DEPARTMENT OF STATE REVENUE

04-20090591.SLOF

Supplemental 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; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue, 644 N.E.2d 960 (Ind. Tax Ct. 1994); Meyer Waste Sys., Inc. v. Indiana Dep't. of State Revenue, 741 N.E.2d 1 (Ind. Tax 2000).

Taxpayer protests the imposition of use tax on the purchase price of two trucks claiming they qualify for the public transportation exemption.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation that builds and services grain dryers and silos. For the years at issue Taxpayer had expanded its business activity to include waste hauling.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 2005, 2006, and 2007, which credited Taxpayer for 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 a Letter of Findings (04-20090591) ("Letter of Findings") was issued denying Taxpayer's protest of the assessment of use tax, but sustaining Taxpayer's protest of the penalty. Taxpayer requested rehearing based on the discovery of additional facts not previously known. The rehearing was granted and held, and this Supplemental Letter of Findings ensues. Additional facts will be provided as necessary.

I. Use Tax – Public Transportation Exemption.

DISCUSSION

This Supplemental Letter of Findings will not restate all the analysis of Letter of Findings 04-20090591 ("Letter of Findings"), but rather will only address the issues relevant to the request for rehearing.

At hearing, the facts were as such: 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 landfills qualified for the public transportation exemption from sales and use tax.

The Letter of Findings agreed with the Department's audit that as a hauler of waste, Taxpayer did not qualify for the public transportation exemption unless Taxpayer could show a writing that retained ownership of the waste with Customers. At hearing Taxpayer provided a copy of a "Master Broker/Carrier Agreement" that represented the agreement between Taxpayer and Broker ("Agreement") to demonstrate that Taxpayer did not own the waste it was hauling. Taxpayer pointed to the following language from the Agreement:

> 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
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> 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.
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> [...]
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> 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.

Taxpayer argued that the above quoted text from the Agreement demonstrates that "the agency relationship is limited to the transportation of the material not the material [itself]."

The Letter of Findings addressed Taxpayer's argument as follows:

> 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 960, 961 (Ind. Tax Ct. 1994). 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.

(Emphasis added).

The burden of proving that the proposed assessment is wrong still 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.

On rehearing Taxpayer describes new or additional facts. Taxpayer states that the sludge it transports is actually generated by a single customer, a steel manufacturer, who contracts with Broker to arrange for transport of the waste to specially qualified landfills. Broker then contracts with Taxpayer to haul that waste to the landfills. On rehearing, Taxpayer states that it has discovered an addendum to the Agreement between Taxpayer and Broker that contains specific language that Broker owns the waste that Taxpayer transports. Therefore, Taxpayer argues, because the addendum states that Broker owns the waste, Taxpayer cannot be deemed to own the waste. This, Taxpayer says, demonstrates that it is using the trucks to transport the property of another, thus qualifying Taxpayer's use of the trucks for the public transportation exemption from use tax.

In light of Taxpayer's new claim, at the rehearing the Department requested that Taxpayer provide some form of documentation – agreements, contracts, insurance policies, etc. – that demonstrates the transfer and/or ownership of this waste down the chain starting with Customer, the steel mill. Based on existing case law, as discussed in the Letter of Findings, the key factor is whether or not the steel mill retains ownership of the waste. In the absence of a clear statement of this transfer, it cannot be determined whether, or when, Customer transferred ownership of the waste. Taxpayer merely made self-serving assertions in the absence of the requisite documentation. Meyer Waste Sys., Inc. v. Indiana Dep't. of State Revenue, 741 N.E.2d 1, 6-7 (Ind. Tax 2000).

Taxpayer also points to the fact that disposal of the industrial waste is governed by statutes and regulations that stipulate disposal at specially qualified landfills. Taxpayer argues that because it must comply with legal disposal requirements it cannot be deemed to exercise ownership control over the industrial waste it hauls. Taxpayer misses the point that whoever is deemed to own the industrial waste would be obligated to dispose of it at qualified landfills. In this instance the lack of control of the disposal location does not change the ownership analysis, since that restraint would apply to whoever is deemed to own the waste.

There is no documentation that shows that Customer retained ownership of the waste such that it could transfer that ownership to Broker (thus allowing Broker to claim retention of ownership per the recently discovered addendum to Agreement). And, since Broker is not a hauler, but merely an agent for Customer (as well as an agent for Taxpayer), there is no presumption that Broker owns the waste.

While possession is not tantamount to ownership, it does raise a rebuttable presumption of ownership. Id. at 6. Taxpayer still has not overcome that presumption in this case.

FINDING

Taxpayer's protest is respectfully denied on rehearing.

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