DEPARTMENT OF STATE REVENUE

04-20170769.LOF

Letter of Findings: 04-20170769
Gross Retail and Use Tax
For the Years 2013, 2014, 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 found that Indiana Truck and Auto Repair Business was required to pay use tax on supplies and materials consumed in providing its customers repair services; since Truck and Auto Repair Business was not predominately engaged in providing public transportation services to its customers, the vehicles it purchased and used in its business were subject to use tax.

ISSUES

I. Gross Retail and Use Tax - Repair Supplies.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-4-1; IC § 6-2.5-5 et seq.; 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); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that it was not required to self-assess use tax on the purchase of supplies and materials it consumed in providing services to its truck and auto repair customers.

II. Gross Retail and Use Tax - Public Transportation Exemption.

Authority: IC § 6-2.5-3-2(a); IC § 6-2.5-5-27; IC § 6-8.1-5-1(c); Carnahan Grain, Inc. v. Indiana Dep't of State Revenue, 828 N.E.2d 465 (Ind. Tax Ct. 2005); 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, (July 2015).

Taxpayer argues that it was not required to self-assess use tax on the purchase of three vehicles because the vehicles were engaged in providing public transportation services.

STATEMENT OF FACTS

Taxpayer is an Indiana company operating as a truck and auto repair business. Taxpayer also provides road-side assistance and towing services.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records. The audit resulted in an assessment of additional sales and use tax. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Gross Retail and Sales Tax - Repair Supplies.

DISCUSSION

The Department's audit found that Taxpayer failed to pay sales tax on the purchase of various supplies such as silicone, sandpaper, paint markers, shop gases, cleaners, and hand-wipes. These materials were used and consumed by Taxpayer in providing repair services for its customers. The Department's audit assessed use tax

on the purchase of these supplies. The Department's audit report explains:

> During the audit period, the [T]axpayer did not have an active use tax accrual system in place. Tax was not paid on all used or consumed items in the business. These items include but are not limited to shop supplies, tools, and equipment that were not used in public transportation.

Taxpayer disagrees arguing that it has already collected and remitted sales tax on these materials. Taxpayer explains that it charges its customers a "miscellaneous" cost which is intended to cover the supply and material expenses.

This portion of the Letter of Finding addresses supplies consumed in providing customer services. Issues related to supplies and parts purportedly exempt under the "public transportation" exemption are addressed in Part II below.

The proposed assessment constitutes evidence that the Department's claim for the unpaid tax is valid, and each taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); 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. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). In reviewing a taxpayer's argument, the Indiana Supreme Court has held, that when it examines a statute that an agency is "charged with enforcing . . . we 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).

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. 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 Department's audit found that Taxpayer purchased supplies consumed in providing its customers services. As such, the purchase of the supplies falls squarely within the purview of Indiana's use tax provisions because the supplies were used or consumed by Taxpayer in Indiana.

Taxpayer may very well have recovered the cost of these materials by charging its customers a "miscellaneous" line item on its customer invoices and may very well charged its customers sales tax on those charges. However, Taxpayer did not in fact sell the materials; it simply recovered an ordinary and necessary shop expense.

FINDING

Taxpayer's protest is respectfully denied.

II. Gross Retail and Sales Tax - Public Transportation Exemption.

DISCUSSION

Taxpayer purchased three vehicles on which the Department's audit imposed use tax because the vehicles were first entered on Taxpayer's depreciation schedule during the years under audit. Taxpayer also purchased parts and supplies purportedly used to repair and maintain these vehicles. The Department's audit found that the vehicles and parts were subject to tax because Taxpayer was not engaged in public transportation.

The Department's audit report quoted from Sales Tax Information Bulletin 12 (July 2015), 20150729 Ind. Reg. 045150221NRA:

> "Public transportation" means the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, a contract carrier, a 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 appropriate federal or state regulatory authority. Even if a person or company operates under the appropriate authority, they also must transport people or property for consideration. That is to say, a public transportation provider must be compensated for transporting people or goods. The goods transported must be goods owned by someone other than the public transportation provider. To qualify for the exemption, the tangible personal property purchased must be predominately used in providing public transportation. The tangible personal property is predominately used in public transportation if more than 50[percent] of its use is attributable to transporting people or property for hire.

The audit concludes, "The [T]axpayer was not hauling people or property for consideration. These trucks were predominately used as work trucks for [Taxpayer's] own use."

IC § 6-2.5-5-27 offers a tax exemption on certain purchases of tangible personal property and services, 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, further 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.

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 purchased vehicles and associated parts used in providing towing services and other services related to its auto and truck repair business. Although the vehicles may serve a business purpose, there is no indication that Taxpayer is predominately engaged in the business of "providing public transportation for persons or property." As explained by the tax court in Carnahan Grain, Inc. v. Indiana Dep't of State Revenue, 828 N.E.2d 465 (Ind. Tax Ct. 2005).

> If [] the property is used predominantly for third-party public transportation, then the taxpayer is entitled to the exemption. Conversely, if the property is not predominantly used for third-party public transportation (i.e., it is predominantly used to transport the taxpayer's own property), then the taxpayer is not entitled to the exemption. Id. at 468

Taxpayer points out that its vehicles have a Department of Transportation ("DOT") number but the law states that simply possessing or exhibiting a registration number does not necessarily mean that a vehicle qualifies for the exemption. As stated in 45 IAC 2.2-5-61(b), "[T]he 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 . . . ."

Taxpayer has failed to meet its burden under IC § 6-8.1-5-1(c) of establishing that the assessment of tax on the vehicles and parts was "wrong." Since Taxpayer did not pay tax on these items and the sought-after exemption is inapplicable, the Department's assessment of use tax pursuant to IC § 6-2.5-3-2(a) was correct.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest is denied in its entirety.

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An html version of this document.