**DEPARTMENT OF STATE REVENUE**

04-20150416.LOF

**Letter of Findings: 04-20150416**
**Gross Retail Tax**
**For the Year 2013**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 Letter of Findings.

## HOLDING

Indiana Boat Manufacturer failed to establish that it was exempt from paying sales tax when it purchased vehicles from Indiana vendors, that its subsidiary qualified for the public transportation exemption, or that it was not required to pay sales tax on the purchase of ventilation units installed at its Indiana facility.

## ISSUES

### I. Gross Retail Tax - Installation of Ventilation Equipment.

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2-5-4-1; IC § 6-2.5-5 et seq.; IC § 6-8.1-5-1(c).

Taxpayer argues that it was not subject to use tax on the purchase and installation of five ventilation units.

### II. Gross Retail Tax - Vehicle Purchase.

**Authority:** IC § 6-2.5-2-3; IC § 6-2.5-2-3(a)(1); IC § 6-2.5-2-3(b).

Taxpayer states it was not subject to sales tax on the purchase of a vehicle because the Taxpayer transported the vehicle to an out-of-state location.

### III. Gross Retail Tax - Truck Rigging.

**Authority:** IC § 6-2.5-2-3(b); IC § 6-2.5-5-27; 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); 45 IAC 2.2-5-61; Sales Tax Information Bulletin 12 (December 2014).

Taxpayer claims that it was not subject to sales tax on the purchase of "truck rigging" from an Indiana dealer because the rigging was incorporated into a vehicle which Taxpayer transported to an out-of-state location.

### IV. Gross Retail Tax - Pickup Truck Purchase.

**Authority:** IC § 6-2.5-2-3; IC § 6-2.5-2-3(b); IC § 6-2.5-5-27; IC § 6-8.1-5-1(c); Sales Tax Information Bulletin 12 (December 2014).

Taxpayer argues that it was not subject to sales tax on the purchase of a pickup truck from an Indiana dealer because Taxpayer transported the truck to an out-of-state location and because the truck was purchased by a subsidiary which is in the business of providing public transportation.

### V. Gross Retail Tax - Vehicle Rentals.

**Authority:** IC § 6-2.5-5-27; Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Sales Tax Information Bulletin 12 (December 2014).

Taxpayer states it was not subject to sales tax on the price it paid to rent trucks because the trucks were rented by a related entity which is in the business of providing public transportation.

**VI. Tax Administration - Negligence Penalty.**

**Authority:** IC § 6-8.1-5-1(c); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(2); IC § 6-8.1-10-2.1(d); 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

Taxpayer asks that the Department exercise its discretion to abate a ten-percent negligence penalty and that the Department abate any interest charges due on the remaining assessment.

**STATEMENT OF FACTS**

Taxpayer is an Indiana company in the business of manufacturing boats and boat parts which it sells to retailers.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records.

The audit determined that Taxpayer had not paid sales tax when it bought various capital assets. The audit concluded that Taxpayer owed additional sales/use tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

**I. Gross Retail Tax - Installation of Ventilation Equipment.**

**DISCUSSION**

Taxpayer entered into contracts for the improvements to its Indiana real property. The Department's audit asked that Taxpayer contact each of the contractors it hired to make these improvements. Each contractor was asked if it had received an exemption certificate from Taxpayer, whether the contractor paid sales tax when it purchased materials for the projects, or whether the contractor self-assessed use tax before it installed the materials.

The audit further noted that, "In cases where the contractor indicated that it had not paid sales tax when it bought the materials and did not self-assess use tax, the contractor was asked for a 'breakdown of materials and labor.'"

The audit assessed Taxpayer sales tax on the cost of materials used in the installation of five ventilation units on Taxpayer's property. In the assessment at issue, Taxpayer was assessed 60 percent of the total contract price it paid to a contractor called Summit Mechanical.

Taxpayer disagrees with the assessment. Taxpayer states that it was contractor's responsibility to pay the tax.

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. IC §§ 6-2.5-5 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2-5-4-1. 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.

Taxpayer bought and paid for ventilation units installed at its facility. In the absence of more specific information, the audit assessed Taxpayer use tax in part because of "the fact that [T]axpayer had given exemption certificates to other lump sum contractors." Taxpayer argues that it was the contractor's responsibility to pay the tax but makes no argument that it should not now be responsible for paying that tax. Taxpayer has not met its burden of establishing that the assessment was "wrong" as required under in IC § 6-8.1-5-1(c), which provides that "[t]he burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

**FINDING**

Taxpayer's protest is respectfully denied.

**II. Gross Retail Tax - Vehicle Purchase.**

**DISCUSSION**

Taxpayer bought a Peterbilt truck from an Indiana dealer. The truck is purportedly used by Taxpayer to deliver its

boats. The audit assessed Taxpayer sales/use tax on the purchase price.

Taxpayer disagrees stating that the vehicle is registered, titled, operated, and maintained by its subsidiary here designated as "Transportation Subsidiary." Taxpayer argues that the vehicle was transported to Iowa and delivered to its Transportation Subsidiary and is registered in that state. Taxpayer concludes that:

> As Indiana sales tax is only imposed on vehicles which are subject to the motor vehicle registration laws of the state, and the truck was not purchased, delivered, or registered in Indiana, no tax should be due by [Taxpayer] for the purchase of this truck.

In support of its argument that the truck is not subject to Indiana's sales/use tax, Taxpayer cites to IC § 6-2.5-2-3:

> (a) As used in this section, "motor vehicle" means a vehicle that would be subject to the annual license excise tax imposed under IC 6-6-5 if the vehicle were to be used in Indiana.
> (b) Notwithstanding section 2 of this chapter, the state gross retail tax rate on a motor vehicle that a purchaser intends to:
> (1) transport to a destination outside Indiana within thirty (30) days after delivery; and
> (2) title or register for use in another state or country; is the rate of that state or country (excluding any locally imposed tax rates) as certified by the seller and purchaser in an affidavit satisfying the requirements of subsection (c).
> (c) The department of state revenue shall prescribe the form of the affidavit required by subsection (b). In addition to the certification required by subsection (b), the affidavit must include the following:
> (1) The name of the state or country in which the motor vehicle will be titled or registered.
> (2) An affirmation by the purchaser under the penalties for perjury that the information contained in the affidavit is true.
> (3) Any other information required by the department of state revenue for the purpose of verifying the information contained in the affidavit.
> (d) The department may audit affidavits submitted under this section and make a proposed assessment of the amount of unpaid tax due with respect to any incorrect information submitted in an affidavit required by this section.

Taxpayer explains that it accepted delivery from the Indiana dealer and arranged to have the vehicle transported to an out-of-state location within 30 days of the date of the delivery.

At the outset, Taxpayer has not explained how it is entitled to rely on IC § 6-2.5-2-3, promulgated and made effective July 1, 2014, for a transaction which occurred in 2013.

However, even assuming that the cited provision was applicable to the transaction at issue, IC § 6-2.5-2-3(a)(1) is conditioned on the explicit requirement that it document the arrangement by means of an affidavit meeting the requirements set out in IC § 6-2.5-2-3(b). Taxpayer has provided no such affidavit, and the Department is unable to agree that it was not required to pay sales tax at the time of the original transaction.

**FINDING**

Taxpayer's protest is respectfully denied.

**III. Gross Retail Tax - Truck Rigging.**

**DISCUSSION**

Taxpayer bought rigging equipment for one of its vehicles from an Indiana vendor. The rigging consists of "cantilevered brackets," "uprights," and "cross bars." Taxpayer argues that the purchase of the rigging was not subject to sales tax because the rigging was installed on a vehicle which it transported outside Indiana and which is used by Transportation Subsidiary to provide public transportation services.

Taxpayer maintains that the rigging was installed on the Peterbilt truck described in Part II above. Taxpayer repeats its argument that the truck was delivered to an out-of-state location within 30 days of the date Taxpayer bought the truck from the Indiana dealer. However, as noted above, there is no indication that Taxpayer complied with the requirement that it obtain - or is qualified to obtain - the affidavit as required in IC § 6-2.5-2-3(b) or that the cited provision is relevant to transactions which occurred in 2013.

Taxpayer makes a secondary argument. Taxpayer states that the rigging was installed on a vehicle - the Peterbilt truck - which is engaged in public transportation. As a result, Taxpayer concludes that the purchase of the rigging is exempt pursuant to IC § 6-2.5-5-27.

IC § 6-2.5-5-27 states:

> 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.

45 IAC 2.2-5-61, in relevant part, provides:

> (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.

Taxpayer explains that the vehicle and its rigging were "assigned" to its Transportation Subsidiary and that the Transportation Subsidiary is fully qualified to provide "public transportation." Taxpayer explains that the truck is used to move Taxpayer's "boats and trailers," that Transportation Subsidiary charges Taxpayer for the cost of these services, that Transportation Subsidiary is licensed and insured to provide public transportation, and that the vehicle displays a Department of Transportation identification number.

The Department's Sales Tax Information Bulletin 12 (December 2014) (20150128 Ind. Reg. 045150028NRA) sets out certain benchmarks necessary to qualify for the exemption. See also Sales Tax Information Bulletin 12 (July 1, 2010) (20100623 Ind. Reg. 045100390NRA).

The Bulletin provides: "The following requirements are factors the department weighs in determining whether a transportation company is engaged in public transportation. The requirements below are classified as "critical elements" necessary to qualify for the exemption. As stated in the Bulletin, "A transportation company fails to qualify for the exemption if it does not, at a minimum, adhere to all the critical elements." (Emphasis added).

- The transportation company must transport the persons or property of another.
- The transportation company must maintain all shipping/transporting documents for all transactions (e.g., trip reports, truck logs, and invoices).
- The transportation company must receive compensation for the services it provides.
- The transportation company must hold and pay for appropriate public transportation insurance.
- The transportation company must be fully and independently authorized by federal and/or state authorities to provide public transportation services.
- If an employee of the parent company performs duties for the parent company and also performs "leased" duties for the transportation company, the parent company must maintain detailed records of when and which duties that employee is performing for the parent company and when and which duties that employee is performing under the lease.
- If the parent company makes a capital contribution of the vehicles to the transportation company, titles to the vehicles must be transferred to the transportation company.
- The transportation company and the parent company must maintain separate books and records, including separate charts of accounts for each company.
- Transactions between the parent company and the transportation company must evidence a commercially

reasonable, arms-length relationship between the parties.
• Transactions between the parent company and the transportation company must be evidenced by actual invoicing and payments for all transactions.
• The parent company and the transportation company must segregate and account for each entity's purchases and expenses.
• The parent company and the transportation company must maintain separate bank accounts.

Taxpayer states that it hires Transportation Subsidiary to transport its boats, that it pays Transportation Subsidiary for doing so, and that Transportation Subsidiary is fully insured to serve as a public carrier. Taxpayer has provided no evidence to this effect. Taxpayer has provided no evidence to show Transportation Subsidiary has its own employees, that the Transportation Subsidiary purchased the vehicle here at issue, or that it and the Transportation Subsidiary engage in service transactions by means of a "commercially reasonable, arms-length relationship."

IC § 6-2.5-5-27 like all 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). In this case, Taxpayer has failed to make a reasonable or documented argument that its Transportation Subsidiary is engaged in public transportation and that it is entitled to the sought-after exemption.

**FINDING**

Taxpayer's protest is respectfully denied.

**IV. Gross Retail Tax - Pickup Truck Purchase.**

**DISCUSSION**

Taxpayer bought a Dodge pickup truck from an Indiana dealer. The truck is used to deliver its boats. The audit found that the pickup truck was normally stored at Taxpayer's Indiana facility when not being used to deliver boats. The audit determined that the pickup was owned by Taxpayer.

Taxpayer disagrees stating that this truck was bought by one subsidiary and delivered to another company here designated as "Transportation Subsidiary." Taxpayer states that the pickup truck is registered in Iowa.

Taxpayer makes the same argument it did in Part II above. Taxpayer states that the vehicle was transported to a location outside Indiana within 30 days of the date the pickup truck was bought from the Indiana dealer and that it is entitled to the IC § 6-2.5-2-3 thirty-day "drive away" exemption. The Department again repeats its objection. There is no evidence that the Taxpayer obtained - or is qualified to obtain - the affidavit necessary under IC § 6-2.5-2-3(b) or that relied upon provision was in effect at the time of the transaction.

Taxpayer makes the identical argument it did in Part III above. Taxpayer states the pickup truck is owned and operated by its Transportation Subsidiary, that it pays Transportation Subsidiary to deliver its boats, and that Transportation Subsidiary is engaged in public transportation such that it qualifies for the exemption IC § 6-2.5-5-27.

The Department repeats its objections set out in Part III above. There is little or no evidence that it has met the threshold requirements set out in Sales Tax Information Bulletin 12, that it is engaged in commercially reasonable, arms-length transactions with Transportation Subsidiary, and that it has met its burden of establishing that the original assessment was wrong as required under IC § 6-8.1-5-1(c).

**FINDING**

Taxpayer's protest is respectfully denied.

**V. Gross Retail Tax - Vehicle Rentals.**

**DISCUSSION**

Taxpayer rented trucks and trailers during the period under review. The trucks and trailers are used to transport Taxpayer's boats. Taxpayer explained that the trucks and trailers are used by its Transportation Subsidiary to deliver the boats.

Taxpayer did not pay sales tax when it paid the rental invoices. The audit found that the trucks and trailers were rented in the Transportation Subsidiary's name however "the expenses were reflected in [Taxpayer's] accounts payable information provided to the auditor."

The audit rejected Taxpayer's contention that the rental expenses were exempt on the ground that the Transportation Subsidiary used the trucks and trailers to provide public transportation. The audit found that Transportation Subsidiary did not pay the rental costs and Taxpayer did not itself meet the requirements of a public transportation company.

Taxpayer repeats yet again that its Transportation Subsidiary qualifies for the public transportation exemption allowed under IC § 6-2.5-5-27. In response, the Department again reminds Taxpayer that "[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). As explained previously, the Department requires that Taxpayer establish by "sufficient evidence" - as detailed in Sales Tax Information Bulletin 12 - that it, or Transportation Subsidiary, qualifies for the exemption. Taxpayer makes certain assertions that Transportation Subsidiary is a distinct business registered, licensed and insured to provide public transportation and the vehicles it rented were necessary for Transportation Subsidiary to provide those services. However, Taxpayer has failed to establish that Transportation Subsidiary meets the basic requirements necessary to qualify for the exemption.

**FINDING**

Taxpayer's protest is respectfully denied.

**VI. Tax Administration - Negligence Penalty.**

**DISCUSSION**

Taxpayer asks that the Department abate any penalties and interest associated with the 2013 assessment of additional sales or use tax.

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(2) requires a ten-percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to . . . pay the full amount of tax shown on the person's return . . . or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

Departmental regulation 45 IAC 15-11-2(c) requires that 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 IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment - including the negligence penalty - is presumptively valid.

The Department believes that Taxpayer erred in determining its sales and use tax liability. However, there is insufficient information to establish that Taxpayer's position was so egregious as to constitute "willful neglect." Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of each taxpayer" the Department agrees that the ten-percent negligence penalty should be abated.

Taxpayer has cited no authority by which the Department has the discretion to abate interest charges.

**FINDING**

Taxpayer's protest of the penalty is sustained. Taxpayer's request to abate the interest charges is denied.

**SUMMARY**

Taxpayer's challenge of the ten-percent negligence penalty is sustained; in all other respects, Taxpayer's protest is denied.

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