DEPARTMENT OF STATE REVENUE

04-20231493.ODR

Final Order Denying Refund: 04-20231493
Gross Retail (Sales) and Use Tax
For the Tax Year 2021

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 tax because it failed to demonstrate that it was entitled to a statutory exemption, and it overpaid the tax.

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); 45 IAC 2.2-5-61; Sales Tax Information Bulletin 12 (September 2019).

Taxpayer protests the refund denial of gasoline use tax, claiming that it was entitled to the public transportation exemption.

STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of providing customers heating, cooling, and plumbing services. To provide those services, Taxpayer operates various gasoline power vehicles. In 2022, Taxpayer filed a claim for refund of sales and use tax. The Indiana Department of Revenue ("Department") denied Taxpayer's claim on the ground that the "required supporting documentation is missing."

Taxpayer protested and requested that the Department make the determination without an administrative hearing. This final determination ensues. Additional facts will be provided as necessary.

I. Sales and Use Tax - Exemption.

DISCUSSION

The Department denied Taxpayer's refund because the "required supporting documentation is missing." Taxpayer, in its protest letter, stated in part:

> The refund was for gasoline tax paid on items/transactions for which were directly and predominantly used in the provision of for-hire public transportation services and qualify for the sales/use tax exemption at Ind. Code 6-2.5-5-27.

Thus, the issue is whether Taxpayer provided documents sufficiently demonstrating that it was entitled to the refund.

A. Applicable Law.

Indiana generally 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); *see also* 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 tax on the transaction. IC 6-2.5-2-1(b). The purchaser "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." *Id*.

The Indiana use tax 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).

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 $12,000 refund of tax under the public transportation exemption, IC 6-2.5-5-27, which states:

> [T]ransactions 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**).

Sales Tax Information Bulletin 12 (Sept. 2019), 20200826 Ind. Reg. 045200438NRA, further offers, in part:

> **II. PUBLIC TRANSPORTATION REQUIREMENTS**
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> The following requirements are factors the department weighs in determining whether a transportation company is engaged in public transportation. An asterisk (*) indicates a requirement that is considered by the department to be a critical factor in determining whether a transportation company qualifies for the public transportation exemption. A transportation company fails to qualify for the exemption if it does not, at a minimum, adhere to all the critical requirements. . . . The requirements are as follows:
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> - 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:
° Transactions between the parent company and the transportation company must evidence a commercially reasonable, arms-length relationship between the parties.
° Transactions between the parent company and the transportation company must be evidenced by actual invoicing and payments for all transactions.*
° The parent company and the transportation company must segregate and account for each entity's purchases and expenses.*
° The parent company and the transportation company must maintain separate bank accounts.
° The parent company and the transportation company must issue separate W-2 forms to their employees.
° The parent company and the transportation company must maintain separate federal depreciation schedules pursuant to generally accepted accounting standards.
° Any income earned by the transportation company for transporting for a third party is to be recognized by the transportation company.
° Because the transportation company and the parent company must have a distinct, arms-length business relationship, their separate incomes and expenses must be reflected on the taxpayers' federal income tax filings, all of which must be reconciled with the taxpayers' own records. When transactions are eliminated as intercompany transactions, the taxpayers must file the appropriate schedules with their federal returns.*

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. The Tax Court, ruling in favor of Panhandle, explained:

> [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. The Department assessed Carnahan additional 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 stated 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. But 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.

B. Taxpayer's Protest and Supporting Documentation

Taxpayer in this instance claimed that it was entitled to the approximately $12,000 refund of tax it paid during 2021 under the public transportation exemption. To support its protest, Taxpayer offered a one-page calculation regarding the tax it paid on the monthly purchases, the first page of the monthly Fleet Management Reports, and monthly invoices from its vendor.

The Fleet Management Reports contain information, including names of individual drivers, purchase dates, fuel types, quantity, purchase price per gallon, and total amount per transaction and total amount per card. The Fleet Management Reports, however, did not have information about the amount of taxes paid at each retail transaction. For example, the Fleet Management Reports separately listed individual driver's card purchases for a specific month, in part:

[] Date	[] Num	Driver	Fuel Type	QTY	PPG	Total

01/18/21	314026	C[]	0001 UNL REG 86/87 OC	19.12	2.338	44.73
01/27/21	170419	C[]	0019 ETUNLREG-86/87OC	15.87	2.460	39.04
02/03/21	794164	C[]	UNLEADED REGULAR	18.88	2.409	45.48
			CARD TOTAL	53.87		129.25

(**Emphasis in original**).

At the end of each billing cycle, when the vendor invoiced Taxpayer, the vendor summarized the total purchases and adjusted the total amount charged by adding and subtracting fees or rebates. Taxpayer then calculated by multiplying "Gallons" and "Gasoline Use Tax Rate" to arrive at the amount of "Tax Refund" in an Excel summary.

C. Analysis and Conclusion.

Upon review, Taxpayer's reliance of the supporting documentation is misplaced. As explained above, to claim the public transportation exemption, Taxpayer must demonstrate that it did not own the property it transports, and that the vehicles in question were directly and predominantly used to transport property of others for consideration in addition to the requirements under the Sales Tax Information Bulletin 12. Taxpayer here failed to do all of the above. Its supporting documents simply showed that Taxpayer paid its vendor for the fleet management services.

In addition, as explained earlier, the purchaser "shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction." The "page 1" of the monthly Fleet Management Reports failed to provide any verifiable information to substantiate the amount of tax paid at the time of the retail transactions. Without verifiable information to substantiate the tax paid at the time of the retail transactions, the Department is not able to agree that Taxpayer is entitled to the claimed refund.

In short, Taxpayer failed to provide verifiable documentation sufficiently demonstrating that it qualified for the public transportation exemption, that it overpaid tax, and that it was entitled to the approximately $12,000 refund.

FINDING

Taxpayer's protest is respectfully denied.

June 5, 2023

Posted: 08/30/2023 by Legislative Services Agency
An html version of this document.