

Final Order Denying Refund: 42-20190202
Motor Carrier Fuel Tax
For the Year 2016

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana register. The publication of this document provides the general public with information about the Indiana Department of Revenue's ("Department") official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Final Order Denying Refund.

HOLDING

Motor Carrier's consumption of fuel on the Indiana Toll Road is properly subject to the Indiana Motor Carrier Fuel Tax.

ISSUE

I. Motor Carrier Fuel Tax - Refund.

Authority: IC § 6-6-4.1-1; IC § 6-6-4.1-4; *Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Alloy Custom Products, Inc. v. Indiana Dep't of State Revenue*, 26 N.E.3d 1078 (Ind. Tax Ct. 2015); *Anderson v. Indiana Dep't of State Revenue*, 758 N.E.2d 597 (Ind. Tax Ct. 2001); *Roehl Transport, Inc. v. Indiana Dep't of State Revenue*, 653 N.E.2d 539 (Ind. Tax Ct. 1995); *Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 605 N.E.2d 272 (Ind. Tax Ct. 1992); International Fuel Tax Agreement Articles of Agreement, § R1210.300 (2013); Indiana Finance Authority & ITR Concession Company LLC, Indiana Toll Road Concession and Lease Agreement (April 12, 2006); Indiana Finance Authority & ITR Concession Company LLC, Amended and Restated Indiana Toll Road Concession and Lease Agreement (July 1, 2017); Indiana Legislative Services Agency, Fiscal Impact Statement House Bill 1008 (ver. 11 2006).

Taxpayer protests the denial of refund of Indiana motor carrier fuel tax.

STATEMENT OF FACTS

Taxpayer is a motor carrier that does business in Indiana. Taxpayer timely filed and paid the Indiana Motor Carrier Fuel Tax (the "MCFT") for the first and second quarters of 2016. Taxpayer submitted a refund claim for an overpayment of the MCFT. The Department denied the claim. Taxpayer disagreed with the denial and submitted a protest to that effect and an administrative hearing was held. This Final Order Denying Refund results. Further facts will be supplied as necessary.

I. Motor Carrier Fuel Tax - Refund.

DISCUSSION

The MCFT "is imposed on the consumption of motor fuel by a carrier in its operations on **highways** in Indiana." IC § 6-6-4.1-4(a) (**Emphasis added**). A "highway" is defined as "the entire width between the boundary lines of every **publicly maintained** way that is open in any part to the use of the public for purposes of vehicular travel." IC § 6-6-4.1-1(h) (**Emphasis added**). Taxpayer argues that the Toll Road is not "publicly maintained," because the Toll Road is leased via the Amended and Restated Indiana Toll Road Concession and Lease Agreement (the "Lease") to ITR Concession Company LLC ("Concessionaire"), and the Lease generally requires Concessionaire to maintain the Toll Road out of its own funds. Since this means the Toll Road is not "publicly maintained," Taxpayer argues, it cannot be a "highway," and fuel consumed on the Toll Road is therefore excluded from taxation.

Taxpayer also contends that fuel consumed on the Toll Road is **excluded** from taxation by the definition of "highway" in IC § 6-6-4.1-1(h), rather than by an **exemption** carved out from the broader grant of taxation authority. Thus, Taxpayer argues entitlement of a presumption in its favor. See *Alloy Custom Products, Inc. v. Indiana Dep't of State Revenue*, 26 N.E.3d 1078, 1082 n.4 (Ind. Tax Ct. 2015) (discussing the distinction between exclusions and exemptions).

In the matter at hand, neither an exclusion nor an exemption is at issue, because the Indiana Tax Court has

repeatedly held that fuel consumed on the Toll Road is subject to the MCFT. See *Area Interstate Trucking, Inc. v. Indiana Dep't of Revenue*, 605 N.E.2d 272 (Ind. Tax Ct. 1992) (MCFT is owed on fuel consumed on Toll Road even though a toll is charged); *Roehl Transport, Inc. v. Indiana Dep't of State Revenue*, 653 N.E.2d 539 (Ind. Tax Ct. 1995) (MCFT is owed even on fuel consumed while idling off the highway); *Anderson v. Indiana Dep't of State Revenue*, 758 N.E.2d 597 (Ind. Tax Ct. 2001) (MCFT was owed on fuel consumed on Toll Road even though the Toll Road was at the time maintained out of a different fund). In any event, the Toll Road is in fact "publicly maintained," so Taxpayer's argument fails on its own terms as well.

A. Indiana Tax Court decisions unequivocally establish that fuel consumed on the Toll Road is subject to the MCFT regardless of whether the Toll Road is "publicly maintained."

On three separate occasions the Indiana Tax Court has squarely rejected arguments designed to avoid the MCFT. In *Area Interstate Trucking*, the Indiana Tax Court rejected a contention that the charging of tolls meant that the Toll Road was not "open" to the public under IC § 6-6-4.1-1(h). Thus, fuel consumed on the Toll Road was subject to MCFT even if the Toll Road is arguably not "public."

In *Anderson*, the petitioner raised a Commerce Clause challenge, arguing that a tax on motor fuel consumed on the Toll Road was not "fairly related" to the services the state provides, because the motor carrier fuel tax did not fund maintenance of the Toll Road. The Tax Court rejected this argument:

When a tax is assessed proportionally "to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of police and fire protection, the benefit of a trained work force, and the advantages of civilized society." For the purpose of the MCFT, Indiana taxes M.X. Express [the petitioner] on fuel it consumes on Indiana highways as measured by the miles it drives on Indiana highways. I.C. § 6-6-4.1-4(a). Thus, the measure of the MCFT is in "proper proportion" to the extent of M.X. Express's activity on Indiana highways and, therefore, to its "consequent enjoyment of the opportunities and protections which the State has afforded in connection with those activities."

By assessing the MCFT for the fuel that M.X. Express consumes on Indiana highways, the State is merely requiring M.X. Express to assume its fair share of the State tax burden. The State is well within its rights—and well within the Commerce Clause—to do so. Accordingly, the Court holds that the MCFT does not violate the Commerce Clause under the fourth prong of the *Complete Auto* test.

Anderson, at 602.

The *Anderson* decision recognizes that Indiana provides a wide array of services to travelers passing through Indiana, and the MCFT fairly compensates Indiana for those services, even though the Toll Road is maintained out of a separate fund. Thus, the MCFT was owed on fuel consumed on the Toll Road even though the MCFT did not fund maintenance of the Toll Road.

In *Roehl*, the petitioner contended that fuel consumed while its vehicles idled off the highway was exempt from the MCFT. Since this fuel was not consumed on "highways," Roehl argued, it was excluded from the MCFT under IC § 6-6-4.1-4(a)—just as Taxpayer argues here. The Indiana Tax Court squarely rejected this argument.

The Tax Court focused on IC § 6-6-4.1-4(b), which defines the amount of fuel subject to tax under subsection (a) of that section:

Of particular importance, then, is the language in I.C. 6-6-4.1-4(b) . . . which provides:

[t]he amount of motor fuel consumed by a carrier in its operations on highways in Indiana is the total amount of motor fuel consumed **in its entire operations** within and without Indiana, multiplied by a fraction. The numerator of the fraction is the total number of miles traveled on highways in Indiana, and the denominator of the fraction is the total number of miles traveled within and without Indiana.

Thus, by reading subsection (a) and subsection (b) together, it is apparent that subsection (a) establishes that the motor carrier fuel tax will be imposed when there is "consumption of motor fuel by a carrier in its operations on highways in Indiana." For purposes of calculating how much motor carrier fuel tax is due, however, subsection (b) defines the amount of fuel consumed by a carrier "in its operations on highways in Indiana." That definition provides that the total amount of fuel consumed in a carrier's entire operations, regardless of where or in what manner it was consumed, is to be included in the formula used to calculate motor carrier fuel tax liability.

Roehl, at 542.

(**Emphasis added**).

Accordingly, the Indiana Tax Court held that subsection (a)—on which Taxpayer relies—provides that a carrier is subject to the MCFT if it travels on Indiana highways, as Taxpayer indisputably does. Once it is determined that Taxpayer is subject to the tax under subsection (a), subsection (b) provides that all fuel consumed by a commercial motor vehicle, regardless of where and how it is consumed, is to be included in the formula for purposes of calculating motor carrier fuel tax liability. In *Roehl* that meant that MCFT was owed on fuel consumed while idling off of public highways. Here that means that Taxpayer is subject to MCFT on fuel consumed on the Toll Road, regardless of whether it is "publicly maintained."

But if this were so, the petitioner in *Roehl* argued that then Indiana's motor vehicle tax would run afoul of the Commerce Clause of the United States Constitution, because it would tend to overstate the amount of fuel consumed by carriers in Indiana. As in *Anderson*, the Tax Court rejected this argument as well:

Indiana's motor carrier fuel tax is a use tax. The Federal Constitution does not require Indiana to establish a system of motor carrier fuel taxation that reflects "with exact precision every graduation in use." Indeed, it is nearly impossible to calculate "drop-for-drop," "fume-for-fume," the exact amount of fuel *Roehl* consumes on the highway. As a result, "as long as [the amount of tax] is based on some fair approximation of use or privilege for use ... and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster ..."

In the case at bar, *Roehl* has not shown that the formula by which motor carrier fuel tax liability is calculated discriminates against interstate commerce to the advantage of intrastate carriers, nor has *Roehl* shown that the method for calculating motor carrier fuel tax liability does not reflect a fair approximation of the use of Indiana's highways. Furthermore, *Roehl* has not shown that, although the motor carrier fuel tax is apportioned on the basis of the benefit of *Roehl*'s use of Indiana's public roads, the resulting liability is excessive in relation to Indiana's costs for the upkeep and reconstruction of its highway system. As a result, the court holds that Indiana's formula for calculating motor carrier fuel tax liability does not violate the Commerce Clause of the United States Constitution.

(Internal citations omitted).

Roehl, at 546.

Anderson and *Roehl* stand for the propositions that:

- (1) Whether motor fuel taxes are paid into the particular fund that finances the maintenance of a particular road does not matter, because the MCFT is fairly related to the burdens imposed by Indiana highway travelers and the services Indiana provides to them; and
- (2) The MCFT must be paid on all fuel that regulated carriers consume, whether that fuel is consumed on "highways" or off of "highways."

Thus, Taxpayer's contention that the Toll Road is not publicly maintained is irrelevant. Taxpayer indisputably drives its vehicles on Indiana's public highways. So under *Roehl*, Taxpayer is subject and so owes MCFT on every gallon of fuel it consumes in Indiana, wherever that may occur. This alone requires that Taxpayer's protest be denied.

B. MCFT is owed on fuel consumed on the Toll Road because the Toll Road is in fact "publicly maintained."

In this case, Taxpayer argues that the Toll Road is not "publically maintained" because the Toll Road is leased to Concessionaire. Taxpayer further argues that the MCFT on the Toll Road "is not taxable because it falls outside the scope of the statute giving rise to a tax." According to Taxpayer, the Toll Road is not a highway under IC § 6-6-4.1-4(b) and, therefore, fuel consumed on the Toll Road is excluded from MCFT.

Regarding the Indiana Toll Road, the Indiana Department of Transportation ("INDOT") website (<https://www.in.gov/indot/2413.htm>, last visited February 4, 2020) states:

The Indiana Toll Road is no longer operated by INDOT. In 2006, a limited liability company was awarded a 75-year lease of the toll road for \$3.8 billion. **The Indiana Finance Authority, INDOT, and the Indiana Toll**

Road Oversight Board, appointed by the Governor, retain oversight responsibility on behalf of the State of Indiana to assure that toll road operator ITR Concession Company LLC (ITRCC) operates and maintains the Toll Road in accordance with the terms of the lease. (Emphasis added).

Also, IC § 6-6-4.1-4 states in relevant part:

(a) A tax is imposed on the consumption of motor fuel by a carrier in its operations on highways in Indiana.

The Department next refers to IC § 6-6-4.1-1, which states in relevant part(s):

(a) "Carrier" means a person who operates or causes to be operated a commercial motor vehicle on any highway in Indiana.

...

(h) "Highway" means the entire width between the boundary lines of every publicly maintained way that is open in any part to the use of the public for purposes of vehicular travel.

Furthermore, the Department notes that the Indiana Finance Authority ("IFA") is responsible for the Indiana Toll Road and that, according to the Fiscal Impact Statement for House Bill 1008 ("Public-private agreements for transportation"):

Under the terms of the Agreement that will be signed on June 30, 2006, at the offices of Ice Miller LLP, the concessionaire will be granted an exclusive franchise and license to provide Toll Road services, including operating, managing, maintaining, rehabilitating, and tolling the Toll Road in exchange for a wire transfer of the amount of rent less any cash deposit previously paid in same-day funds. **For federal and state tax purposes, the lease of the Toll Road is considered a sale. (Emphasis added).**

Indiana Legislative Services Agency, Fiscal Impact Statement House Bill 1008 (ver. 11 2006), page 15.

While the sentence "For federal and state tax purposes, the lease of the Toll Road is considered a sale[]" might at first blush appear to mean that the Toll Road was sold to Concessionaire and therefore became a private road with private maintenance, this is not the case. Rather, that sentence means only what it says: for **federal and state tax purposes** the lease of the Toll Road was considered a sale to Concessionaire, meaning that it is "considered" a sale to the Concessionaire for Concessionaire's tax purposes. There was no actual sale of the Toll Road.

The Fiscal Impact Statement also provides:

The IFA is allowed, under current law, to contract with or lease to INDOT for construction, reconstruction, improvements, maintenance or repairs, or operation of toll projects or toll bridges. The statute also allows for the IFA to determine under [IC 8-23-7](#) that a toll road project constructed or operated by the IFA should become a part of the system of state highways free of tolls or become a tollway.

Id. at 4.

(Emphasis added).

Next, the Fiscal Impact Statement provides:

The IFA leases the toll road to INDOT to operate and maintain the road in an efficient and economical manner, as allowed under current law.

Id. at 4.

Additionally, the Fiscal Impact Statement states:

Since the Toll Road is operated by a state agency, purchases are not currently subject to retail Sales or Use Tax. Based on past financial data, the IFA estimates an average of about \$3.4 [million] a year in FY 2006 and FY 2007 in purchases that would be subject to the state's 6[percent] Sales Tax.

Id. at 14.

Also of relevance is IC § 8-15-2-12, which states:

(a) The exercise of the powers granted by this chapter will be in all respects for:

- (1) the benefit of the people of the state;
 - (2) the increase of their commerce and prosperity; and
 - (3) the improvement of their health and living conditions.
- (b) **As the operation and maintenance of toll road projects by the authority will constitute the performance of essential governmental functions, the authority shall not be required to pay any taxes or assessments upon any toll road project or any property acquired or used by the authority under the provisions of this chapter or upon the income therefrom.**
- (c) The bonds issued under the provisions of this chapter, their transfer, and the income therefrom (including any profit made on the sale thereof) shall at all times be free from taxation within the state.
(Emphasis added).

Under definitions provided by IC § 8-15-2-4, the "authority" referred to in IC § 8-15-2-12(b) is IFA. Therefore, while IC § 8-15-2-4 and IC § 8-15-2-12 are not statutes under Title 6 of the Indiana Code, which includes the statutes used to administer the MCFT, they do establish that actions undertaken by IFA constitute essential government functions. Therefore, these Fiscal Impact Statement provisions and IC § 8-15-2-4 show that IFA has always leased the Toll Road to an operator. Whomever operates it, regardless whether a public operator or private entity, the Toll Road has always been publicly maintained with IFA performing essential government functions via a lease or contract with an operator. The court in *Area Interstate Trucking* specifically acknowledged that the Toll Road has always been separately funded and managed from other Indiana public roads, yet remains part of MFCT calculations.

Turning to the Toll Road Lease itself, the following sections and provisions of the Lease unequivocally establish that IFA retained control and Indiana retained ownership of the Toll Road, and that any maintenance was conducted under their auspices. The definitions of "Concession Compensation," "Operating Standards," and "Toll Road Operations" found under Section 1.1 provide that Concessionaire is required to perform maintenance activities pursuant to the Lease with IFA and at IFA's approval under operating standards under the Lease.

Section 1.1 of the Lease provides:

"Concession Compensation" means compensation payable by the IFA to the Concessionaire in order to restore the Concessionaire to the same economic position the Concessionaire would have enjoyed if such Compensation Event had not occurred, which compensation shall equal the sum of (i) all Losses (including increased operating, capital and maintenance costs but excluding any costs and expenses that the Concessionaire would otherwise expend or incur in order to comply with this Agreement or in the ordinary course of the performance of the Toll Road Operations or the carrying on of business in the ordinary course) that are reasonably attributable to such Compensation Event plus (ii) the losses of the Concessionaire's present and future Toll Road Revenues and Alternative revenues that are reasonably attributable to such Compensation Event. Any Concession Compensation payable with respect to Losses or lost Toll Road Revenues or Alternative Revenues that will not occur until the future shall not be payable until actually suffered or incurred. If the Concessionaire is required to provide its own capital with respect to compliance with or implementation of an IFA Directive or a modified or changed Operating Standard, then the Concession Compensation, shall, in addition to the components described above, take into account the actual cost to the Concessionaire of such capital and include a then applicable market-based rate of return thereon.

...

"Operating Standards" means the standards, specifications, policies, procedures and processes that apply to the operation, maintenance, rehabilitation and tolling of, and capital improvements to, the Toll Road set forth on Schedule 2, including any plans submitted by the Concessionaire to the IFA pursuant to the Operating Standards. To the extent that any term or provision set forth in Schedule 2 or incorporated by reference in Schedule 2 conflicts with any term or provision specified in this Agreement, then such term or provision of this Agreement shall govern and shall supersede any such conflicting term or provision.

...

"Toll Road Operations" means (i) the operation, management, maintenance, construction, rehabilitation and tolling of the Toll Road and (ii) all other actions relating to the Toll Road or otherwise that are to be performed by or on behalf of the Concessionaire pursuant to this Agreement or the Operating Standards, including all action relating to Vendors.
(Emphasis added).

Section 2.1 of the Lease, which defines the granting of the Lease, states:

Grant of Lease. Upon the terms and subject to the conditions of this Agreement, effective at the Time of Closing, (a) the Concessionaire shall pay the IFA the exact amount of \$3,800,000,000.00 in cash (the "Rent") and (b) **the IFA shall** (i) demise and lease the Toll Road Land and the Toll Road Facilities to the Concessionaire free and clear of Encumbrances other than Permitted IFA Encumbrances for and during the term (the "Term") commencing on the Closing Date and expiring on the seventy-fifth (75th) anniversary of the Closing Date (or such later date as required pursuant to the terms of this Agreement in connection with the occurrence of any Delay Events), unless terminated earlier as herein provided, (ii) **grant the Concessionaire an exclusive franchise and license for and during the Term to provide Toll Road Services, and in connection therewith to operate, manage, maintain, rehabilitate and toll the Toll Road for Highway Purposes and otherwise in accordance with and pursuant to this Agreement**, and (iii) assign, transfer and otherwise convey to the Concessionaire or cause the relevant State agency to assign, transfer, and otherwise convey to the Concessionaire each of the Toll Road Assets and Assigned Toll Road Contracts, and the Concessionaire shall accept each such demise, lease, grant, assignment, transfer and conveyance (collectively, the "Transaction").

Amended and Restated Indiana Toll Road Concession and Lease Agreement (April 12, 2006)

(Emphasis added).

Section 3.7(b) specifically reserves access rights for IFA to conduct repairs when Concessionaire fails to do so. Section 3.7 of the Lease states:

(a) **Reservation of Rights. The IFA reserves (for itself, the State and their respective Representatives, as well as grantees, tenants, mortgagees, licensees and others claiming by, through or under the IFA or the State) and shall, at all times during the Term, have the right to enter the Toll Road and each and every part thereof at all reasonable times and upon reasonable prior notice:** (i) to inspect the Toll Road or determine whether or not the Concessionaire is in compliance with its obligations under this Agreement or applicable Law pursuant to Section 8.3; (ii) if a Concessionaire Default then exists, to make any necessary repairs to the Toll Road and perform any work therein pursuant to Section 16.1(b)(iii); (iii) **in the event of an actual or reported emergency, danger, circumstance, event or action that is reasonably believed by the IFA or its designee to have caused (or to present the imminent potential to cause) either (A) injury to individuals or damage to property or (B) an impairment to the continuous operation of the Toll Road as a public highway, and if the IFA in its sole discretion determines that the Concessionaire is not then taking all necessary steps to rectify or deal therewith, then the IFA or its designee shall be authorized to immediately and without notice take such actions as it determines may be necessary to rectify such emergency, danger, circumstance or event or to restore the operation of the Toll Road;** (iv) to design, construct, operate, manage, maintain, repair and rehabilitate any existing or future roads, streets or highways (other than the Toll Road) adjacent to, above or under the Toll Road in accordance with the terms set forth in this Agreement; (v) to use the Toll Road for all purposes not inconsistent with the rights granted to the Concessionaire in this Agreement (including any purpose not reasonably related to the generation of Toll Road Revenues); (vi) **at its own cost and expense to** (A) install, design, manage, maintain, inspect, repair and rehabilitate any existing or future utilities or similar services or safety measures, including, but not limited to, Project Hoosier SAFE-T, (whether provided by the IFA, the State or third parties) in, on, along, under, across, over or through the Toll Road (including water and sewer lines, power transmission lines, fiber optic cable, surveillance equipment and other communications) provided that the IFA shall not be required to reimburse the Concessionaire with respect to the use of Toll Road Facilities for such services or measures to the extent they do not materially interfere with the use of such Toll Road Facilities for Toll Road Operations, (B) grant easements and rights on the Toll Road for the benefit of suppliers or owners of any such utilities, services or measures and (C) **use the Toll Road in connection with any such installation, design, management, maintenance, repair or rehabilitation (provided that notwithstanding the foregoing, the Concessionaire shall have the right, at all times during the Term, to install, design, manage, maintain, repair and rehabilitate utilities or other services for its own account (and not for lease, resale or service to third parties) to the extent that the said utilities or services are necessary for the Toll Road Operations);** (vii) to perform any actions taken to address releases of Hazardous Substances to the Environment occurring prior to the time of Closing; (viii) to perform any activities related to the completion of the remediation projects listed on Schedule 3.2; and (ix) to, solely in accordance with the terms hereof, do any other act or thing that the IFA or the State may be obligated to do pursuant to the terms of this Agreement or have a right to do under this Agreement; provided, however, that the IFA shall use reasonable efforts to minimize interference with the Toll Road Operations in connection with any entry on the Toll Road pursuant to this Section 3.7(a) The IFA shall pay to the Concessionaire the Concession Compensation, upon demand by the Concessionaire, resulting from any entry or action on the Toll Road pursuant to clauses (iv), (v), (vi), and (viii) and, to the extent applicable pursuant to the terms of this Agreement, clause (ix) of this Section.

(Emphasis added).

(b) **Access Rights.** The IFA, the State and their Representatives, during the progress of any work referred to in this Section 3.7, at no cost to the IFA, the State or their Representatives, shall have all necessary easement and access rights and may keep and store at the Toll Road all necessary materials, tools, supplies, equipment, sheds, mobile trailers and other vehicles, in a reasonably neat and orderly fashion, in material compliance with all Laws (including Environmental Laws), and so as to not unreasonably interfere with the Concessionaire's conduct of Toll Road Operations. **To the extent that the IFA or the State undertakes work or repairs under this Section 3.7 or any other provision of this Agreement, such work or repairs shall be commenced and diligently completed in a good and workmanlike manner, in accordance with any applicable Operating Standards and in such a manner as not to unreasonably interfere with the conduct of business in or use of such space to the extent reasonably possible without incurring any additional cost.**

(Emphasis added).

(c) **Effect of Reservation.** Any reservation of a right by the IFA to enter upon the Toll Road and to make or perform any repairs, alterations, restoration or other work in, to, or about the Toll Road which is the Concessionaire's obligation pursuant to this Agreement, shall not be deemed to (i) impose any obligation on the IFA to do so, (ii) render the IFA liable to the Concessionaire or any other Person for the failure to do so or (iii) relieve the Concessionaire from any obligation to indemnify the IFA as otherwise provided in this Agreement. **Nothing in this Agreement shall impose any duty upon the part of the IFA to do any work required to be performed by the Concessionaire hereunder and performance of any such work by the IFA shall not constitute a waiver of the Concessionaire's default in failing to perform the same.**

(Emphasis added).

Next, Sections 7.3(c) and 11.7 establish that Concessionaire is obligated to follow IFA direction and supervision regarding maintenance of the Toll Road. Section 7.3 of the Lease provides in relevant part(s):

(a) **Toll Road Revenues.** The Concessionaire shall, at all times during the Term, have the right, title, entitlement and interest in all revenues (i) charged by or on behalf of the Concessionaire in respect of vehicles using the Toll Road during the Term, including revenues collected through an electronic tolling system ("Toll Revenues") and (ii) generated pursuant to the lease agreements listed on Schedule 7.3 or otherwise from any other leases or agreements from Vendors or any of the Assigned Toll Road Contracts (collectively, "Vendor Revenues" and together with Toll Revenues, "Toll Road Revenues").

...

(c) **Use of Toll Revenues.** The Concessionaire shall use all Toll Revenues for debt service related to the Toll Road and for the costs necessary for the proper operation and maintenance of the Toll Road (including reconstruction, resurfacing, restoration and rehabilitation of the Toll Road in compliance with the requirements of this Agreement) prior to making any distribution of such Toll Revenues to any holder of an equity interest in the Concessionaire.

(Emphasis added).

Section 11.7 of the Lease states:

Buy Indiana Presumption. The Concessionaire agrees to the goal of awarding contracts representing at least ninety percent (90[percent]) of its aggregate annual expenditures for construction (including all construction mandated under Article 5 of this Agreement), repairs and maintenance of the Toll Road, compliance with IFA Directives and performance of Approved Concessionaire Requests to "Indiana businesses" as such term is defined in [IC 5-22-15-20.5](#).

(Emphasis added).

Further evidence that this is a lease and not a sale is found under Sections 14.2 and 16.1 of the Lease, which demonstrate that IFA's underlying control of the Toll Road would be retained in the event of termination or default by the Concessionaire. The common theme to all of these provisions in the Lease establish that, while Concessionaire has day-to-day operational control of running the Toll Road under the Lease, IFA and Indiana retain ownership and supervisory "oversight" control. While Taxpayer contends that the existence of the Lease proves that the Toll Road is not "publicly maintained," the Lease plainly establishes that Indiana has employed Concessionaire to provide for public maintenance of the Toll Road.

C. Conclusion.

The Indiana Tax Court has repeatedly held that carriers who travel on Indiana highways must pay the MCFT on all the fuel they consume, whether they are traveling on the Toll Road, traveling on other public highways, or even idling while entirely off of any highway. Whether the Toll Road is "publicly maintained" is irrelevant for the purpose of this protest. If they travel on highways in Indiana, carriers must pay the MCFT on "all fuel consumed by a commercial motor vehicle, regardless of where and how it is consumed." *Roehl*, at 543.

In any event, the terms of the Lease make it plain that IFA did not surrender Indiana's ownership of the Toll Road. Neither did IFA abandon its management and maintenance duties. It simply arranged for another party to perform those routine maintenance duties on IFA's behalf. Thus, the Toll Road is "publicly maintained," and the Lease is the vehicle by which Indiana has chosen to maintain the Toll Road.

FINDING

Taxpayer's protest is respectfully denied.

February 5, 2020

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An [html](#) version of this document.