DEPARTMENT OF STATE REVENUE

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Supplemental Letter of Findings Number: 10-0048
Use Tax
For the Years 2006-2008

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ISSUE

I. Use Tax–Imposition.

Authority: IC § 6-8.1-5-1; 45 IAC 2.2-3-27; Mason Metals Co, Inc. v. Indiana Dep't of State Revenue, 590 N.E.2d 672 (Ind. Tax Ct. 1992).

Taxpayer protests the Department's assessment of use tax with respect to several items.

STATEMENT OF FACTS

Taxpayer is a corporation doing business in Indiana. The Indiana Department of Revenue ("Department") audited Taxpayer and determined that Taxpayer owed additional use tax. Taxpayer protested various items in the assessment.

The Department previously conducted an administrative hearing on the protest and issued a Letter of Findings denying Taxpayer's protest except for certain duplicate invoices. Taxpayer requested a rehearing on one issue, which the Department granted. This Supplemental Letter of Findings result.

I. Use Tax–Imposition.

DISCUSSION

Taxpayer protests the assessment of additional use tax with respect to certain crane leases. In particular, Taxpayer asserts that it paid for the crane leases as a service–that is, the crane provider operated the crane and Taxpayer did not control how the particular job was completed. The issue is whether the crane lease was a lease of tangible personal property or a service.

Under IC § 6-8.1-5-1(c):

(c) If the person has a surety bond guaranteeing payment of the tax for which the proposed assessment is made, the department shall furnish a copy of the proposed assessment to the surety. The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

With regard to this issue, 45 IAC 2.2-3-27 provides:

The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

(1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental of lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals.

(2) Rental or lease period. For purposes of the imposition of the gross retail tax or use tax on rental or leasing transactions, each period for which a rental is payable shall be considered a complete transaction. In the case of a weekly rate, each week shall be considered a complete transaction. In the case of a continuing lease or contract, with or without a definite expiration date, where rental payments are to be made monthly or on some other periodic basis, each payment period shall be considered a completed transaction.

(3) Renting or leasing property with an operator:

(A) The renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised.

(B) The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator.

(C) When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges

for the operator's services, provided such charges are separately stated on the invoice rendered by the lessor to the lessee.

(D) Notwithstanding any other provision of this regulation [45 IAC 2.2] any lessee leasing or renting a vehicle(s) from any lessor, including an individual lessor, with or without operators, driver(s), or even if the operator (driver) himself is the lessor, regardless of control exercised, shall not be subject to the gross retail tax or use tax, if the leased or rented vehicle(s) are directly used in the rendering of public transportation.

(4) Supplies furnished with leased property. A person engaged in the business of renting or leasing tangible personal property is considered the consumer of supplies, fuels, and other consumables which are furnished with the property which is rented or leased.

Taxpayer also cited to Mason Metals Co, Inc. v. Indiana Dep't of State Revenue, 590 N.E.2d 672 (Ind. Tax Ct. 1992) with regard to its claim that the crane contracts should not be subject to use tax. In that case, a manufacturer "leased" a truck for purposes of carrying the manufacturer's products. Under the terms of the lease, the truck remained under use and control of the manufacturer. However, rather than accepting the nominal listing of the contract as a "lease," the court considered various factors in determining whether the manufacturer in fact had control over the trucks. The court found that under the agreement between the manufacturer and the lessor of the truck, the lessor was in fact providing a transportation service to the manufacturer rather than leasing a truck. Therefore, the manufacturer was not leasing the truck and its "lease" payments were not subject to Indiana use tax. Id. at 675.

Taxpayer provided copies of invoices for the cranes the Department stated that Taxpayer used. The lease invoices listed an hourly fee for use of the cranes. In instances where Taxpayer leased a crane for more than a specified period (usually eight hours per day), the invoice also had a separate charge for the "operator." The Department charged use tax on the hourly fees and not for the separately listed "operator" fees.

Taxpayer provided copies of purchase orders and contracts between it and the crane provider. Based on the purchase orders and contracts, Taxpayer has established that the crane operator was not acting under Taxpayer's control and thus the "lease" was exempt. Because Taxpayer affirmatively demonstrated that it lacked control over the crane operator, Taxpayer has provided sufficient evidence to demonstrate that it lacked control over the cranes and thus fall under 45 IAC 2.2-3-27 and Mason Metals. Thus, Taxpayer's protest of use tax on the crane leases is sustained.

FINDING

Taxpayer's protest is sustained with regard to the crane leases assessed by the Department.

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