

Letter of Findings: 04-20130049
Gross Retail Tax
For the Years 2009 and 2010

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ISSUE

I. Public Transportation Exemption – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-2.5-5-27; IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629 (Ind. Tax Ct. 1999); Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282 (Ind. Tax Ct. 1999); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991) Indiana Dept. of State Rev. v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Fell v. West, 73 N.E. 719 (Ind. App. 1905); Sales Tax Information Bulletin 12 (July 2010).

Taxpayer argues that it is not required to pay sales tax on certain transactions because Taxpayer is entitled to claim the "public transportation" exemption.

STATEMENT OF FACTS

Taxpayer is the marketing and sales company for a Related Trucking Company. Taxpayer acts as the broker for the Related Trucking Company.

The Department of Revenue ("Department") conducted an audit of Taxpayer's business records. The audit resulted in the assessment of additional sales/use tax. Taxpayer disagreed with that assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Public Transportation Exemption – Gross Retail Tax.

DISCUSSION

The Department's audit found that Taxpayer purchased certain items of tangible personal property without paying sales tax. The audit found that Taxpayer was a "marketing company" and that it did "not carry or transport persons and/or property for hire." The audit further found that although Taxpayer's Related Trucking Company did "qualify as a public transportation company, [Taxpayer] does not" because Taxpayer and Related Trucking Company were two separate business entities.

The audit concluded that Taxpayer "is not predominately engaged in providing public transportation [and] it would not be afforded the exemptions provided to companies that are engaged in public transportation."

Taxpayer disagrees on two grounds. First, Taxpayer argues that it meets the qualifications necessary to qualify as a public transportation entity. For example, Taxpayer points out that it is registered with the Department of Transportation, that it provides delivery services in conjunction with its Related Trucking Company, that it files a consolidated Indiana corporate tax return with its Related Trucking Company, that it should be treated as a "unitary group" with its Related Trucking Company, that it performs "the 'common' definition of transportation," and that it performs the important function of obtaining customers for its Related Trucking Company.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary 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. IC § 6-2.5-3-2.

IC § 6-2.5-5-27 provides a "valid exemption" from the sales tax as follows:

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.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "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." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). The presumption in Indiana is that all retail sales are subject to sales tax unless expressly exempted by statute. IC § 6-2.5-2-1 ("An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana . . . except as otherwise provided in this chapter . . .").

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dept. of State Rev. v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). A statute which provides a tax exemption . . . is strictly construed against the taxpayer. *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here . . . an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101.

IC § 6-2.5-5-27 like all such tax exemption provisions, is strictly construed against exemption from the tax. *Tri-States Double Cola Bottling Co. v. Dep't of State Revenue*, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999). Nevertheless, the Department is well aware of the countervailing rule that a "statute must not be construed so narrowly that it does not give effect to legislative intent because the intent of the legislature embodied in a statute constitutes the law." *General Motors Corp. v. Indiana Dept. of State Revenue*, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991).

Taxpayer states that it has established a combined integrated relationship with its Related Trucking Company and that Taxpayer and its related entity are entitled to claim the public transportation exemption permitted under IC § 6-2.5-5-27 because the two entities are collectively in the business of providing public transportation.

The Department must respectfully disagree. Taxpayer's parent company chose to separate its logistics and transportation functions into two, separate and distinct entities presumably for sound business reasons which provide both entities certain business advantages. However, as pointed out in *Sales Tax Information Bulletin 12* (July 2010), 20100623 Ind. Reg. 045100390NRA, there are certain factors which are used to determine whether or not any specific entity is entitled to claim the exemption and that one of the "critical requirements" is that "[t]he transportation company must transport the persons or property of another." Taxpayer does not meet this particular requirement and although Taxpayer's function may be integral to the provision of the Related Trucking Company's business, Taxpayer itself is not entitled to claim the exemption.

Taxpayer makes a second, more specific requirement. If Taxpayer is not entitled to the exemption because it does not transport persons or property, certain specific sales transactions are exempt because Taxpayer acts as a pass-through purchasing entity on behalf of its Related Trucking Company.

Taxpayer points out that it purchases goods and supplies which are intended to be used by the Related Trucking Company. Taxpayer purchases the goods and supplies, pays for the goods and supplies, and then passes along to those costs to its Related Trucking Company which consumes the goods and supplies in providing public transportation services. As a consequence, Taxpayer believes it is entitled to a "pass-through" exemption originating from its Related Trucking Company.

Again, the Department must disagree. As noted above, IC § 6-2.5-2-1, imposes the tax on retail transactions made in Indiana unless an exemption is applicable. In other words, the tax is imposed on the retail transactions and not on the tangible personal property which is the subject of the transactions. In this case, the transactions consist of agreements or exchanges between Taxpayer and its vendors and not between the vendors and the Related Trucking Company. Taxpayer asks for an expansive view of both the statute imposing the tax and on the exemption statute which allows for an exception from the imposition. Taxpayer asks too much. Indiana law has long held that, "The statutes of this state relating to the assessment and collection of taxes are liberally construed in favor of the taxing powers. *Fell v. West*, 73 N.E. 719, 722 (Ind. App. 1905)" and that – as noted above – "tax exemptions are strictly construed in favor of taxation and against the exemption." *Kimball Int'l Inc.*, 520 N.E.2d 456. Taxpayer's argument meets neither test and Taxpayer has not met the statutory burden of establishing that the assessment is "wrong." IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

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