DEPARTMENT OF STATE REVENUE

04-20211013.ODR

Final Order Denying Refund: 04-20211013
Gross Retail (Sales) Tax
For the Tax Years 2018 - 2020

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 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 determination.

HOLDING

Indiana Business was not entitled to a refund of sales and use tax because it failed to demonstrate that it was entitled to a statutory exemption.

ISSUE

I. Sales and Use Tax - Exemption.

Authority: IC 6-2.5-1-2; IC 6-2.5-1-27; IC 6-2.5-2-1; IC 6-2.5-3-1; IC 6-2.5-3-2; IC 6-2.5-4-1; IC 6-2.5-5-27; *Indiana Dep't. of State Revenue v. Calcar Quarries, Inc.*, 394 N.E.2d 939 (Ind. Ct. App. 1979); *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); *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); *Panhandle Eastern Pipeline Co. v. Indiana Dep't. of State Revenue*, 741 N.E.2d 816 (Ind. Tax Ct. 2001); *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); *USAir, Inc. v. Indiana Dep't of State Revenue*, 623 N.E.2d 466 (Ind. Tax Ct. 1993); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); 45 IAC 2.2-5-61; Sales Tax Information Bulletin 12 (July 2015); Sales Tax Information Bulletin 12 (September 2019).

Taxpayer protests the refund denial of sales and use tax on various purchases of tangible personal property in 2018, 2019, and 2020, claiming that it was entitled to the public transportation exemption.

STATEMENT OF FACTS

Taxpayer is an Indiana company which was registered to be in the business of providing landscaping services. To facilitate its business, Taxpayer purchased various dump trucks in 2018, 2019 and 2020 from others, including dealerships. Taxpayer either paid sales tax at the time of the purchase or use tax to Indiana Bureau of Motor Vehicles ("BMV") when it titled and registered the trucks at the BMV.

In May 2021, Taxpayer filed a claim for refund of sales and use tax it paid for the trucks. The Indiana Department of Revenue ("Department"), after an initial review, fully denied Taxpayer's claim.

Taxpayer protested. An administrative hearing was held. This final determination ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax - Exemption.

DISCUSSION

The Department denied Taxpayer's refund claim because the documentation submitted by Taxpayer in providing landscaping services failed to substantiate its refund claim. Taxpayer, to the contrary, claimed that it was "A FOR-HIRE D.O.T. LICENSED CARRIER" and thus it was entitled to the refund under the public transportation exemption. Thus, the issue is whether Taxpayer provided documents sufficiently demonstrating that it was entitled to the refund.

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); 45 IAC 2.2-2-1. A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC 6-2.5-4-1(b). A person who acquires tangible personal property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC 6-2.5-2-1(b). The purchaser in general "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." *Id*. "The retail merchant shall collect the tax as agent for the state." *Id*.

The Indiana use tax, on the other hand, is imposed on a person's 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); IC 6-2.5-1-27. "Use" means the "exercise of any right or power of ownership over tangible personal property." IC 6-2.5-3-1(a). 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. *Rhoade v. Indiana Dep't of State Revenue*, 774 N.E.2d 1044, 1048 (Ind. Tax Ct. 2002); *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. *Rhoade*, 774 N.E.2d at 1050. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. IC 6-2.5-3-2(a); *USAir, Inc.*, 623 N.E.2d at 468-69. 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) and (c); IC 6-2.5-3-2(a).

A statute which provides a tax exemption 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). "[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 (internal citations omitted). In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

Taxpayer in this instance argued that it was entitled to an approximately $30,000 refund of tax under the public transportation exemption, 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(b), in part, explains:

> 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.(**Emphasis added**).

The Department's Sales Tax Information Bulletin 12 (July 2015), 20150729 Ind. Reg. 045150221NRA, in part, further outlines the following requirements:

- 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:
. . .
• If the parent company owns and holds titles to the vehicles, the parent company may lease those vehicles to the transportation company. However:
° The lease must be documented as a commercially reasonable, arms-length transaction; and
° The lease must be evidenced by actual payments to the parent company.
• If the transportation company owns the vehicles, titles to the vehicles must be held by the transportation company.
• The parent company and transportation company must have separate employees, or, if the transportation company leases its employees from the parent company, there must be a meaningful, arms-length charge for the leased employees.

Sales Tax Information Bulletin 12 (July 2015); *see also* Sales Tax Information Bulletin 12 (September 2019), 20200826 Ind. Reg. 45200438NRA.xml.

In *Meyer Waste Sys., Inc. v. Indiana Dep't of State Revenue*, a garbage hauler, Meyer Waste System, Incorporated, argued that it was entitled to the public transportation exemption on various purchases and use of tangible personal property, including "garbage trucks, garbage loading and unloading equipment, replacement parts for trucks and loading equipment, and tools and machinery for repair and maintenance of said items." *Meyer Waste Sys., Inc. v. Indiana Dep't of State Revenue*, 741 N.E.2d 1, 3 (Ind. Tax Ct. 2000). Following the case law established by Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue, 633 N.E.2d 359 (Ind. Tax Ct. 1994) (Indiana Waste I), *Indiana Waste Systems of Indiana, Inc. v. Indiana Dep't of State Revenue,* 644 N.E.2d 960 (Ind. Tax Ct. 1994) (Indiana Waste II), and National Serv-All, Inc. v. Indiana Dep't of State Revenue, 644 N.E.2d 954 (Ind. Tax Ct. 1994), the Indiana Tax Court explained that garbage was "property" under IC 6-2.5-5-27, but "in order to qualify for the exemption the hauler must not be the owner of the garbage." *Id*. at 4-5. Additionally, "the carrier must be predominantly engaged in transporting property of another to be entitled to the exemption." *Id*. The court further explained that "[a]t the point the garbage is abandoned, the generators of the garbage lose their ownership rights." In other words, "a garbage generator abandons its garbage when it places garbage on the curb or curtilage to be picked up by the garbage hauler unless it takes affirmative steps to retain ownership or control." *Id*. The court concluded that "[a]bsent an agreement between a garbage generator and a garbage hauler reserving ownership in the generator, the ownership of the garbage passes when the hauler removes the garbage from the generator." *Id*. The court determined that the garbage hauler was not entitled to the public transportation exemption because it did not haul the property of another. As to the second requirement–the carrier must be predominantly engaged in transporting property of another–the Indiana case law further offers useful guidance, as follows:

In *Indiana Dep't. of State Revenue v. Calcar Quarries, Inc.*, 394 N.E.2d 939 (Ind. Ct. App. 1979), the taxpayer, Calcar Quarries, Inc. ("Calcar"), had multiple lines of business, including a stone quarry, a hot mix asphalt plant, and a ready-mix concrete facility in Indiana. *Id*. at 940. After an audit, the Department determined that Calcar engaged primarily in the service of hauling its own product, and, thus, was not entitled to public transportation exemption on trucks and equipment it purchased or rented because it was not engaged in public transportation. *Id*. The Indiana Court of Appeals found that Calcar's trucks had been used for hauling property owned by others. *Id*. at 941. The Court of Appeals also found that Calcar charged separately for the stone and maintained separate accounting records for its trucking operation from those of the quarry, asphalt, and ready-mix operations. *Id*. The Court of Appeals further noted,

> [W]hen an item has been used for several purposes and only some of the purposes qualify the item for exemption, the taxpayer can gain exemption for the total amount of the purchase price of the item by showing that the item was used predominantly in an exempt manner.
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> *Id*. at 941 n.1.

Ruling in Calcar's favor, the Court of Appeals concluded that Calcar demonstrated that it predominantly used the trucks and equipment in transporting property of others.

In *Panhandle Eastern Pipeline Co. v. Indiana Dep't. of State Revenue*, 741 N.E.2d 816 (Ind. Tax Ct. 2001),

Panhandle Eastern Pipeline Co., and its subsidiaries ("Panhandle") claimed that, based on the amount of tangible personal property publicly transported, they were entitled to a 100 percent exemption of sales/use tax for equipment purchased and used in the distribution of natural gas, but the Department only granted a prorated exemption based on the actual amount of gas Panhandle publicly transported. *Id*. at 817. Ruling in favor of Panhandle, the Tax Court stated:

> [T]he public transportation exemption provided by section 6-2.5-5-27 is an all-or-nothing exemption. If a taxpayer acquires tangible personal property for predominate use in providing public transportation for third parties, then it is entitled to the exemption. If a taxpayer is not predominately engaged in transporting the property of another, it is not entitled to the exemption.
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> *Id.* at 819.

In *Carnahan Grain, Inc. v. Indiana Dep't of State Revenue*, 828 N.E.2d 465 (Ind. Tax Ct. 2005), the Department determined that, based upon total miles traveled for each of the audited years, the taxpayer, Carnahan Grain, Inc. ("Carnahan"), predominantly used the tractor-trailers and related equipment to haul property owned by third parties, but it received only approximately 22 percent of its total income from hauling property of others. Thus, the Department assessed Carnahan additional sales/use tax on the tractor-trailers and related equipment on the ground that, although Carnahan predominantly used the tractor-trailers for third-party hauling, it was not predominantly engaged as a business in hauling for third parties, pursuant to the two-prong test outlined in the *Panhandle Eastern Pipeline Co.* decision. *Id*. at 467. Rejecting the Department's "income" approach, the Tax Court explained the proper application, as follows:

> 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.
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> *Id*. at 468.

Specifically, following the *Calcar* decision, the court in *Carnahan Grain* reasoned that "when **an item** has been used for several purposes and only some of the purposes qualify **the item** for exemption, the taxpayer can gain exemption for the total amount of the purchase price of the item by **showing that the item was used predominantly in an exempt manner**." *Id*. at 469 (**emphasis added**) (quoting *Calcar*, 394 N.E.2d at 941 n.1). The Tax Court ruled in Carnahan's favor based upon miles the trucks traveled to conclude that Carnahan predominantly used the trucks to transport property of others and thus public transportation exemption applied to the trucks and related equipment. *Id*.

Thus, pursuant to the above statutes, regulations, and case law, a taxpayer is not required to be in the business of transporting property of others to claim the public transportation exemption. Nonetheless, 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.

In this instance, Taxpayer claimed that it was entitled to the approximately $30,000 tax refund for tax it paid in 2018 through 2020 based on the public transportation exemption because its dump trucks were used to provide public transportation of goods for hire. But Taxpayer only provided sample invoices it issued for jobs in 2021. Taxpayer also offered documents, such as a Certificate of Liability Insurance, and a copy of broker agreement for 2021, a sample trip sheet and email, and Excel worksheets summarize "Gallons," "Odometer Start," "Odometer Finish" and "Mileage" by quarter, to support its protest.

Upon review, Taxpayer is mistaken. Taxpayer's documents demonstrated that Taxpayer purchased materials, such as aggregates, from its vendors. Taxpayer invoiced customers subsequently after its drivers delivered. When Taxpayer purchased items to be delivered, Taxpayer acquired the ownership. As such, when its drivers delivered, Taxpayer's trucks were used to deliver its own goods. Therefore, Taxpayer's documents failed to establish that it used these trucks in question to transport the property of another for consideration. In addition, Taxpayer's supporting documents failed to establish that it "directly and predominantly" used the trucks in question to transport the property of another for consideration.

In short, Taxpayer failed to provide documents sufficiently demonstrating that it was entitled to the approximately $30,000 refund.

FINDING

Taxpayer's protest is respectfully denied.

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An html version of this document.