

**Letter of Findings: 10-0218
Sales and Use Tax
For the Years 2007 and 2008**

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ISSUES

I. Sales Tax – Imposition – Diesel Fuel Sales.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-7-2.5; IC § 6-2.5-7-3; IC § 6-2.5-8-8; IC § 6-8.1-5-1; [45 IAC 2.2-8-8](#); [45 IAC 2.2-8-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin #15 (September 2006) 20061129 Ind. Reg. 045060520NRA.

Taxpayer protests the imposition of sales tax on the sale of special fuel which Taxpayer claims it sold subject to an exemption.

II. Tax Administration – 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 operates a full service travel center in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of sales tax on sales of diesel fuel during the tax years 2007 and 2008. Also, the Department determined that Taxpayer slightly overstated its prepaid sales tax on purchase of fuel from its supplier. The Department therefore issued proposed assessments for sales tax, use tax, negligence penalty, and interest for those years. Taxpayer protested the proposed assessments relating to the sale of diesel fuel on the grounds that some of the diesel sales were to exempt customers. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax – Imposition – Diesel Fuel Sales.

DISCUSSION

The Department determined, under IC § 6-2.5-7-3(b), that Taxpayer, in the absence of relevant exemption certificates, had not collected and remitted the proper amount of sales tax on sales of diesel fuel during the tax years 2007 and 2008. Due to the volume of sales over the course of the two years at issue, the Department used a sample period, December 2008, to determine the percentage of taxable and exempt sales. It should be noted that the Department's audit excluded from the sample period those transactions where the purchaser was clearly a for-hire trucking company even though Taxpayer did not have exemption certificates on hand. The Department then applied the taxable percentage from the sample period to all sales for the whole audit period. This resulted in assessments for additional sales tax which the Department determined Taxpayer should have collected and remitted over the two years.

Taxpayer protests that some of the sales included as taxable in the sample period were actually exempt and that, when these sales are moved from "taxable" to "exempt" status in the taxable sales calculations, the overall taxable percentage will be reduced as will the Department's assessments. In its protest letter dated March 22, 2010, Taxpayer cites to IC § 6-2.5-7-2.5 and Sales Tax Information Bulletin # 15 (September 2006) (20061129 Ind. Reg. 045060520NRA) as authority for its protest.

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).

The first relevant statute is 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.
- (Emphasis added).

Next, IC § 6-2.5-8-8 states:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
- (b) The following are the only persons authorized to issue exemption certificates:

- (1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter;
- (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the department under this chapter; and
- (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
- (c) The department may also allow a person to issue a blanket exemption certificate to cover exempt purchases over a stated period of time. The department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt. (Emphasis added).
- Finally, regulation [45 IAC 2.2-8-12](#) provides:
- (a) Exemption certificates may be issued [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [\[IC 6-2.5\]](#) may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [\[IC 6-2.5\]](#) with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.
- (b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.
- (c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.
- (d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.
- (e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.
- (f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.
- (g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.
- (h) Exemption certificates may be reproduced provided no change is made in the wording or content. (Emphasis added).

Therefore, as provided by [IC § 6-2.5-8-8\(a\)](#), a seller accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. As provided by [45 IAC 2.2-8-12\(f\)](#), an exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

Most relevant in this case is that in the absence of valid exemption certificates, [45 IAC 2.2-8-8\(d\)](#) makes it clear that Taxpayer bears the burden of proving that sales tax was remitted to the State or that Taxpayer's customers did indeed use the diesel fuel for exempt purpose.

[IC § 6-2.5-7-3\(b\)](#) specifically requires retail merchants who sell special fuel from metered pumps - i.e., Taxpayer and other retailers like Taxpayer - to collect exemption certificates from their customers when they makes exempt sales. Otherwise, in the absence of exemption certificates, the sales are deemed taxable:

- (a) With respect to the sale of gasoline which is dispensed from a metered pump, a retail merchant shall collect, for each unit of gasoline sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:
- (1) the price per unit before the addition of state and federal taxes; multiplied by
 - (2) seven percent ([percent]). The retail merchant shall collect the state gross retail tax prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#).
- (b) **With respect to the sale of special fuel or kerosene which is dispensed from a metered pump, unless the purchaser provides an exemption certificate in accordance with [IC 6-2.5-8-8](#), a retail merchant shall collect, for each unit of special fuel or kerosene sold, state gross retail tax in an amount equal to the product, rounded to the nearest one-tenth of one cent (\$0.001), of:**
- (1) the price per unit before the addition of state and federal taxes; multiplied by**
 - (2) seven [percent].**

Unless the exemption certificate is provided, the retail merchant shall collect the state gross retail tax

prescribed in this section even if the transaction is exempt from taxation under [IC 6-2.5-5](#). (Emphasis added).

The language of IC § 6-2.5-7-3(b) is unequivocal in its requirement that Taxpayer collect exemption certificates for its exempt sales of diesel fuel.

Taxpayer makes several arguments in support of its protest. First, Taxpayer cites to IC § 6-2.5-7-2.5 stating that had the requirement to collect exemption certificates been absolute, IC § 6-2.5-7-2.5 would be rendered superfluous. IC § 6-2.5-7-2.5 states:

- (a) A retail merchant may designate any metered pumps at a business location that dispense special fuel as being "for trucks only". To do this, a retail merchant must place on the pump a sign that states that fuel dispensed from the metered pump may only be placed in the fuel supply tanks of a truck. A sign that reads "TRUCKS ONLY" is sufficient to meet the requirements of this subsection.
- (b) A retail merchant may not dispense special fuel from a metered pump that is designated for trucks only into the supply tank of a vehicle that is not a truck.
- (c) A retail merchant is not required to display the total price per unit of the special fuel on a metered pump if that particular metered pump is designated for trucks only.
- (d) A retail merchant may advertise special fuel at a price that does not include gross retail taxes that may be due on the sale of the special fuel only if he maintains a metered pump that is designated for trucks only. If a retail merchant advertises special fuel at a price that does not include any gross retail taxes that may be due on the sale of the special fuel, the retail merchant must display in easily read lettering above or below the advertised price the words "EXEMPT TRUCKS ONLY".

Taxpayer asks:

If Indiana law requires such a retailer to collect an exemption certificate for each sales of exempt diesel fuel, why did the legislature deem it necessary to spell out the detailed requirements of [IC 6-2.5-7-2.5](#)?

IC § 6-2.5-7-2.5 establishes that (1) retailers may designate "TRUCKS ONLY" special fuel pumps, (2) only trucks may fill up at these pumps, (3) retailers are not required to state the full price of diesel per unit at these pumps, and (4) a retailer may advertise a price that does not include the sales tax that may be due, but if a retailer so advertises, the retailer must place a sign that reads "EXEMPT TRUCKS ONLY" above the advertised price. A retailer may have other reasons why it wishes to direct trucks to certain pumps other than to make exempt sales. A retailer may wish to direct trucks to a particular area of its premises for logistical reasons, for example. It should be noted that the designation "TRUCKS ONLY" does not exclude non-exempt trucks; i.e., those pumps may be used by any truck whether exempt or not, but they cannot be used by vehicles other than trucks. IC § 6-2.5-7-2.5 makes no mention of exemption certificates. IC § 6-2.5-7-3, on the other hand, gives unequivocal direction as to the requirement to collect exemption certificates when Taxpayer sells special fuel to customers who are exempt from sales tax.

Taxpayer next complains that the Department's Sales Tax Information Bulletin #15 (September 2006) which deals with sales tax on the sale of gasoline and special fuels does not give clear guidance to taxpayers. The Information Bulletin states the following in relevant part:

IV. Special Fuel: Calculating the Tax

A. Special fuels include those fuels commonly known as diesel fuel, biodiesel, LPG, propane, compressed natural gas and compressed methane. Fuels that are not gasoline by statute will be considered a special fuel.

B. The sales tax is applied to the total sales price of the special fuel sold (except for the part that constitutes Indiana special fuel tax or federal excise tax) unless the retail merchant designates the metered pumps by a sign that reads "TRUCKS ONLY". To do this, a retail merchant must place at the pump a sign that states that fuel dispensed from the metered pump may only be placed in the fuel supply tanks of trucks. A sign that reads "TRUCKS ONLY" is sufficient to meet the requirements. **If the purchaser does not issue an exemption certificate indicating that the vehicle is engaged in public transportation and uses a "TRUCKS ONLY" pump, the sales tax is required to be charged to the purchaser.** The sales tax will be the sales tax rate times the raw price of the fuel that excludes state and federal excise taxes.

A retail merchant may not dispense special fuel from a metered pump that is designated for "TRUCKS ONLY" into the supply tank of a vehicle that is not a truck.

A retail merchant is not required to display the total price per unit of the special fuel on a metered pump if that particular metered pump is designated for "TRUCKS ONLY".

C. Each seller is responsible for deducting the correct amount of state and federal excise tax to determine the base for computing sales or use tax.

V. Exempt Sales of Special Fuel Sold Through a Stationary Metered Pump designated "TRUCKS ONLY"

A. The retail merchant **may** accept a properly completed exemption certificate from the purchaser of diesel or other special fuel where the sales tax is not required to be included in the pump price. The ST-105 allows a nonregistered exempt buyer to purchase exempt.

B. Exemption certificate Form ST-105 is normally used to certify exempt use. Farmers or others hauling their own products are not eligible for the exemption for persons engaged in public transportation. The purchaser's vehicle must be predominately engaged in providing public transportation of persons or property.

Specifically, Taxpayer refers to the use of the word "may" in section V. Taxpayer states that this suggests that a taxpayer "may" or "may not" collect exemption certificates. Taxpayer is directed to the specific language of section IV of the Information Bulletin where the requirement to collect exemption certificates is clearly stated. Furthermore, and most importantly, the legislature's directive is clearly stated in IC § 6-2.5-7-3(b).

Taxpayer also complains that the requirement to collect exemption certificates is burdensome on Taxpayer due to the volume of its business. Taxpayer estimates that each day about one hundred trucks use its exempt diesel fuel pumps. If the Department requires Taxpayer to collect an exemption form from each customer, Taxpayer will have to collect thousands of exemption forms every month. However, Taxpayer, per IC § 6-2.5-8-8(c), quoted above, may accept blanket certificates. Taxpayer also has the option of approaching the Department with a request for a formulary agreement which will be based on Taxpayer's verifiable facts and specific record maintenance requirements. In the absence of other statutory guidance, the legislature's directive to require the collection of exemption certificates is clear as stated in IC § 6-2.5-7-3(b) and as reflected in the Information Bulletin under section IV.

Given all of the above, and in the absence of valid exemption certificates, [45 IAC 2.2-8-8\(d\)](#) makes it clear that Taxpayer bears the burden of proving that sales tax was remitted to the State or that Taxpayer's customers did indeed use the diesel fuel for exempt purpose. In response, Taxpayer offered sample documentation that consisted of individual records of fill-ups. Taxpayer pointed to the fact that DOT and ICC (now FMCSA) numbers were on these records and that "comcheck" cards were used for these transactions. Taxpayer states that this data indicates that the transaction was for exempt use. Upon further research with Comdata, the Department learned that the "comdata" cards are not issued solely to "for hire" – i.e., exempt – users. Furthermore, Taxpayer did not provide further explanation of the DOT and ICC (now FMCSA) numbers such that they clearly designate exempt status.

Taxpayer has not met its burden to show that the subject purchases of diesel fuel were exempt from sales tax.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. 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 has affirmatively established, as required by [45 IAC 15-11-2\(c\)](#), that its failure to pay sales tax on its purchases was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest is respectfully sustained.

CONCLUSION

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

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