

**Supplemental 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 Supplemental Letter of Findings.

HOLDING

Indiana Boat Company was not required to pay sales tax on the price it paid to have ventilation units installed at its facility; Boat Company established the installed units were improvements to its realty, that it did not provide the vendor with its exemption certificate, and the vendor self-assessed use tax on its original acquisition of the units; Boat Company established that its related transportation company was entitled to claim the public transportation sales tax exemption.

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); 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); [45 IAC 2.2-3-9\(e\)](#).

Taxpayer argues it was not subject to sales or use tax on the price of five ventilation units installed at its facility.

II. Gross Retail Tax - Public Transportation Exemption.

Authority: IC § 6-2.5-5-27; IC § 6-8.1-5-1(c); [45 IAC 2.2-5-61](#); Sales Tax Information Bulletin 12 (December 2014); Sales Tax Information Bulletin 12 (July 1, 2010).

Taxpayer maintains it was not required to pay sales tax on the purchase or rental of items of equipment because the items were acquired by a related entity in the business of providing public transportation.

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 and tax returns.

The audit determined that Taxpayer had not paid sales tax when it bought various capital assets. Therefore 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. A Letter of Findings was issued January 2016. The Letter of Findings sustained Taxpayer's objection to the imposition of penalty but denied Taxpayer on the substantive sales tax issues.

Taxpayer disagreed with the January 2016 decision and requested a rehearing. The rehearing was granted, Taxpayer's representatives explained the reasons why they disagreed with the original decision, and Taxpayer provided additional documentation not available during the original administrative hearing. This Supplemental Letter of Findings results.

At the outset, it should be noted that although the Department's audit addressed transactions which occurred during 2010, 2011, 2012, and 2013, this Supplemental Letter of Findings addresses only 2013 transactions.

I. Gross Retail Tax - Installation of Ventilation Equipment.

DISCUSSION

Taxpayer paid for a company to install ventilation units at its facility. During the course of the audit, Taxpayer was asked to contact each of the contractors it hired to make improvements to its facility such as the installation of these ventilation units. 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 improvement projects, or whether the contractor had self-assessed use tax before it installed the equipment and materials.

In the case of these ventilation units, Taxpayer was unable to provide the requested documentation. The Department's audit assessed Taxpayer sales tax on the cost of the ventilation units.

Taxpayer claims it is not required to pay this assessment because the contractor self-assessed use tax on the price of the materials, because the materials were used to improve Taxpayer's real property, and because it did not provide its contractor with its own exemption certificate.

As with any challenge to any tax assessment, the affected taxpayer is required to meet its burden of establishing that the assessment is wrong. IC § 6-8.1-5-1(c) provides that "[t]he 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). Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong.

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.

[45 IAC 2.2-3-9](#)(e) addresses a construction contractor's responsibility to self-assess use tax. The law states in part:

With respect to construction material a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner . . . (3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

After the Letter of Findings was issued, Taxpayer obtained additional information verifying that the vendor had paid tax at the time the units were acquired, that Taxpayer had not issued the vendor an exemption certificate, and that the fulfillment of a lump-sum agreement required the vendor to make improvements to Taxpayer's property.

Taxpayer has met its burden of proof under IC § 6-8.1-5-1(c) of establishing the Department's imposition of sales tax on Taxpayer's acquisition of the ventilation equipment was wrong.

FINDING

Taxpayer's protest is sustained.

II. Gross Retail Tax - Public Transportation Exemption.

DISCUSSION

Taxpayer purchased or rented various vehicles. The Department's audit assessed tax on these transactions. Taxpayer argues that the transactions were entered into by Taxpayer's related company. The issue is whether this related company ("Transportation Company") was entitled to claim the public transportation exemption.

The January 2016 Letter of Findings concluded that Taxpayer had not provided sufficient information to establish that Taxpayer "engaged in commercially reasonable, arms-length transactions with Transportation Subsidiary . . .

." Therefore, the purchases of a 2014 Peterbilt Truck, a 2013 MO pontoon trailer; a 2012 Dodge Ram pick-up truck, were subject to sales tax. For the same reason, the rental of vehicles from Ryder Transportation Company were subject to sales tax.

As noted in Part I, the law requires that Taxpayer meet its burden of establishing that the assessment of tax on the sales and rental transactions was wrong. IC § 6-8.1-5-1(c).

Taxpayer relies on the exemption set out at IC § 6-2.5-5-27 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.

[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 is - as explained - in the business of building, selling, and distributing boats and not in the business of providing public transportation. Taxpayer is making its case for the exemption on the proposition that its related Transportation Company is a distinct entity which does qualify for the exemption.

The Department's Sales Tax Information Bulletin 12 (December 1, 2014) (20150128 Ind. Reg. 045150028NRA) sets out certain benchmarks necessary for a transportation business 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.

Taxpayer has provided documentation establishing that Transportation Company was transporting property which belonged to Taxpayer; that Transportation Company maintained shipping reports and logs; that Transportation Company was compensated by Taxpayer for the services it provided; that Transportation Company maintained and paid for public transportation insurance; that Transportation was authorized by government to provide public transportation services; that Transportation maintained records of the employees who operated Transportation Company's vehicles; that Transportation paid the wages of its employees; that the vehicle titles were in the name of the Transportation Company; that Transportation Company and Taxpayer maintained separate financial accounts; that Transportation Company and Taxpayer maintained a "commercially reasonable, arms-length relationship;" (Sales Tax Information Bulletin 12) that Taxpayer and Transportation Company segregated and accounted for each other's own expenses; and that Transportation Company and Taxpayer maintained separate bank accounts.

Taxpayer has provided original documentation establishing that the 2014 Peterbilt truck; 2013 MO pontoon trailer; 2012 Dodge Ram pick-up truck were purchased by Transportation Company. Taxpayer has provided that the Ryder Transportation vehicles were leased by Transportation Company. The purchase and/or lease agreements list Transportation Company as either the purchaser or the lessor. The cost of the purchases and/or leases was paid by Taxpayer and Transportation Company's "combined payment group."

Taxpayer has met its burden under IC § 6-8.1-5-1(c) of establishing that the Transportation Company is a distinct legal entity operating in an arm's length fashion in providing transportation services for Taxpayer.

Therefore Transportation Company was entitled to purchase or lease items of equipment previously in dispute in the January 2016 Letter of Findings: 2014 Peterbilt truck; 2013 MO pontoon trailer; 2012 Dodge Ram pick-up truck; vehicles rented by Transportation Company from Ryder Transportation Services (as explained in Taxpayer's documentation submitted and dated March 9, 2016).

FINDING

Taxpayer's protest is sustained.

SUMMARY

Taxpayer is sustained on both issues; Taxpayer is not required to pay sales tax on the purchase of the ventilation units and is not required to pay sales tax on the rental and/or purchase of Transportation Company's vehicles.

Posted: 06/29/2016 by Legislative Services Agency
An [html](#) version of this document.