**DEPARTMENT OF STATE REVENUE**

04-20130671.SLOF

**Supplemental Letter of Findings Number: 04-20130671**
**Use Tax**
**For Tax Years 2010, 2011, and 2012**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded by the publication of another document in the Indiana Register.

**ISSUES**

**I. Use Tax - Subdivision Development.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-6(b); IC § 6-2.5-5-1 et seq.; IC § 6-2.5-5-7; IC § 6-8.1-5-1(c); Department of Revenue v. Kimball International, Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Indiana Dept. of State Revenue v. Cave Stone, Inc., 457 N.E.2d 520 (Ind. 1983); Indiana Dept. of State Revenue v. AOL, 963 N.E.2d 498 (Ind. 2012); Rhoade v. Indiana Dept. of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); 45 IAC 2.2-2-1; 45 IAC 2.2-3-4.

Taxpayer protests the imposition of additional use tax on certain purchases, claiming that they were exempt purchases of materials used in construction for a subdivision development.

**II. Use Tax - Fuel Purchases.**

**Authority:** IC § 6-8.1-5-1; IC § 6-8.1-5-4(a).

Taxpayer protests the imposition of additional use tax on purchases of fuel because it believes that its source documentation of purchases of fuel is sufficient to determine its tax liability. Taxpayer protests the tax rate used to calculate additional tax due on purchases of fuel and points out that an invoice was duplicated in the audit calculations of additional tax due.

**STATEMENT OF FACTS**

Taxpayer is an Indiana S corporation doing business as a contractor. Taxpayer performs lump-sum jobs. The Indiana Department of Revenue ("Department") conducted an audit and proposed assessments of additional use tax, penalty, and interest. Taxpayer protested the proposed assessments of additional use tax. An administrative hearing was held, and Letter of Findings 04-20130671 (July 28, 2014) sustained Taxpayer's protest in part and denied its protest in part. Taxpayer timely requested a rehearing, providing additional documentation. The Department granted its request and held a rehearing. This Supplemental Letter of Findings results.

**I. Use Tax - Subdivision Development.**

**DISCUSSION**

On rehearing, Taxpayer protests the Departments denial of its protest regarding the imposition of additional use tax on purchases of construction material because it was purchased for use in subdivision development. During the protest process, Taxpayer provided a copy of the audit report highlighting the specific purchases it claims are exempt ("Materials"). During the rehearing process, Taxpayer provided copies of its contracts with one general contractor and one developer, its invoices to the general contractor and developer, and the owner's certifications of donated water lines.

All tax assessments are prima facie evidence that the Department's claim for the tax is valid, and the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c). The issue before the Department is whether Taxpayer met its burden to prove the proposed assessment is incorrect.

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a); 45 IAC 2.2-2-1. Indiana imposes a complementary use tax on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction" regardless of the merchant's or transaction's location. IC § 6-2.5-3-2(a); 45 IAC 2.2-3-4. The use tax is "functionally equivalent to [the] sales tax." Rhoade v. Indiana Dept. of

State Revenue, 774 N.E.2d 1044, 1047-48 (Ind. Tax Ct. 2002). "Indeed, the purpose of the use tax is merely to prevent evasion of the sales tax." Indiana Dept. of State Revenue v. AOL, 963 N.E.2d 498, 501 (Ind. 2012). The person who uses, stores, or consumes property acquired in a retail transaction in Indiana is responsible for payment of use tax on the transaction. IC § 6-2.5-3-6(b).

Taxpayer concedes that the use tax applies to the purchases of the Materials; however, Taxpayer argues that these purchases are exempt because the Materials were used in construction of a subdivision development.

Retail transactions ordinarily subject to use tax will be exempt if sales tax was paid at the point of purchase. IC § 6-2.5-3-4; 45 IAC 2.2-3-4. The legislature also provided specific exemptions from sales or use tax. IC § 6-2.5-5-1 et seq. Exemption statutes are strictly construed in favor of taxation. Indiana Dept. of State Revenue v. Cave Stone, Inc., 457 N.E.2d 520, 524 (Ind. 1983). Whether a taxpayer qualifies for an exemption from tax is "highly fact sensitive," and it is the taxpayer's burden to prove the exemption criteria has been met. Department of Revenue v. Kimball International, Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

The subdivision exemption is found at IC § 6-2.5-5-7, which states:

> Transactions involving tangible personal property are exempt from the state gross retail tax if:
> (1) the person acquiring the property is in the construction business;
> (2) the person acquiring the property acquires it for incorporation as a material or integral part of a public street or of a public water, sewage, or other utility service;
> (3) the public street or public utility service into which the property is to be incorporated is required under a subdivision plat, approved and accepted by the appropriate Indiana political subdivision; and
> (4) the public street or public utility is to be publicly maintained after its completion.

Taxpayer is in the construction business, so Taxpayer would need to establish the other three elements. Namely, it would need to show that it acquired the Materials "for incorporation as a material or integral part of a public street or of a public water, sewage, or other utility service." Additionally, it would need to show that the public street or public utility service into which the Materials are incorporated is required under an approved subdivision plat. Finally, Taxpayer would need to show that the public street or public utility service is "to be publicly maintained after its completion."

During the protest process, Taxpayer provided copies of two subdivision maps and copies of its vendors' invoices showing the purchases of the Materials. Upon rehearing, Taxpayer provided copies of its contracts with one general contractor and one developer, its invoices to the general contractor and developer, and the owner's certifications of donated water lines. The contracts indicates that Taxpayer was a subcontractor contracted to provide "Earthwork/Site Utilities" for one subdivision and "Site Grading, Sanitary Sewer System, Water Distribution System, and Storm Drainage System" work for a second subdivision approved by the same city. The subdivision maps indicate where these utility systems run in the subdivisions. The owner's certifications of donated water lines indicate the city's acceptance of the transfer of ownership of the water lines placed in the subdivisions.

Taxpayer has demonstrated that the purchases of the Materials met the requirements of IC § 6-2.5-5-7 and are exempt from use tax, and Taxpayer's protest is sustained.

**FINDING**

Taxpayer's protest is sustained.

**II. Use Tax - Fuel Purchases.**

**DISCUSSION**

On rehearing, Taxpayer protests the Department's denial of its protest regarding the imposition of additional use tax on purchases of fuel, and it disputes the sales tax rate used to calculate the additional tax due on the purchases of fuel. During the rehearing process, Taxpayer provided copies of its contracts with one general contractor and one developer and its invoices to the general contractor and developer of the subdivisions. It also provided a copy of a receipt for the purchase of fuel for the proposition that the sales tax rate used on the receipt is the proper sales tax rate on purchases of fuel.

All tax assessments are prima facie evidence that the Department's claim for the tax is valid, and the taxpayer

bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c). The issue before the Department is whether Taxpayer met its burden to prove the proposed assessment is incorrect.

**A. Additional Use Tax on Purchases of Fuel**

Taxpayer protests the imposition of additional use tax on purchases of fuel. "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). Such records include "all source documents necessary to determine the tax . . . ." Id. If the Department cannot determine a taxpayer's liability and the Department reasonably believes that the taxpayer has not reported the proper amount of tax due, the Department will propose an assessment of unpaid tax based on the best information available to the Department. IC § 6-8.1-5-1(b).

The audit report noted that Taxpayer's gross receipts for the audit years increased by 10 to 11 percent per year, but its purchases of fuel did not match that trend. The report states that "[w]ith the increase of gross receipts one would expect the fuel [purchases] to increase as well . . ." because of Taxpayer's line of work. Because of this, it appeared that not all of the 2012 fuel purchase invoices were provided during the audit. The Department made an adjustment to estimate additional fuel purchases in only that year. This adjustment was made tracking the percentage increase in Taxpayer's gross receipts.

Taxpayer argues that it provided all of the 2012 fuel purchase invoices during the audit. Additionally, it states that the increased fuel usage for 2010 and 2011 resulted from "excessive grading in the subdivisions [using] a D7 dozer and 627 scraper . . . ." Taxpayer states that it "did not use the D7 dozer and 627 scraper in any subdivisions in 2012."

Upon rehearing, Taxpayer provided copies of two contracts with the subdivision developers/general contractors; one was signed in May 2011 and the other in December 2011. Upon review, the contract signed in December 2011 was for "Site Grading, Sanitary Sewer System, Water Distribution System, and Storm Drainage System" work for the development of one of the subdivisions. Taxpayer also reiterated that it developed a subdivision in each of 2010 and 2011 using the D7 dozer and 627 scraper and did not use these two pieces of machinery in 2012.

However, Taxpayer did not provide documentation to show what jobs were done in 2010 and 2011 which required the use of a D7 dozer and 627 scraper compared with the jobs done in 2012 which did not. Taxpayer also did not provide documentation showing that its gross receipts increased even though its fuel usage decreased by identifying jobs which resulted in higher gross receipts in 2012 than in 2010 and 2011 but did not require the use of the D7 dozer and 627 scraper. Additionally, no documentation was provided confirming the fuel usage of the D7 dozer and 627 scraper to show that their use was causing the disparity in fuel usage.

Taxpayer did not meet its burden to prove the proposed assessment is incorrect, and Taxpayer's protest on this issue is respectfully denied.

**B. Tax Rate on Fuel**

Taxpayer protests the tax rate used to calculate the additional tax imposed on purchases of fuel. Upon rehearing, Taxpayer provided a copy of a receipt for the purchase of fuel for the proposition that the sales tax rate used on the receipt is the proper sales tax rate on purchases of fuel. However, Taxpayer has not pointed to any statute, regulation, or case law to support the assertion that the sales tax rate used in the audit is incorrect. Taxpayer's protest on this issue is respectfully denied.

**FINDING**

Taxpayer's protest on the issue of the proposed assessment of additional use tax on fuel purchases and the issue of the tax rate used to calculate additional tax on fuel purchases are respectfully denied.

**SUMMARY**

Taxpayer's protest on Issue One regarding whether its purchases of Materials were exempt is sustained. Taxpayer's protest on Issue Two regarding the proposed assessment of additional use tax on fuel purchases and the tax rate used to calculate additional tax on fuel purchases are respectfully denied.

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