

**Letter of Findings: 04-20160352**  
**Gross Retail Tax**  
**For the Years 2012, 2013, and 2015**

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

The Department did not agree with Environmental Services Provider that it was entitled to claim the public transportation exemption on purchases of items peripherally related to the transportation of property it did not own or that the Provider was not required to provide detailed, documentary evidence to support its multiple exemption claims.

### ISSUE

#### I. Gross Retail Tax - Public Transportation Exemption.

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-4; IC § 6-2.5-5-27; IC § 6-8.1-5-1(c); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Conklin v. Town of Cambridge City, 58 Ind. 130 (1877); Wendt LLP v. Indiana Dep't of Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Carnahan Grain, Inc. v. Indiana Dep't of State Revenue, 828 N.E.2d 465 (Ind. Tax Ct. 2005); Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); Panhandle Eastern Pipeline Co. v. Indiana Dep't. of State Revenue, 741 N.E.2d 816 (Ind. Tax Ct. 2001); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991); Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); [45 IAC 2.2-5-61](#); [45 IAC 2.2-5-61\(a\)](#); [45 IAC 2.2-5-61\(j\)](#).

Taxpayer argues that it is entitled to claim the public transportation exemption on the purchase of particular items of tangible personal property and that the Department's audit decision to the contrary was erroneous.

### STATEMENT OF FACTS

Taxpayer is an Indiana service company which provides rail car cleaning services, fuel recycling, hazardous and non-hazardous waste removal, dewatering services, and other similar services. Taxpayer provides services to Indiana clients and to out-of-state clients.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's tax returns and business records. The audit found that Taxpayer was entitled to claim the "public transportation" exemption on the purchase of certain equipment and supplies but was not entitled to claim that exemption on other purchases.

The audit resulted in an assessment of additional sales/use tax. Taxpayer disagreed with both the audit's conclusions and the additional tax 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 - Public Transportation Exemption.

### DISCUSSION

The issue is whether Taxpayer is entitled to claim the "public transportation" exemption on the purchase of certain items of tangible property such as supplies, various vehicles, and other equipment.

## **A. Audit Result.**

The audit found that Taxpayer was entitled to purchase certain items - including trucks - without paying sales tax because Taxpayer was transporting waste materials which it did not own and that the items were "used more than 50[percent] in providing public transportation services . . . ." For example, the audit found that Taxpayer's "vacuum trucks" were exempt along with "any of the related [truck] repair parts."

In addition, the audit found that certain items such as uniforms and supplies were also exempt because "[T]axpayer established that these items were predominately used in providing public transportation . . . ." The audit granted a partial exemption on "supplies purchased in bulk" which could have been used in both "an exempt fashion and a non-exempt fashion." For example, the audit granted a partial exemption on purchases of "oil and washer fluid for the trucks, gloves, rags, protective clothing, etc."

However, the audit found that "[a]ll other purchases by the [T]axpayer were determined to be used in a taxable [manner] by the [T]axpayer in the provision of its services, its building maintenance or for other shop uses." The audit disallowed:

supplies such as uniforms for the projects division, air compressors, power washers, propane for forklifts, off-road diesel fuel, other tools, mats, office and janitorial supplies, mold remediation supplies, barricade tape, building maintenance supplies, shop supplies, equipment rentals and other supplies for various industrial cleaning jobs.

The audit denied the exemption on these items because "[t]he [T]axpayer was unable to provide documentation in the way of logs, purchase orders, or other form[s] of documentation which would establish that these pieces of equipment and/or supplies were used more than 50[percent] of the time in providing public transportation services."

The audit report concluded that "since the services provided by the [T]axpayer are vast and some of which do not include the transport of waste materials whether hazardous or not, the [T]axpayer has not established that these supplies and equipment are used in public transportation let alone that these items were predominately used in such a [manner]."

## **B. Taxpayer's Response.**

Taxpayer argues that it is entitled to an exemption on "nearly all" supplies and capital asset purchases. Taxpayer points to [45 IAC 2.2-5-61\(c\)](#) as the basis for its argument. The regulation provides:

In order to qualify for the exemption, the tangible personal property must be reasonably necessary to the rendering of the public transportation. The tangible personal property must be indispensable and essential in directly transporting persons or property.

Taxpayer argues that its purchases of any tangible property, "including pre-transportation and post-transportation items are reasonably necessary to provide public transportation and qualify for the Use Tax Exemption."

Taxpayer further explains that "logs/purchase journals showing the percentage of use are not required to provide predominate use for tangible personal property used."

Taxpayer concludes that the Department's audit applied the public transportation exemption too narrowly. Instead it argues:

[n]early all of its purchases of tangible personal property should be exempt as it uses or consumes the property in connection with the rendering of public transportation in its unique system, which includes a bundle of services comprising integrated, indivisible and continuous steps that are all necessary and linked to the provision of public transportation.

## **C. Hearing Analysis.**

The issue is whether Taxpayer has provided information sufficient to conclude that it is entitled to the sales tax exemption on the purchase of or payment for approximately 420 items or transactions.

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 an 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.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the 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 location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See *Rhoads v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. *Id.*; *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466, 468-69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. *Id.* A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a).

In general, all purchases of tangible personal property are taxable unless specifically exempt by statute. [45 IAC 2.2-5-61\(j\)](#). An exemption from use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4. There are also additional exemptions from sales tax and use tax under IC § 6-2.5-5-27. A statute which provides a tax exemption, however, 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). A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *Id.* at 97. "[W]here such 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 (citing *Conklin v. Town of Cambridge City*, 58 Ind. 130, 133 (1877)).

Taxpayer relies on the "public transportation" exemption found at IC § 6-2.5-5-27 which 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, explains:

- (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.

In support of its position that "nearly all" its purchases qualified for the exemption, Taxpayer cites to *Wendt LLP v. Indiana Dep't of Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012). In that case the taxpayer, Wendt LLP, was in the business of relocating oversized factory machinery, and claimed that it was entitled to the public transportation exemption on its tangible personal property used in the course of its business. Following the rulings of *Panhandle Eastern Pipeline Co.*, 741 N.E.2d 816 (Ind. Tax Ct. 2001); and *Carnahan Grain v. Ind. Dep't of State Revenue*, 828 N.E.2d 465 (Ind. Tax Ct. 2005) the Tax Court reiterated that "[t]he public transportation exemption is an all-or-nothing exemption" and this exemption requires "an item to be predominantly used, not exclusively used, in public transportation to be exempt." *Id.* at 484-85.

Taxpayer argues that the exemption should be broadly interpreted and that - having established it is in the business of providing public transportation - it is entitled to an exemption on the purchase of "nearly all" items directly or peripherally related to the provision of that service. For example, Taxpayer argues that it was entitled to purchase such items as a "weed wacker," fluorescent light bulbs, cordless phone, a garden hoe, shop rags, padlocks, copier maintenance, janitorial supplies, trash bags, office supplies, printer stand, paint, LCD monitor, ice melt, and toilet paper without paying sales tax. The Department does not agree that any of these disparate items are - or conceivably could be - exclusively used in "directly transporting persons or property" because it is not self-evident these items are "directly used in the rendering of public transportation . . . ." [45 IAC 2.2-5-61\(a\)](#).

Taxpayer also argues that items such as hitches, brakes, air filters, fuel filters are exempt. The Department agrees that the purchase of these items might very well be entitled to the exemption but Taxpayer has provided nothing of any substance which establishes that the purchase of these items are indispensable to transporting property which it does not own. These very same items might be entirely unrelated to the public transportation arm of its business, and the Department is unprepared to agree that it should exempt these items on what is ultimately Taxpayer's undocumented or unsubstantiated say-so.

Indiana law on this issue is clear; it is Taxpayer's burden of establishing that the proposed assessment is wrong and not simply rely on an open-ended argument that "nearly all of its purchases of tangible personal property should be exempt . . . ." and that specific documentation establishing the "percentage of [exempt] use is not required . . . ." While the Department agrees entirely with Taxpayer when it points out 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), but does not agree that it was ever the legislature's intent to exempt many of the items which Taxpayer claims are exempt such as trash bags or garden supplies or that Taxpayer was not required to establish with documented certainty the extent to which other more plausible items - air filters or gloves - are "directly used in the rendering of public transportation."

#### FINDING

Taxpayer's protest is denied.

*Posted: 11/30/2016 by Legislative Services Agency*  
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