DEPARTMENT OF STATE REVENUE

04-20170528.SLOF

Supplemental Letter of Findings Number: 04-20170528
Sales and Use Tax
For Tax Years 2012, 2013, and 2014

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

HOLDING

Indiana Company, which provided environmental services, demonstrated that its purchases of items, including drums, qualified for the "purchase for resale" exemption; nonetheless, it was liable for the sales tax on the sales of the items (including markups) on which it failed to collect the sales tax or obtain the properly executed exemption certificates (AD-70 forms). Indiana Company failed to establish that its dump trailer and parts qualified for the public transportation exemption.

ISSUE

I. Sales and Use Tax - Exemption.

Authority: IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-5-8; IC § 6-2.5-5-27; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1; *Meyer Waste Sys., Inc. v. Indiana Dep't of State Revenue*, 741 N.E.2d 1 (Ind. Tax Ct. 2000); Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue, 633 N.E.2d 359 (Ind. Tax Ct. 1994); Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue, 644 N.E.2d 960 (Ind. Tax Ct. 1994); National Serv-All, Inc. v. Indiana Dep't of State Revenue, 644 N.E.2d 954 (Ind. Tax Ct. 1994); *Carnahan Grain, Inc. v. Indiana Dep't of State Revenue*, 828 N.E.2d 465 (Ind. Tax Ct. 2005); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); *Rhoade v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of Revenue,* 977 N.E.2d 480 (Ind. Tax Ct. 2012); 45 IAC 2.2-3-4; 45 IAC 2.2-3-14; 45 IAC 2.2-4-2; 45 IAC 2.2-5-15; 45 IAC 2.2-5-61; Letter of Findings 04-20160012 (May 16, 2017).

Taxpayer protests the assessments of use tax on various purchases of tangible personal property, claiming that it was entitled to several statutory exemptions under IC 6-2.5-5.

STATEMENT OF FACTS

Taxpayer is a "full-service industrial waste and recycling corporation." Taxpayer provides a wide range of professional environmental services, which include waste removal, industrial maintenance, decontamination, waste treatment, recycling, and safety training. To facilitate its business, Taxpayer purchased or leased various tangible personal property including hazardous waste labels, drums, poly pails, trailer tires, repair parts, and a steel frameless dump trailer.

The Indiana Department of Revenue ("Department") audited Taxpayer's business records for tax years 2012, 2013, and 2014. Pursuant to the audit, the Department determined that Taxpayer purchased (or leased) various tangible personal property without paying sales tax or self-assessing use tax. The Department assessed additional tax, interest, and penalty. Taxpayer timely protested the assessment. A hearing was held and Letter of Findings 04-20160012 (May 26, 2017), 20170726 Ind. Reg. 045170324NRA ("LOF") was issued, denying Taxpayer's protest.

Taxpayer disagreed with the LOF and submitted additional documentation to support its rehearing request. A rehearing was conducted based on the additional documentation submitted by Taxpayer. This Supplemental Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax - Exemption.

DISCUSSION

The Department previously found that Taxpayer purchased (or leased) and used various items, including drums, dump trailer, and parts, in its business without paying sales tax or use tax on those items. Taxpayer argued that it was not liable for the tax because its use of those items qualified for several statutory exemptions. After the administrative hearing, the LOF determined that Taxpayer's use of those items did not qualify for exemptions under IC § 6-2.5-5-8 and IC § 6-2.5-5-27. Taxpayer disagreed, requesting a rehearing. Throughout the rehearing process, Taxpayer continued to argue that its use of drums and trailer qualify for the exemptions. The issue here is whether Taxpayer was entitled to (1) purchase for resale exemption under IC § 6-2.5-5-8 and (2) public transportation exemption under IC § 6-2.5-5-27.

As explained previously in the LOF, Taxpayer is required to demonstrate that the assessment is incorrect. IC § 6-8.1-5-1(c). Furthermore, Taxpayer is required to provide verifiable documentation explaining and supporting its challenge that the Department's assessment 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).

Also, as discussed in the LOF, in addition to the sales tax, Indiana 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 Rhoade v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

All purchases of tangible personal property generally are taxable unless specifically exempted by Indiana law. An exemption from the 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 and 45 IAC 2.2-3-4. There are various tax exemptions available under IC 6-2.5-5; these enumerated exemptions also apply to transactions which are subject to Indiana use tax. 45 IAC 2.2-3-14. 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). Taxpayer here is required to "show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id*. at 101.

During the rehearing, relying on its additional documentation, Taxpayer continued to argue that it was entitled to (1) purchase for resale exemption, and (2) public transportation exemption. This Supplemental Letter of Findings references and also incorporates all relevant statutes, regulations, facts, and the audit findings discussed in the LOF and addresses Taxpayer's arguments, in turn, as follows:

A. Purchases for Resale, Rental, or Leasing

Taxpayer claimed that its purchases of "gallon drums, poly pails," "[p]oly overpacks," and "[s]ponge rubber lid gaskets" ("Items at Issue") were not subject to sales tax or use tax pursuant to IC § 6-2.5-5-8(b) because it resold to its customers.

To qualify for the exemption under IC § 6-2.5-5-8(b), 45 IAC 2.2-5-15 explains:

> (a) The state gross retail tax shall not apply to sales of any tangible personal property to **a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser**.
> (b) General rule. Sales of tangible personal property for resale, rental or leasing are exempt from tax **if all of the following conditions are satisfied:**
> **(1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;**
> **(2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and**
> **(3) The property is resold, rented or leased in the same form in which it was purchased.**
> (c) Application of general rule.
> (1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendition of services or performance of work with respect to such property.
> (2) **The purchaser must be occupationally engaged in reselling, renting or leasing such property in**

the regular course of his business. Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.
(3) The property must be resold, rented or leased in the same form in which it was purchased.

(**Emphasis added**).

Throughout the rehearing, Taxpayer stated in part:

> The drums . . . were purchased by [T]axpayer for resale to third parties. [T]axpayer does not use or consume any drums in providing its services. Further, the customer (generator) of the waste has the choice of using various means for containing the waste that will be hauled. One choice is drums. Other options include . . . a tanker where no drum is required.
>
> Drums are routinely invoiced separate *[sic]* and apart from an invoice for the transportation services . . . .

To support its protest, Taxpayer provided sample invoices, billing information, and several signed special exemption certificates (AD-70 forms). Taxpayer also submitted additional documents to establish that the purchaser and the seller of the Items at Issue were the same entity. Therefore, the issue becomes whether Taxpayer, as a provider of environmental services, is "occupationally engaged in reselling . . . such property in the regular course of [its] business."

Upon review, Taxpayer's supporting documentation established that it was in the business of providing environmental services. Taxpayer purchased the Items at Issue and, in turn, in conjunction with rendering its services, Taxpayer often resold the Items at Issue (with markups) to its customers. Thus, the Department is prepared to agree that Taxpayer is a retail merchant selling at retail because it transferred the Items at Issue for consideration in conjunction with rendering its services. 45 IAC 2.2-4-2(a), (d). To state it differently, the documentation provided by Taxpayer demonstrated that it acted as a retail merchant when it sold the Item at Issue; they were not "[o]ccasional sales and sales by servicemen in the course of rendering services." Taxpayer thus qualified for the exemption pursuant to IC § 6-2.5-5-8(b) and 45 IAC 2.2-5-15.

Nonetheless, as a retail merchant and an agent for the state, Taxpayer must collect the sales tax on the total sales price (including markups) of the Items it resold; or, alternatively, it was required to obtain properly executed exemption certificates at the time when the Items at Issue were resold. IC § 6-2.5-8-8. Otherwise, Taxpayer was personally liable for the payment of the sales tax - a trust tax - plus any penalties and interest attributable to the tax. IC § 6-2.5-9-3. Subsequently after the Department issued the LOF, Taxpayer provided several signed AD-70 forms to support its rehearing request. Thus, the Department's Enforcement Division is requested to review these AD-70 forms in a supplemental audit review and make necessary adjustments as required. Taxpayer remained responsible for the sales tax when the properly executed special exemption certificates (AD-70 forms) were not provided.

Taxpayer is reminded that sales tax becomes due at the time of the retail transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained *at the time the transaction occurs* otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

In short, Taxpayer qualified for the exemption under IC § 6-2.5-5-8(b) on its purchase of the Items of Issue. Without the properly signed AD-70 forms, however, Taxpayer remained responsible for the sales tax on the sales price of the Items at Issue it resold to its customers.

B. Purchases for Providing Public Transportation Services

Taxpayer protested the audit assessment on the purchases of dump trailer and parts. The LOF determined that Taxpayer was not entitled to the public transportation exemption because Taxpayer's documentation failed to establish (1) that it was in the business of transporting tangible personal property of others and (2) that it predominantly used the dump trailer and parts to transport tangible property of others pursuant to Indiana law.

Throughout the rehearing, Taxpayer continued to argue that the dump trailer and parts were exempt from sales and use tax pursuant to IC § 6-2.5-5-27 and 45 IAC 2.2-5-61. Taxpayer maintained that it used the dump trailer and parts exclusively to transport waste of others. To support its protest, Taxpayer provided sample copies of purchase orders, invoices, trip sheets, bills of lading, hazardous or non-hazardous waste manifests, and services

contracts. Taxpayer further stated, in part, that:

> Under federal law, the hazardous waste must remain and, in fact, does remain owned by the generator at all times. In all cases [Taxpayer] does not take ownership of the waste. Instead, it is simply providing a transportation service.

Taxpayer relied on the word - "consignment" - in a standard "Uniform Hazardous Waste Manifest" which was a pre-printed form Taxpayer used during the course of performing its services. The pre-printed sentence in that form, in part, provides:

> I hereby declare that the contents of this consignment are fully and accurately described above by the proper shipping name . . . .

Taxpayer further contended that "[t]he purpose of Article 19.1 [Title and Risk of Loss under its Environmental Services Contract] is to establish that [Taxpayer] is responsible for the risk of loss and liability and damage caused in transport of the goods." Taxpayer maintained that it did not own the waste; rather, it "simply provid[ed] a transportation service."

Upon review, however, the Department is not able to agree. As explained in the LOF, "waste" is property under IC § 6-2.5-5-27. Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue, 633 N.E.2d 359, 365-68 (Ind. Tax Ct. 1994) (Indiana Waste I) (finding that "garbage is undisputedly a physical thing" within the meaning of property under IC § 6-2.5-5-27"). Taxpayer here was required to demonstrate that, first, it was not the owner of the waste "in order to qualify for the exemption." *Id*.; *Meyer Waste Sys., Inc. v. Indiana Dep't of State Revenue*, 741 N.E.2d 1, 3-11 (Ind. Tax Ct. 2000); Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue, 644 N.E.2d 960, 961-62 (Ind. Tax Ct. 1994) (Indiana Waste II), and National Serv-All, Inc. v. Indiana Dep't of State Revenue, 644 N.E.2d 954, 956-60 (Ind. Tax Ct. 1994). Taxpayer was also required to demonstrate that it predominantly engaged in transporting property of another to be entitled to the exemption. Taxpayer failed to do either.

Specifically, in this instance, Taxpayer's Environmental Services Contract, in relevant part, expressly stated the following:

> Risk of loss, and **all other incidents of ownership to the conforming Waste shall transfer** from [customer] **to [Taxpayer] upon [Taxpayer's] taking possession of the Waste**. . . . [Taxpayer] shall be deemed to have taken possession after completion of the loading of the Waste onto [Taxpayer's] vehicle. (**Emphasis added**).

The language stated in Taxpayer's Services Contract is plain, clear, and undisputed - the ownership and the title of the Waste were transferred to Taxpayer upon its taking possession of the Waste. In other words, by signing the Services Contract, Taxpayer expressly agreed to be and had become the owner of the Waste when it took possession and loaded the Waste onto its dump trailer. Taxpayer did not provide any contracts regarding consignment or insurance which specifically excluded Taxpayer from becoming the owner of the Waste; rather, Taxpayer simply relied on the pre-printed Uniform Hazardous Waste Manifest, suggesting that it did not own the Waste due to consignment. However, without specific contractual agreement from its customers stating otherwise, the Uniform Hazardous Waste Manifest alone was insufficient to support that Taxpayer's assertion that its customers retained the title and possession of the "Waste" after the "Waste" was loaded onto Taxpayer's dump trailer; *especially*, the Services Contract speaks for itself. In this case, Taxpayer signed the Services Contract and expressly affirmed that the ownership of the Waste was transferred to Taxpayer. Taxpayer's reliance on the pre-printed Uniform Hazardous Waste Manifest was misplaced.

Furthermore, Taxpayer referenced no specific federal statutory provision to support its contention that its customers were the owners of the Waste even after the Waste was loaded onto Taxpayer's trailer and throughout the transportation during which Taxpayer controlled the Waste. Thus, given the totality of the circumstances, in the absence of other supporting documentation to demonstrate otherwise, Taxpayer was the owner of the Waste when it loaded the Waste onto its dump trailer and took possession of the Waste. Taxpayer failed to meet the first requirement - transporting tangible personal property of others.

Even if, for the sake of argument, Taxpayer were transporting the Waste of others, it failed to meet the second requirement–the carrier must be predominantly engaged in transporting property of another and the item must be directly used to transport property of another. This exemption requires "an item to be predominantly used, not exclusively used, in public transportation to be exempt." *Wendt LLP v. Indiana Dep't of Revenue,* 977 N.E.2d 480,

484-85 (Ind. Tax Ct. 2012). That is, Taxpayer was required to demonstrate the trailer "was used predominantly in an exempt manner." *Carnahan Grain, Inc. v. Indiana Dep't of State Revenue*, 828 N.E.2d 465, 469 (Ind. Tax Ct. 2005). The LOF specifically explained, in relevant part, that:

> [A] taxpayer is not required to be in the business of transporting property of others to claim the public transportation exemption. The taxpayer is entitled to the public transportation exemption on its purchase of an item only when the taxpayer demonstrates that, first, it does not own the property it transports, and, second, the item is directly and predominantly used to transport property of others for consideration. **When in doubt, the courts examine the actual use of the item in question. There are various ways to show the item qualifies for "predominant use," including miles traveled, the ratio of time spent, volume, or income derived from the use of the item** in question. (**Emphasis added**).

Upon review, however, Taxpayer's documentation was insufficient to establish that the trailer was predominantly used to transport property of another. Without verifiable documents, which established Taxpayer's use of the trailer, including mileage, time spent, or income derived from the use of the trailer, the Department is unable to agree that Taxpayer met the second requirement.

In short, Taxpayer bears the burden of proving the Department's assessments were incorrect. Taxpayer's documentation failed to establish that it directly and predominantly used the dump trailer to transport Waste owned by others for consideration. Therefore, Taxpayer's use of the trailer and parts did not qualify for the public transportation exemption under IC § 6-2.5-5-27. Since sales tax was not paid, use tax was properly imposed.

FINDING

Taxpayer's protest is sustained in part and respectfully denied in part. Taxpayer's protest of Part A is sustained to the extent that properly executed exemption certificates (AD-70s) were provided. Taxpayer's protest of Part B, however, is respectfully denied.

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