 2007 and also protests the imposition of use tax on purchases it made in the tax years 2006 and 2007. Taxpayer states that Related is in the business of providing specific services and installations at 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. There was no distinction between the two for income tax purposes, but they were treated as two distinct entities for sales tax purposes. The Department considered that these circumstances showed the two companies were not acting as separate companies. The second factor is that Taxpayer did not adequately explain the driver's duties and that Taxpayer provided no computation for the percentage of time the technician/drivers allocated to service runs versus installation jobs. The third factor is that Taxpayer did not have its own insurance policy, but was instead listed as an additional insured on Related's policy.

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).

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.

After review of the Department's concerns as listed in the audit report and of Taxpayer's protest analysis and supporting documentation, and when considered together, Taxpayer has sufficiently addressed the Department's concerns. Therefore, Taxpayer did qualify for the public transportation exemption for the years 2006 and 2007. Taxpayer has met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c). Also, Taxpayer is eligible for the claimed refunds for 2006 and 2007.

FINDING

Taxpayer's protest is sustained.

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.

In this case, Taxpayer did not incur the 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 has 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 sustained.

CONCLUSION

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

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