DEPARTMENT OF STATE REVENUE

04-20140038.SLOF

Supplemental Letter of Findings Number: 04-20140038
Use Tax
For Tax Years 2010-12

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 This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Supplemental Letter of Findings.

HOLDING

Agricultural lime seller/spreader was eligible for neither the agricultural exemption nor the public transportation exemption. Therefore use tax was properly imposed.

ISSUES

I. Use Tax–Agricultural Exemption.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-2; IC § 6-8.1-5-1; 45 IAC 2.2-3-4; 45 IAC 2.2-5-4; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Ind. Dept. of State Revenue v. Cave Stone, Inc. 457 N.E.2d 520 (Ind. 1983); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Graham Creek Farms v. Ind. Dept. of State Revenue 819 N.E.2d 151 (Ind. Tax Ct. 2004); Sales Tax Information Bulletin 9 (July 2012).

Taxpayer claims eligibility for the agricultural exemption.

II. Use Tax–Public Transportation Exemption.

Authority: IC § 6-2.5-3-2; IC § 6-2.5-5-27; IC § 6-8.1-5-1; 45 IAC 2.2-3-4 ; 45 IAC 2.2-5-61; 45 IAC 2.2-5-62; Ind. Dept. of State Revenue, Gross Income Tax Division v. Klink, 112 N.E.2d 581 (Ind. 1953); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Wendt, LLP v. Ind. Dept. of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Howland v. Ind. Dept. of State Revenue, 790 N.E.2d 627 (Ind. Tax Ct. 2003).

Taxpayer claims eligibility for the public transportation exemption.

STATEMENT OF FACTS

Taxpayer sells and spreads agricultural lime ("lime") on farmers' fields. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid sales tax on certain taxable purchases. Specifically, the Department determined that the purchase of two payloaders and the fuel used to operate them, along with the fuel used to operate trucks hauling the lime to the fields, were subject to sales and use taxes. The Department therefore issued proposed assessments for use tax and interest. Taxpayer protested the proposed assessments, claiming that it qualified for two exemptions from sales and use taxes. An administrative hearing was held and a Letter of Findings was issued denying Taxpayer's protest. Taxpayer requested and was granted a rehearing to clarify the facts and analysis of its protest and this Supplemental Letter of Findings results. Further facts will be supplied as required.

I. Use Tax–Agricultural Exemption.

DISCUSSION

Taxpayer protests that it was eligible for the agricultural exemption on certain purchases it made during the tax years 2010, 2011, and 2012. Taxpayer states that two payloaders purchased during the audit period, diesel fuel used in those payloaders, and diesel fuel used in Taxpayer's trucks to haul the lime to the fields were used in

agricultural production and were therefore eligible for the agricultural exemption from sales and use taxes. Taxpayer explains that farmers contacted it to purchase agricultural lime ("lime") and to have the lime spread on their fields. In its audit report, the Department considered that Taxpayer did not qualify for the agricultural exemption since Taxpayer did not own the land upon which the payloaders were used. Taxpayer protests that its use of the payloaders did qualify for the agricultural exemption and therefore there should be no sales or use tax imposed on its purchases of the two payloaders. Taxpayer states that the two payloaders and fuel were used in the direct production of agricultural commodities, which it believes qualify for the agricultural exemption.

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). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . .[courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Sales tax is imposed by 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.

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

> An 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, regardless of the location of that transaction or of the retail merchant making that transaction.

45 IAC 2.2-3-4 further explains:

> Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when sales tax is not paid at the time TPP is purchased, use tax will be imposed unless there is an applicable exemption.

In the instant case, Taxpayer purchased two payloaders and fuel to operate them plus fuel to operate Taxpayer's trucks which hauled the lime to the fields during the tax years at issue. Taxpayer believes that its purchases of the payloaders and the fuel were exempt under the agricultural exemption provided by IC § 6-2.5-5-2, which states:

> (a) Transactions involving agricultural machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for his direct use in the direct production, extraction, harvesting, or processing of agricultural commodities.
> (b) Transactions involving agricultural machinery or equipment are exempt from the state gross retail tax if:
> (1) the person acquiring the property acquires it for use in conjunction with the production of food and food ingredients or commodities for sale;
> (2) the person acquiring the property is occupationally engaged in the production of food or commodities which he sells for human or animal consumption or uses for further food and food ingredients or commodity production; and
> (3) the machinery or equipment is designed for use in gathering, moving, or spreading animal waste.
>
> (Emphasis added).

Also of relevance is 45 IAC 2.2-5-4(e), which states in relevant part:

> The fact that an item is purchased for use on the farm does not necessarily make it exempt from sale [sic.] tax. It must be directly used by the farmer in the direct production of agricultural products. The property in question must have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces agricultural products. The fact that a piece of equipment is convenient, necessary, or essential to farming is insufficient in itself to determine if it is used directly in direct production as required to be exempt.

(Emphasis added).

Therefore, in order for a person to acquire agricultural machinery, tools, or equipment exempt from sales and use taxes, the person must acquire the agricultural machinery, tools, or equipment for his direct use in the direct production of food and food ingredients or commodities which he sells, as provided by IC § 6-2.5-5-2(b). Also, the person who acquires agricultural machinery must be the farmer who is raising the agricultural products, as provided by 45 IAC 2.2-5-4(e).

Taxpayer refers to Sales Tax Information Bulletin 9 (July 2012) 20120725 Ind. Reg. 045120427NRA, which states that agricultural equipment is exempt from sales tax if it is used to move exempt items such as seeds, plants, fertilizers, insecticides, and fungicides from temporary storage to a location where such will be used in an exempt process. Id. at I(B)(3). Also, Taxpayer refers to Sales Tax Information Bulletin 9 "Example 8" found on page six of that bulletin. That example also explains the exempt nature of equipment used in the moving of exempt items from temporary storage.

The Department notes that the payloaders at issue in this protest did not move the lime from temporary storage. Rather, Taxpayer would receive orders from farmers, then either pick up the lime from quarries or other suppliers or withdraw the required amount of lime from its stockpiles, transport the lime on trucks it owned, dump the lime on the ground upon arrival at the farmer's field(s), use the payloader(s) to load the lime from the ground into the spreader(s), and then use the spreaders to distribute the lime onto the farmer's field in a pre-arranged pattern. In other words, the payloaders only lifted the lime from the ground on a given field and then dumped the lime into the spreaders. There was no moving from temporary storage because Taxpayer was not storing the lime in the farmers' fields. Therefore, Taxpayer's reference to Sales Tax Information Bulletin 9, I(B)(3) and Example 8 on page six of the bulletin is misplaced.

Next, Taxpayer refers to Sales Tax Information Bulletin 9 "Example 5" found on page five of that bulletin. That example provides:

> Corporation C is engaged in the business of selling agricultural chemicals and fertilizers to farmers. Corporation C purchases an applicator that will be used to spread the chemicals and fertilizer on its customers' fields. The purchase of the applicator is exempt from tax because the application of fertilizers and agricultural chemicals is necessary and plays a key role in the raising of crops.

Taxpayer believes that this example is directly on point with its situation and that the payloaders are clearly exempt as provided in Example 5 above.

The Department disagrees with this analysis. The piece of equipment discussed in Example 5 of Sales Tax Information Bulletin 9 is an applicator, not a payloader as is at issue in the instant protest. Taxpayer's payloaders picked up lime from piles on the ground and loaded the lime into its spreaders. If any equipment used in Taxpayer's spreading operations was analogous to the applicators discussed in Example 5 of Sales Tax Information Bulletin 9 (2012) it would be Taxpayer's lime spreaders and not the payloaders. Therefore, Example 5 does not apply to Taxpayer's situation on its face. Taxpayer's reliance on Example 5 is misplaced.

Further, the Department takes this opportunity to state that Example 5 found on page five of Sales Tax Information Bulletin 9 (2012) 20120725 Ind. Reg. 045120427NRA is incorrect. "Corporation C" in Example 5 would not be eligible for the exemption provided by IC § 6-2.5-5-2 because "Corporation C" is not the person selling the agricultural commodities, as required by IC § 6-2.5-5-2(b)(2). Therefore, as of the publication date of this Supplemental Letter of Findings in the Indiana Register, Example 5 found on page five of Sales Tax Information Bulletin 9 (2012) 20120725 Ind. Reg. 045120427NRA will not be considered a valid source of information from the Indiana Department of Revenue.

Finally, Taxpayer refers to two Indiana court cases in support of its position that the payloaders and related fuel were eligible for the agricultural exemption. The first is Graham Creek Farms v. Ind. Dept. of State Revenue 819 N.E.2d 151 (Ind. Tax Ct. 2004). That case dealt with the agricultural exemption and various items which Graham Creek Farms believed were eligible for the exemption. In the instant case, Taxpayer points out that the court in

Graham ruled that equipment used in moving property from temporary storage to the point where it was directly used in the direct production of agricultural commodities was eligible for the agricultural exemption. Id, at 163-64. Taxpayer believes that this ruling means that the payloaders at issue in the instant protest were also eligible for the agricultural exemption.

The Department does not agree with this conclusion. The taxpayer in Graham Creek Farms was the entity raising crops and turkeys it sold. As previously pointed out, Taxpayer in the instant protest was neither the owner of the fields nor the seller of the crops being produced thereon. Therefore, Taxpayer was not selling the crops being produced and so was not eligible for the exemption as explained by IC § 6-2.5-5-2(b). Taxpayer's reference to Graham Creek Farms is misplaced.

The other case to which Taxpayer refers is Ind. Dept. of State Revenue v. Cave Stone, Inc. 457 N.E.2d 520 (Ind. 1983). In that case, the court explained that equipment used in an integrated production process is eligible for the exemption. Id. at 524-25. Taxpayer believes that this means that its payloaders and the fuel used to operate them were exempt since they were part of an integrated agricultural process. Again, the Department does not agree that Taxpayer is eligible for the agricultural exemption at all since it was not the owner of the fields or crops to which it applied the lime. Ownership of the agricultural commodities being produced for sale by the owner is a requirement for qualification for the exemption provided by IC § 6-2.5-5-2. The Department is not convinced that Taxpayer's reference to Cave Stone is relevant to the protest.

In conclusion, the Department does not agree that the payloaders, the fuel used to operate them, and the diesel fuel used to power the trucks that brought the lime to the farm fields qualified for the agricultural exemption. IC § 6-2.5-5-2(b)(2) directly requires that the person claiming the exemption be the person who is producing agricultural commodities which they will then sell. In this case, Taxpayer was not producing agricultural commodities which it sold. Taxpayer was only providing a service to those who were producing agricultural commodities which those producers will sell. Taxpayer's references to Sales Tax Information Bulletin 9 are not relevant. The payloaders were not moving the lime from temporary storage as described in Example 8 on page six of the bulletin. The loaders were not directly spreading the lime, as described in Example 5 on page five of the bulletin. Additionally, Example 5 on page five of Sales Tax Information Bulletin 9 (2012) 20120725 Ind. Reg. 045120427NRA is incorrect in its description of the applicability of the agricultural exemption found under IC § 6-2.5-5-2 and is not a reliable source of information regarding the agricultural exemption. Taxpayer's references to the court cases Carnahan Grain and Cave Stone are not relevant, since Taxpayer was not the entity which raised agricultural commodities which it then sold, as required by IC § 6-2.5-5-2(b). Taxpayer has not met the burden of proving the proposed assessment wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

II. Use Tax–Public Transportation Exemption.

DISCUSSION

Taxpayer protests that the payloaders in question and the fuel used to operate them were eligible for the public transportation exemption. The Department based its determination that the payloaders, their fuel, and the fuel used to truck the lime to the fields were subject to sales and use taxes on the basis that Taxpayer's activities regarding its sale and spreading of agricultural lime were not in the course of providing public transportation. The Department determined that, while Taxpayer sometimes used its trucks and the fuel they consumed to move its own property, the payloaders, their fuel, and the fuel used to truck the lime to the fields were used exclusively to transport Taxpayer's own property and therefore were not eligible for the public transportation exemption at all. Taxpayer states that the portion of fuel which the Department determined was not used in public transportation it was transporting agricultural lime ("lime") which was the TPP of others for pay and that the payloaders were part of an overall public transportation process. Therefore, Taxpayer believes that the payloaders and their fuel did qualify for the public transportation exemption and that use tax should not be imposed.

As explained above in Issue I, 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). Consequently, a taxpayer is required to provide

documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . .[courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Also as explained in Issue I above, IC § 6-2.5-3-2(a) and 45 IAC 2.2-3-4 provide that use tax will be due when sales tax is not paid at the time TPP is purchased, unless there is an applicable exemption. The public transportation exemption is found at IC § 6-2.5-5-27(a), which states:

> Except as provided in subsection (b), 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.

The exemption is further explained by 45 IAC 2.2-5-61, which states in part:

> (a) The state gross retail tax shall not apply to the sale and storage or use in this state of tangible personal property which is directly used in the rendering of public transportation of persons or property.
> (b) Definition: Public Transportation. Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, the Interstate Commerce Commission, the aeronautics commission of Indiana, the U.S. Civil Aeronautics Board, the U.S. Department of Transportation, or the Federal Maritime Commissioner; however, the fact that a company possesses a permit or authority issued by the P.S.C.I., I.C.C., etc., does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.
> (c) In order to qualify for exemption, the tangible personal property must be reasonably necessary to the rendering of public transportation. The tangible personal property must be indispensable and essential in directly transporting persons or property.
> . . .
> (f) Pre- and post-transportation activity. The purchase, storage, or use of tangible personal property used for activities prior to or subsequent to the rendition of public transportation is subject to tax. For purposes of this regulation [45 IAC 2.2], transportation means the movement, transporting, or carrying of persons or property from one place to another and includes loading and unloading of persons or property into or from transportation vehicles.
> . . .
> (j) Other property. In general, all other tangible personal property is taxable.
> --EXAMPLES--
> (1) A carrier owns or rents a fork lift to be used for loading and unloading cargo from a railroad car, truck, trailer, or container. The purchase price or rental charge for use of this equipment is exempt from tax.
> . . . .
> (Emphasis added).

Also, Taxpayer refers to 45 IAC 2.2-5-62(g), which provides:

> The purchase, storage, or use of tangible personal property consumed during activities prior to or subsequent to the rendition of public transportation is subject to tax. For purposes of this regulation [45 IAC 2.2], transportation means the movement, transporting, or carrying of persons or property from one place to another and includes loading and unloading of persons or property into or from transportation vehicles.

(Emphasis added).

Therefore, the property in question must be used predominantly for transporting the property of another for consideration in order to qualify for the public transportation exemption.

Taxpayer believes that the loading of the lime by the payloaders into the spreaders constituted use in public transportation. Specifically, Taxpayer states that it sold the lime in question to its customers when they placed their orders and that title to the lime transferred to its customers at that time. Therefore, Taxpayer asserts, all remaining activity leading up to the spreading of the lime on the farmers' fields constituted public transportation under 45 IAC 2.2-5-61(j)(1) and 45 IAC 2.2-5-62(g) and all equipment and fuel used in that process was eligible

for the public transportation exemption.

In support of its position, Taxpayer also refers to two court cases. First, Taxpayer refers to Ind. Dept. of State Revenue, Gross Income Tax Division v. Klink, 112 N.E.2d 581 (Ind. 1953). In that case, the Taxpayer was disputing the Department's determination that it should pay the high rate of gross income tax on income from spreading lime on farmers' fields rather than the low rate. Taxpayer in the instant case points to the court's description of the 1950's standard industry-wide process of selling and spreading the chemical in a single process. Specifically, the court provided:

> The use of soil lime to correct farm soil acidity has become essential to successful farming in a major part of the agricultural area of Indiana, and many other states. The inventive genius of our people has produced a simple method whereby the sellers of soil lime at wholesale can deliver it, spread upon the fields which are to be treated, without additional expense to the buyer. That was the nature of the transactions involved in this case. The lime so spread upon the fields becomes a part thereof and by its corrective influence upon the soil greatly increases its productivity for a period of from six to ten years thereafter. Upon use and application it is immediately expended in the production of farm crops which in Indiana are converted into bread and meat for our people and for export.

Id. at 582-83. (Emphasis added).

Taxpayer states that the same process is still standard and that this establishes that it was transporting the property of its customers when it loaded the lime onto its trucks, moved the trucks to the fields, used the payloaders in question to load the lime into the spreaders, and then spread the lime on the fields.

The Department is not convinced that this case supports Taxpayer's claim. First, the court in Klink was discussing the application of the gross income tax, not sales and use taxes as are at issue in the instant protest. Not only were the gross income tax statutes and regulations which were discussed in Klink totally separate from the sales and use tax statutes and regulations at issue in this protest, the gross income tax was repealed in 2003. Therefore, the discussion and conclusions in Klink are not applicable to Taxpayer's situation.

Second, while the court in Klink explained that those farmers produced a simple method whereby the sellers of soil lime at wholesale can deliver it, spread upon the fields which are to be treated, without additional expense to the buyer, the court also explained that it was focused on determining whether the sale of lime in that case constituted wholesale sales or retail sales, which would in turn determine if that taxpayer paid gross income tax at the high rate or the low rate on that income. In the instant protest, the question is whether or not Taxpayer used the payloaders in the provision of public transportation.

As previously explained, 45 IAC 2.2-5-61(b) defines public transportation as, ". . . the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation. . . ." Under Taxpayer's explanation of its operation, and its reference to Klink, it did not charge a delivery fee for the transport of the lime. Rather, it charged a single price for the sale of and spreading of the lime. Since there was no compensation for the transportation, under 45 IAC 2.2-5-61(b) Taxpayer's activities did not meet the definition of public transportation. Therefore, Taxpayer's reference to the decision in Klink is unconvincing.

Of more relevance is the Indiana Tax Court's decision in Howland v. Ind. Dept. of State Revenue, 790 N.E.2d 627 (Ind. Tax Ct. 2003), in which the court provided:

> Nevertheless, "[i]t is a general rule ... that in case of sale of personal property, where any act remains to be done before the sale is complete, the title remains in the seller." Farmers' Nat'l Bank of Sheridan v. Coyner, 44 Ind.App. 335, 88 N.E. 856, 858 (Ind.Ct.App.1909). This "has been explained to mean ... that where something is to be done by the seller to ascertain the identity, quantity, or quality of the thing sold, or to put it in the condition which the terms of the contract require, the title does not pass." Id. **In the present case, the evidence shows that Howland's customers paid one price for the purchase and installation of equipment. Howland's customers therefore expected him to install the satellite system equipment and to put it in the condition of workability as a term of the contract. Until that was accomplished, title did not pass to the customers, but rather remained in Howland**. See id.
> Id. at 630.
> (**Emphasis added**).

In other words, the transaction in Howland was not complete until the TPP was installed at the end user's property

and title to the TPP did not transfer from seller to buyer until the transaction was complete.

The transactions in the instant case are similar to the transactions in Howland. Taxpayer's customers were not merely ordering agricultural lime. They were ordering agricultural lime spread in a predetermined and specific pattern on specific fields. Taxpayer's transactions with its customers were not complete until the lime was spread on specific fields in specific patterns, as explained by the court in Howland. Therefore, title to the lime did not transfer until the transactions were completed by spreading the lime on the fields. Since title to the lime did not transfer until the spreading of the lime, Taxpayer held title to the lime until the spreading and was therefore transporting its own property up to the point of the spreading. This means that the payloaders, the fuel used to operate the payloaders, and the fuel used to truck the lime to the various fields were all used to transport Taxpayer's own property and so were not used to transport the property of others, as required by 45 IAC 2.2-5-61(b) to qualify for the public transportation exemption.

Taxpayer also refers to Wendt, LLP v. Ind. Dept. of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012), referring to the portion of the court's discussion which provided:

> Furthermore, although pre-transportation activities generally are excluded from the definition of public transportation, property used for the "loading and unloading of persons or property into or from transportation vehicles" is expressly included within the scope of public transportation.
> Id. at 487.

Taxpayer states that the court's explanation establishes that its payloaders and fuel used to operate them, along with the fuel used in trucks to haul the lime to the fields, were equipment used in the loading and unloading of property in the course of providing public transportation and were therefore exempt from sales and use taxes.

The Department does not agree with Taxpayer's conclusion. The taxpayer in Wendt exclusively transported the property of others for consideration, thereby clearly qualifying for the public transportation exemption found under IC § 6-2.5-5-27(a). The court's discussion focused on whether or not certain equipment qualified to be included in Wendt's overall public transportation activities. In the instant protest, Taxpayer was not charging for transportation. Neither was it transporting the property of others, as explained by Howland. On its face, Taxpayer's operations did not constitute a public transportation process when selling and spreading agricultural lime. Therefore, it is unnecessary to determine if the loading and unloading of the lime was part of an overall public transportation process.

In conclusion, Taxpayer's lime spreading operations did not constitute public transportation. The public transportation exemption requires the transportation of the property of others for consideration, as provided by 45 IAC 2.2-5-61(b). Here, Taxpayer neither transported the property of others nor received consideration for transportation, as explained by Howland. Taxpayer's reference to the decision in Klink is not relevant since that case deals with the gross income tax and not with the sales and use taxes at issue in this protest. Taxpayer's references to Wendt, 45 IAC 2.2-5-61(j)(1), and 45 IAC 2.2-5-62(g) are all predicated on the assumption that Taxpayer was involved in public transportation to begin with. As explained above, Taxpayer's lime spreading activities did not constitute public transportation, therefore the references to Wendt, 45 IAC 2.2-5-61(j)(1), and 45 IAC 2.2-5-62(g) are moot. Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

SUMMARY

Taxpayer's protest is denied in Issue I regarding its eligibility for the agricultural exemption in its lime spreading activities. Taxpayer's protest is denied in Issue II above regarding its eligibility for the public transportation exemption in its lime spreading activities.

Posted: 12/30/2015 by Legislative Services Agency
An html version of this document.