

DEPARTMENT OF STATE REVENUE

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**Letter of Findings Numbers: 13-20100737;
 14-20100735; 16-20100736; 16-20100738
 Gasoline Tax, Special Fuel Tax &
 Oil Inspection Fees
 Tax Years: 2007 – 2009**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES**I. Gasoline Tax – Assessment.**

Authority: IC § 6-6-1.1-103; IC § 6-6-1.1-201; IC § 6-6-1.1-203; IC § 6-6-1.1-504; IC § 6-8.1-5-1; [45 IAC 12-2-9](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the assessment of additional tax.

II. Special Fuel Tax – Assessment.

Authority: IC § 6-6-2.5-13; IC § 6-6-2.5-16.1; IC § 6-6-2.5-20; IC § 6-6-2.5-22; IC § 6-6-2.5-23; IC § 6-6-2.5-28; IC § 6-6-2.5-35; IC § 6-6-2.5-41; IC § 6-6-2.5-62; 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).

Taxpayer protests the assessment of additional tax.

III. Oil Inspection Fees – Assessment.

Authority: IC § 6-8.1-5-1; IC § 16-44-2-4; IC § 16-44-2-5; IC § 16-44-2-18; IC § 16-44-2-18.5; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the assessment of additional oil inspection fees.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation. Taxpayer operates gas stations in Indiana. Taxpayer also has a related company that hauls and delivers bulk fuel in tankers. During the time period at issue, Taxpayer did not hold an Indiana gasoline distributor's license, a special fuel supplier license, a special fuel importer license, or a transporter license with the Indiana Department of Revenue ("Department").

In 2007, Taxpayer entered into a business arrangement with another fuel company ("Company A"). Taxpayer would purchase gasoline or diesel fuel from a fuel terminal ("Company B") using Company A's fuel card. The fuel would then be placed in vehicles owned by one of Taxpayer's related companies. Company A would then bill Taxpayer for the fuel. However, this arrangement was not agreed upon in writing. The vehicles owned by one of Taxpayer's related companies would then transport the fuel back to Taxpayer's Indiana service stations, and unload the fuel in the station's fuel tanks.

The Department conducted a gasoline tax and special fuel tax audit of Taxpayer, and concluded that Taxpayer failed to properly remit gasoline tax, special fuel tax, and oil inspection fees to the State of Indiana. Taxpayer was assessed additional gasoline tax, special fuel tax, and oil inspection fees as a result. Taxpayer protests the Department's assessments, claiming that Company A was responsible for collecting the taxes and had failed to do so. Additional facts will be provided as necessary.

I. Gasoline Tax – Assessment.**DISCUSSION**

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

A majority of the fuel that Taxpayer purchased using Company A's fuel card was gasoline. IC § 6-6-1.1-201 imposes an excise tax on the sale of gasoline. It provides that:

The distributor shall initially pay the tax on the billed gallonage of all gasoline the distributor **receives in this state**, less any deductions authorized by this chapter. The distributor shall then add the per gallon amount of tax to the selling price of each gallon of gasoline sold in this state and collected from the purchaser so that the ultimate consumer bears the burden of the tax. (**Emphasis added**).

IC § 6-6-1.1-103 provides the following definitions:

(d) "Distributor" means a person who first receives gasoline in Indiana. However, "distributor" does not include the United States or any of its agencies unless their inclusion is permitted under the Constitution and laws of the United States.

(e) "Licensed distributor" means a person holding a valid distributor's license issued by the administrator.

...

(q) "Import" for gasoline and fuels taxed in the same manner as gasoline under the origin state's statutes means the purchase for export and transportation out of a state by or for the purchaser that is:

- (1) an export by the purchaser in the origin state; and
- (2) an import by the purchaser in the destination state.

Taxpayer does not have, or at the least did not have at the time of the purchases at issue, an Indiana gasoline distributor's license for the purposes of the Indiana gasoline tax.

IC §§ 6-6-1.1-202 through -207 detail when gasoline is actually received for the purposes of applying the gasoline tax. IC § 6-6-1.1-203 states that "Gasoline is received by the owner at the time it is unloaded in this state if it is imported into this state and placed in storage at a place other than a refinery or terminal."

[45 IAC 12-2-9](#)(b) provides that:

In instances where gasoline is being imported to or for the account of a person other than a licensed distributor and section 205 [[IC 6-6-1.1-205](#)] is not applicable, gasoline which is imported into this state by tank car, tank truck, transport, or other motor vehicle, and is subsequently placed into storage at a place other than a refinery or terminal is received by the person for whom the gasoline is being imported.

Example (5) of [45 IAC 12-2-9](#) is fairly on point:

Taxpayer A operates a bulk storage facility located outside Indiana. Taxpayer B operates a service station located in Indiana and does not hold a valid Indiana gasoline distributor's license. Taxpayer A passes title to gasoline to Taxpayer B outside the state of Indiana. The gasoline to which Taxpayer B has title is imported into Indiana for the account of Taxpayer B and is unloaded at Taxpayer B's service station. Since title to the gasoline is held at the time of importation by Taxpayer B who does not hold a valid gasoline distributor's license and since the gasoline is imported for the account of Taxpayer B, the gasoline is received by Taxpayer B at the time of unloading. (See [[45 IAC 12-2-9](#)(b)]). It should be noted that although Taxpayer B has incurred liability to the state of Indiana for the per gallon gasoline tax, Taxpayer B is not in compliance with [[45 IAC 12-4-1](#) and [45 IAC 12-4-2](#)] and therefore must notify and report to the state as required under [[IC § 6-6-1.1-504](#)] to avoid criminal sanctions.

Although Company A's fuel card was used to purchase the fuel from Company B, the fuel was deposited in Taxpayer's vehicle. Title passes instantaneously from Company A to Taxpayer, since Taxpayer had possession of the fuel. As in Example (5), Taxpayer has title when it imported the gasoline into Indiana, and therefore "the gasoline is received by Taxpayer B at the time of unloading."

IC § 6-6-1.1-504 provides that:

Every person other than a licensed distributor who purchases or otherwise acquires taxable gasoline and unknowingly fails to pay the gasoline tax to either a licensed Indiana distributor or Indiana dealer shall make the same reports and payment required of distributors under this chapter. However, the person is not entitled to any deductions or credits.

Accordingly, even though Taxpayer is an unlicensed Indiana gasoline distributor, Taxpayer would still be legally obligated under IC § 6-6-1.1-504 to remit gasoline tax on the purchase of gasoline to the Department. Taxpayer was the distributor who first received gasoline in the State of Indiana when the fuel was imported by Taxpayer and delivered to its fueling stations, and Taxpayer did not pay the tax to a licensed distributor prior to receiving the gasoline. IC § 6-6-1.1-103. Despite Taxpayer's protestations that there are no forms or means for Taxpayer to have remitted Indiana gasoline taxes to the Department, IC § 6-6-1.1-504 makes it clear that unlicensed distributor's are to "make the same reports and payment required of distributors under this chapter."

Taxpayer makes the argument that Company A should have collected Indiana tax at the time of sale in Ohio. However, Taxpayer has not pointed to any statute or court case to show that if title passes outside Indiana, then Company A, even as an Indiana licensed gasoline distributor, would be legally obligated under Indiana law to collect and remit gasoline tax on the sale of gasoline in Ohio. Instead, the statutes and regulations cited above clearly place the burden of remitting Indiana gasoline tax on Taxpayer. Taxpayer alternatively argues that Company A should have collected Ohio fuel taxes on the sale of gasoline in Ohio; however, Ohio has apparently decided not to pursue the collection of Ohio fuel taxes, and it is not the Department's responsibility to determine whether Ohio tax should or should not have been collected.

Taxpayer has not demonstrated that Taxpayer does not owe the Indiana gasoline tax that has been assessed. Therefore, Taxpayer failed to meet its burden of proof to establish that the findings of the audit were incorrect.

FINDING

Taxpayer's protest is respectfully denied.

II. Special Fuel Tax – Assessment.

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer also used Company A's fuel card to purchase diesel fuel at Company B's terminal. IC § 6-6-2.5-28(a) imposes an excise tax on the sale of special fuel. Special fuel basically refers to most combustible

fuel that is not considered gasoline, which includes diesel fuel. IC § 6-6-2.5-22. Pursuant to IC § 6-6-2.5-28(a):

A license tax of sixteen cents (\$0.16) per gallon is imposed on all special fuel sold or used in producing or generating power for propelling motor vehicles except fuel used under section 30(a)(8) or 30.5 of this chapter. The tax shall be paid at those times, in the manner, and by those persons specified in this section and section 35 of this chapter.

IC § 6-6-2.5-35 provides in subsection (a) that "[t]he tax on special fuel received by a **licensed supplier** in Indiana that is imposed by section 28 of this chapter shall be collected and remitted to the state by the supplier who **receives** taxable gallons in accordance with subsection (b)" (**Emphasis added**). Taxpayer does not have, or at the least did not have at the time of the purchases at issue, a special fuel supplier license for purposes of the Indiana special fuel tax.

IC § 6-6-2.5-23 defines "supplier" as:

[A] person that imports or acquires immediately upon import into Indiana special fuel by pipeline or marine vessel from within a state, territory, or possession of the United States into a terminal or that imports special fuel into Indiana from a foreign country, or that produces, manufactures, or refines special fuel within Indiana, or that owns special fuel in the pipeline and terminal distribution system in Indiana, and is subject to the general taxing or police jurisdiction of Indiana, and in any case is also registered under Section 4101 of the Internal Revenue Code for transactions in taxable motor fuels in the bulk distribution system. A terminal operator shall not be considered a supplier merely because the terminal operator handles special fuel consigned to it within a terminal.

IC § 6-6-2.5-16.1 defines "permissive supplier" as:

[A]ny person who does not meet the geographic jurisdictional connections to Indiana required of a supplier (as defined in section 23 of this chapter), but who holds an inventory position in a federally qualified terminal located outside of Indiana and who is registered under Section 4101 of the Internal Revenue Code.

As for the definition of "received," IC § 6-6-2.5-20 provides in pertinent part that "[a]s used in this chapter, 'received' means the removal from any refinery or terminal in Indiana, or the entry into Indiana of any special fuel for consumption, use, sale, or warehousing, except for transfers in bulk into or within a terminal in Indiana between registered suppliers."

IC § 6-6-2.5-13 defines "import" as:

(1) with respect to a seller, when special fuel is delivered into Indiana from out-of-state by or for the seller; and

(2) with respect to a purchaser, when special fuel is delivered into Indiana from out-of-state by or for the purchaser.

The latter definition of "importing" would apply to Taxpayer. IC § 6-6-2.5-28(d) provides that "[t]he tax imposed by [IC § 6-6-2.5-28(a)] on special fuel imported into Indiana, other than into a terminal, is imposed at the time the product is entered into Indiana and shall be measured by invoiced gallons received at a terminal or at a bulk plant." IC § 6-6-2.5-35 goes on to state in relevant part that:

(i) Except as provided in subsection (e), the tax imposed by section 28 of this chapter on special fuel imported from another state shall be paid by the licensed importer who has imported the nonexempt special fuel not later than three (3) business days after the earlier of:

(1) the time that the nonexempt special fuel entered into Indiana; or

(2) the time that a valid import verification number was assigned by the department under rules and procedures adopted by the department.

(j) The department, a licensed importer, the reseller to a licensed importer, and a licensed supplier or permissive supplier may jointly enter into an agreement for the licensed supplier or permissive supplier to precollect and remit the tax imposed by this chapter with respect to special fuel imported from a terminal outside of Indiana in the same manner and at the same time as the tax would arise and be paid under this chapter if the special fuel had been received by the licensed supplier or permissive supplier at a terminal in Indiana. If the supplier is also the importer, the agreement shall be entered into between the supplier and the department. However, any licensed supplier or permissive supplier may make an election with the department to treat all out-of-state terminal removals with an Indiana destination as shown on the terminal-issued shipping paper as if the removals were received by the supplier in Indiana pursuant to section 28 of this chapter and subsection (a), for all purposes. In this case, the election and notice of the election to a supplier's customers shall operate instead of a three (3) party precollection agreement. The department may impose requirements reasonably necessary for the enforcement of this subsection.

(k) Each licensed importer who is liable for the tax imposed by this chapter on nonexempt special fuel imported by a fuel transport truck having less than five thousand four hundred (5,400) gallons capacity, for which tax has not previously been paid to a supplier, shall remit the special fuel tax for the preceding month's import activities with the importer's monthly report of activities. A licensed importer shall be allowed to retain two-thirds (2/3) of the collection allowance provided for in section 37(a) of this chapter for the tax timely remitted by the importer directly to the state, subject to the same pass through provided for in section 37(a) of this chapter.

IC § 6-6-2.5-41(f) & (g) provide that:

(f) Each person who wishes to cause special fuel to be delivered into Indiana on the person's own behalf, for the person's own account, or for resale to an Indiana purchaser, from another state in a fuel transport vehicle having a capacity of more than five thousand four hundred (5,400) gallons, or in a pipeline or barge shipment into storage facilities other than a qualified terminal, shall first make an application for and obtain an importer's license. The fee for an importer's license is two hundred dollars (\$200). This subsection does not apply to a person who imports special fuel that is exempt because the special fuel has been dyed or marked, or both, in accordance with section 31 of this chapter. This subsection does not apply to a person who imports nonexempt special fuels meeting the following conditions:

- (1) The special fuel is subject to one (1) or more tax precollection agreements with suppliers as provided in section 35 of this chapter.
- (2) The special fuel tax precollection by the supplier is expressly evidenced on the terminal-issued shipping paper as specifically provided in section 62(e)(2) of this chapter.

(g) A person desiring to import special fuel to an Indiana destination who does not enter into an agreement to prepay Indiana special fuel tax to a supplier or permissive supplier under section 35 of this chapter on the imports must do the following:

- (1) Obtain a valid license under subsection (f).
- (2) Obtain an import verification number from the department not earlier than twenty-four (24) hours before entering the state with each import, if importing in a vehicle with a capacity of more than five thousand four hundred (5,400) gallons.
- (3) Display a proper import verification number on the shipping document, if importing in a vehicle with a capacity of more than five thousand four hundred (5,400) gallons.

IC § 6-6-2.5-62(d) states that:

No person shall engage in any business activity in Indiana as to which a license is required by section 41 of this chapter unless the person shall have first obtained the license. A person who knowingly violates or knowingly aids and abets another person in violating this subsection commits a Class D felony.

Since the diesel fuel was imported into Indiana by Taxpayer, the tax would have been imposed when the diesel fuel entered Indiana. IC § 6-6-2.5-28(d). Therefore, Taxpayer was required under IC § 6-6-2.5-41(f) & (g) to have obtained an Indiana importer's license and remit special fuel tax when the diesel fuel was imported into Indiana.

Taxpayer has not demonstrated that Taxpayer does not owe the Indiana special fuel tax that has been assessed. Therefore, Taxpayer failed to meet its burden of proof to establish that the findings of the audit were incorrect.

FINDING

Taxpayer's protest is respectfully denied.

III. Oil Inspection Fees – Assessment.

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer also has also been assessed unpaid oil inspection fees on the gasoline and special fuel that Taxpayer imported into Indiana during the period at issue. IC § 16-44-2-4 provides:

(a) The state department [of health] or any authorized agent of the state department [of health] may inspect samples of gasoline or kerosene stored in any tank:

- (1) that is adjacent to a refinery or marine or pipeline terminal in Indiana; and
- (2) from which withdrawals are made for sale or use in Indiana or for transportation to destinations in Indiana other than transportation to other refineries or terminals in Indiana.

(b) Gasoline or kerosene inspected under subsection (a) is subject to the inspection fee specified in section 18 of this chapter whenever the stock in the tank is replenished.

IC § 16-44-2-5 provides:

(a) The state department [of health] or any authorized agent of the state department [of health] may inspect samples of gasoline or kerosene imported into Indiana other than that placed in storage at refineries or marine or pipeline terminals in Indiana.

(b) Gasoline or kerosene inspected under subsection (a) is subject to the inspection fee specified in section 18 of this chapter.

(c) A person who receives gasoline or kerosene:

- (1) that is imported into Indiana (other than that placed in storage at refineries or marine or pipeline terminals in Indiana); and
- (2) on which the inspection fee has not been paid;

shall notify the state department of the receipt of the gasoline or kerosene.

The oil inspection fee on gasoline is found at IC § 16-44-2-18, which provides in relevant part:

(a) Except as provided in subsection (b), fees for the inspection of gasoline or kerosene shall be at the rate of

fifty cents (\$0.50) per barrel (fifty (50) gallons) on all gasoline or kerosene received in Indiana less deductions provided in this section.

(b) A fee for inspection of gasoline or kerosene may not be charged for the following:

- (1) On transport or tank car shipments direct to the federal government.
- (2) On gasoline or kerosene received and subsequently exported from Indiana or returned to refineries or marine or pipeline terminals in Indiana.

(c) Fees shall be paid to the state department by the person receiving gasoline or kerosene in Indiana at the time gasoline or kerosene products are received, unless the person receiving the gasoline or kerosene is licensed as a distributor under the gasoline tax law ([IC 6-6-1.1](#)). In that case, the person in receipt of the gasoline or kerosene shall do the following:

- (1) Include in the person's monthly gasoline tax report a statement of all gasoline and kerosene received during the preceding calendar month on which inspection fees are due.
- (2) Remit the amount of the inspection fees at the same time the monthly motor fuel tax report is due.

(d) A refiner or other person supplying gasoline or kerosene to the first receiver in Indiana may elect to pay the fees monthly on all gasoline or kerosene supplied to persons in Indiana not licensed as distributors under the gasoline tax law ([IC 6-6-1.1](#)). If the supplier is not licensed as a distributor under the gasoline tax law of Indiana ([IC 6-6-1.1](#)), the supplier shall, as a condition precedent to such election, file with the state department a corporate surety bond that meets the following conditions:

- (1) Is in the form and amount that the state department determines, not to exceed two thousand dollars (\$2,000).
- (2) Is conditioned that the supplier does the following:
 - (A) Reports all gasoline and kerosene supplied by the supplier to persons in Indiana not licensed as distributors under the gasoline tax law ([IC 6-6-1.1](#)).
 - (B) Pays inspection fees monthly on or before the twenty-fifth day of each calendar month for the preceding calendar month.

(e) A person taking credit for gasoline or kerosene exported or returned to a refinery or terminal shall substantiate that credit in the manner that the state department reasonably requires by rule.

(f) A distributor who fails to file a monthly report and pay the tax due as required by this chapter is subject to a penalty of five percent (5 [percent]) of the amount of unpaid tax due and interest on the unpaid tax and penalty at the rate of eight percent (8 [percent]) annually. However, if a delay not exceeding ten (10) days is due to a mistake, an accident, or an oversight without intent to avoid payment, the administrator may waive the penalty and interest.

The oil inspection fee on special fuel is found at IC § 16-44-2-18.5, which provides in relevant part:

(a) As used in this section, "special fuel" has the meaning set forth in [IC 6-6-2.5-22](#), except that the term does not include kerosene.

(b) Except as provided in subsection (c), fees for the inspection of special fuel shall be at the rate of fifty cents (\$0.50) per barrel (fifty (50) gallons) on all special fuel sold or used in producing or generating power for propelling motor vehicles in Indiana less deductions provided in this section.

(c) A fee for the inspection of special fuel may not be charged with respect to special fuel that is exempt from the special fuel tax under [IC 6-6-2.5-30](#).

(d) The fee imposed by this chapter on special fuel sold or used in producing or generating power for propelling motor vehicles in Indiana shall be collected and remitted to the state at the same time, by the same person, and in accordance with the same requirements for collection and remittance of the special fuels tax under [IC 6-6-2.5-35](#).

Pursuant to IC § 16-44-2-18(c), Taxpayer owed oil inspection fees on gasoline to the Indiana State Department of Health at the time they were received in Indiana, since Taxpayer was the unlicensed person receiving the gasoline when it entered the state of Indiana, as discussed in Issue I. Similarly, pursuant to IC § 16-44-2-18.5(d), Taxpayer owed oil inspection fees on special fuel to the Indiana State Department of Health at the time they were received in Indiana, since Taxpayer was the unlicensed person receiving the gasoline when it entered the state of Indiana, as discussed in Issue II.

Taxpayer has not demonstrated that Taxpayer does not owe the Indiana oil inspection fees that have been assessed. Therefore, Taxpayer failed to meet its burden of proof to establish that the findings of the audit were incorrect.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest of the gasoline tax liabilities is respectfully denied. Taxpayer's protest of the special fuel tax liabilities is respectfully denied. Taxpayer's protest of the oil inspection fees is respectfully denied.

Posted: 08/29/2012 by Legislative Services Agency

