

PETITIONER APPEARING PRO SE:
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**IN THE
INDIANA TAX COURT**

EUGENE A. BONFIGLIO,)	
)	
Petitioner,)	
)	
v.)	Cause No. 02T10-0506-TA-50
)	
INDIANA DEPARTMENT OF)	
STATE REVENUE,)	
)	
Respondent.)	

ORDER ON PETITIONER'S MOTION TO CORRECT ERROR¹

NOT FOR PUBLICATION

May 8, 2006

FISHER, J.

¹ On February 11, 2006, Bonfiglio filed a petition for rehearing with this Court. A petition for rehearing, however, is inappropriate in this instance. Indeed, when this Court hears cases protesting the final determinations of the Indiana Department of State Revenue (Department), as it did in this case, it acts as a trial court. See IND. CODE ANN. § 6-8.1-9-1(d) (West 2006); *Chrysler Fin. Co. v. Indiana Dep't of State Revenue*, 761 N.E.2d 909, 911 (Ind. Tax Ct. 2002), *review denied*. In turn, the proper method to challenge a judgment entered by a trial court (prior to filing an appeal) is a motion to correct error. See Ind. Trial Rule 59. Because this Court has, in the past, treated petitions for rehearing filed by the Department as motions to correct error, it will extend the same courtesy to Bonfiglio. See, e.g., *Miller Brewing Co. v. Indiana Dep't of State Revenue*, 836 N.E.2d 498 n.1 (Ind. Tax Ct. 2005), *review denied*. Accordingly, the Court will hereinafter refer to Bonfiglio's petition for rehearing as his "motion."

Facts as they pertain to this motion will be supplied as necessary. All other substantive and procedural facts as they relate to the Court's previous decision in this case are undisputed and can be found at *Bonfiglio v. Indiana Department of State Revenue*, Case No. 02T10-0506-TA-50, slip op. (Ind. Tax Ct. Jan. 30, 2006).

On January 30, 2006, this Court issued an unpublished opinion in the above-captioned case. In that opinion, the Court rejected Eugene Bonfiglio's (Bonfiglio) claim that his 1997 airplane purchase was exempt from Indiana's sales tax pursuant to Indiana Code § 6-2.5-5-8. See *Bonfiglio v. Indiana Dep't of State Revenue*, Case No. 02T10-0506-TA-50, slip op. (Ind. Tax Ct. Jan. 30, 2006). Bonfiglio now requests the Court to reconsider its decision. After reviewing his motion and having heard the parties' arguments thereon, the Court GRANTS Bonfiglio's motion.

ANALYSIS AND ORDER

In its initial opinion, the Court explained that in order for Bonfiglio's airplane purchase to be exempt from sales tax pursuant to Indiana Code § 6-2.5-5-8, Bonfiglio was required to show that, when he subsequently leased the airplane to two aviation companies, he either: 1) collected sales tax from the lessees on the lease transactions pursuant to Indiana Code § 6-2.5-4-10(a), or 2) the lessees themselves were exempt from paying the sales tax on the lease transactions. After reviewing the evidence presented by the parties, the Court held that Bonfiglio had not presented evidence to support his claim that the lessees were exempt from paying the sales tax on the lease transactions. More specifically, the Court determined that, with respect to the first lessee, Executive Aviation,² Bonfiglio had not presented its exemption certificate, but rather a copy of its air carrier certificate as issued by the Federal Aviation Administration. The Court explained that, unlike an exemption certificate, the air carrier certificate did not show that Executive Aviation was exempt from paying sales tax on the lease transaction. See *id.*, slip op. at 5-6. With respect to the second lessee, Riley

² Bonfiglio leased his airplane to Executive Aviation from June of 1998 through June of 2000.

Aviation,³ the Court acknowledged that Bonfiglio had presented an exemption certificate. Nevertheless, the Court held that because the exemption certificate was dated nearly four years after the expiration of the actual lease term, it did not show that Riley Aviation was exempt from paying the sales tax *during* the lease term. *See id.*, slip op. at 6.

Now, in his motion, Bonfiglio argues that the Court's decision was erroneous because it was not based on all the facts. More specifically, Bonfiglio explains that before the August 26, 2004 administrative hearing on this matter, he did in fact present an exemption certificate for Executive Aviation to the Department – a fact which the Department acknowledged in its December 2, 2004 letter of findings (LOF). (See Pet'r Mot. to Correct Error at 1 & Attach. B at 3.) Consequently, Bonfiglio asserts that the

³ Bonfiglio leased his airplane to Riley Aviation from June of 2000 to June of 2001.

Court must reexamine its decision in light of this evidence. Bonfiglio is correct.⁴

In presenting a copy of Executive Aviation's exemption certificate, Bonfiglio submitted prima facie evidence that Executive Aviation was exempt from paying sales

⁴ At the time it made its initial ruling in this case, the Court was unaware of Executive Aviation's exemption certificate because, as the Department has admitted, it inadvertently failed to attach the exemption certificate to the trial exhibit (Exhibit J) to which it was supposed to be attached. (See Mot. to Correct Error Hr'g Tr. at 5, 16.) Furthermore, the Court was unable to discern any "clues" from the testimonial dialogue between the Department's witness and its counsel that the exemption certificate was missing from the exhibit:

Q: Miss Quakenbush, [the Department] received [a copy of the lease agreement between Bonfiglio and Executive Aviation] from Mr. Bonfiglio, is that correct? And this is –

A: Yes.

Q: And can you tell me a little bit about . . . what the Department's perspective is when [it] received this?

A: Okay. We received a copy of this lease agreement between Mr. Bonfiglio and Executive Aviation and in the Department's opinion this is not a valid lease.

Q: Did Mr. Bonfiglio provide any other information to the Department [with respect to Executive Aviation]?

A: He had an air carrier certificate that was issued to Executive Aviation attached to it, but that didn't tell us anything[.]

Mr. Morford: Your Honor. I'm going to just leave it short. Mr. Bonfiglio has the burden of showing that he's entitled to an exemption. [The Department's] position is that he has not met that burden. Basically, all the information that he provided is. . . [t]he exemption certificate [for Riley Aviation] that [] was dated . . . 2005.

(Trial Tr. at 39-40, 63-64.) Finally, the Court was unable to refer to the Department's letter of findings (LOF) to determine that the exemption certificate had not been attached as neither party provided the Court with a copy of the LOF.

tax on its lease transaction with Bonfiglio. See *Bonfiglio*, slip op. at 5-6. See also *Galligan v. Indiana Dep't of State Revenue*, 825 N.E.2d 467, 483-84 (Ind. Tax Ct. 2005) (stating that “[t]here is no better way to prove [entitlement to an exemption] than to submit . . . [the] actual exemption certificates themselves”), *review denied*. Consequently, the Court’s initial ruling upholding the Department’s assessment of sales tax against Bonfiglio must be reversed unless the Department has rebutted that evidence. See *Galligan*, 825 N.E.2d at 477. In reviewing all pleadings, evidence, and arguments again, however, the Court finds that the Department has not rebutted this evidence.

While the Department’s LOF acknowledged the fact that Bonfiglio presented the exemption certificate for Executive Aviation, it failed to address *how* the exemption certificate affected the resolution of Bonfiglio’s claim. (See Pet’r Mot. to Correct Error, Attach. B at 2-4.) Rather, the LOF essentially states that, after providing Bonfiglio with seven years’ worth of opportunities to prove his entitlement to the exemption (i.e., from the time he bought the airplane in 1997 until the issuance of the LOF in 2004), the Department was no longer willing to work with him in resolving the matter. (See Pet’r Mot. to Correct Error, Attach. B at 2-4.) Since then, the Department has advanced five more “theories” as to why Bonfiglio should not be relieved of sales tax liability on his purchase of the airplane: 1) despite its failure to attach the exemption certificate to the trial exhibit, it was ultimately up to Bonfiglio to provide it to the Court during trial; 2) the exemption certificate is invalid because it is dated six months prior to the actual lease term; 3) Bonfiglio did not receive the exemption certificate at the point of sale; 4) Bonfiglio’s lease with Executive Aviation was invalid; and 5) the Court lacks subject

matter jurisdiction over Bonfiglio's claim. (See, e.g., Mot. to Correct Error Hr'g Tr. at 6, 17-18, 22-23.) The application of these "theories," however, does not rebut Bonfiglio's prima facie evidence.

The Department Got Tired of Waiting

In its LOF, the Department basically washed its hands of Bonfiglio's protest.

Indeed, the LOF states:

[t]he Department consistently and persistently has requested that [Bonfiglio] provide documentation to substantiate the sales tax exemption [he] sought[.] [Bonfiglio] has been on notice of the nature and character of the documentation sought – but has chosen to provide incomplete, inconclusive, and scattered pieces of documentation. . . . [Bonfiglio] has been on notice since 1997 that complete and accurate documentation would be needed to substantiate an exemption. Yet, [he] has not been proactive in collecting and preserving documentation. . . . After seven years of pursuing this matter, the Department is unmoved and unpersuaded by [his] efforts at providing documentation to prove entitlement to an exemption. Based on this – [Bonfiglio] has yet to submit sales/use tax or demonstrate an exemption[.]

(See Pet'r Mot. to Correct Error, Attach. B at 4.)

Such a result is inappropriate considering Bonfiglio did indeed present an exemption certificate for Executive Aviation nearly three years before the Department even issued its LOF. Furthermore, the Court will not allow the Department to simply ignore the exemption certificate because it took him seven years (again, really only four) to produce it. Indeed, the Department cannot be heard to complain when it was the Department itself that gave Bonfiglio seven years to prove his entitlement to the exemption.

Bonfiglio was Required to Produce the Exemption Certificate at Trial

The Department also argues that despite its failure to attach Executive Aviation's exemption certificate to the trial exhibit, it was ultimately Bonfiglio's responsibility to submit it as evidence at trial. See *Bonfiglio*, slip op. at 2 (stating that "[w]hen a taxpayer claims he is entitled to a tax exemption, he bears the burden of proving that the terms of the exemption have been met" (citation omitted)). Consequently,

Bonfiglio was provided ample opportunity to present his case at . . . trial. All of the information Bonfiglio attached to his [Motion] was available to him on the trial date. Bonfiglio had the burden of proving the exemption and failed to do so. He now requests a second bite of the apple. To grant Bonfiglio's [Motion] would be prejudicial and unduly burdensome on the Department to defend its actions relating to this matter twice when Bonfiglio failed to present his case for the first time.

(Resp't Resp. to Pet'r Mot. to Correct Error at 3, ¶ 8.) (See also Mot. To Correct Error Hr'g Tr. at 17 (where the Department cites to *Miller Brewing Company v. Indiana Department of State Revenue*, 836 N.E.2d 498, 500 (Ind. Tax Ct. 2005), review denied, for the proposition that "a motion to correct error is not an opportunity to present to the Court new information a party failed to raise during the original proceeding due to a lack of research and preparation"). The Court, however, disagrees for two reasons.

First, upon reviewing the trial transcript again, the Court notes that Bonfiglio and the Department essentially stipulated their exhibits as joint exhibits because they were the same documents. (See Trial Tr. at 2-5, 65.) Consequently, to the extent that Bonfiglio would have submitted the exhibit with the exemption certificate attached, he

had no reason to believe that when the Department submitted the exhibit for both parties it would not include the exemption certificate.⁵

Second, the Court does not deem the exemption certificate to be “new information” which would have come to light but for Bonfiglio’s “lack of research and preparation.” The Department has acknowledged that it received the exemption certificate in 2001. Accordingly, it should have addressed the exemption certificate’s applicability in both its 2004 LOF and at trial. *But see* fn. 4, *supra*. The Department cannot now claim it is somehow “surprised” by something it admittedly was aware of all along.

Exemption Certificate Dated Six Months Prior to Lease Term

At the hearing on Bonfiglio’s motion, the Department also theorized that Bonfiglio should not be exempt from paying sales tax on his airplane purchase because Executive Aviation’s exemption certificate was dated January 1, 1998 – six months prior to the actual lease term of June 1998. (See Mot. to Correct Error Hr’g Tr. at 6.) Again, the Court must disagree with the Department.

While Executive Aviation’s exemption certificate is dated January 1, 1998, it is also a “blanket” exemption certificate as opposed to a “single purchase” exemption certificate. (See Pet’r Mot. to Correct Error, Attach. B at 1.) Consequently, the exemption certificate exempts Executive Aviation from paying sales tax on *all* lease transactions entered into *after* January 1, 1998. See WEBSTER’S THIRD NEW INT’L DICTIONARY 230 (1981) (defining the adjective “blanket” as “effective or applicable in all

⁵ And, again, as the Department states, its failure to attach the exemption certificate to the appropriate trial exhibit was not intentional. (See Mot. To Correct Error Hr’g Tr. at 5, 16.) Rather, its failure to do so was simply inadvertent. (See Mot. To Correct Error Hr’g Tr. at 5, 16.)

instances or contingencies”). Because Executive Aviation’s lease with Bonfiglio commenced in June of 1998, it was covered by the exemption certificate.

Exemption Certificate Not Received at Point of Sale

The Department also argues that because Bonfiglio did not receive the exemption certificate from Executive Aviation at the point of sale, but rather several years later, Bonfiglio’s exemption claim should be denied. (See Resp’t Resp. to Pet’r Mot. to Correct Error at 2-3, ¶ 7.) This argument too must fail.

Typically, exemption certificates are to be presented to the retail merchant at the point of sale. See *Bonfiglio*, slip op. at 6 n.4. Nevertheless, the fact that Bonfiglio did not receive Executive Aviation’s exemption certificate until after the point of sale makes little difference in this case. Indeed, all that matters is that he was able to produce to this Court prima facie evidence that he was not required to collect sales tax from Executive Aviation on the lease transaction. See IND. CODE ANN. § 6-8.1-9-1(d) (West 2006). See also *Galligan*, 825 N.E.2d at 472 (stating that because this Court reviews final determinations of the Department *de novo*, it is bound by neither the evidence nor the issues presented at the administrative level).

Bonfiglio’s Lease with Executive Aviation is Invalid

Next, the Department argues that the exemption certificate for Executive Aviation counts for naught because the underlying lease is invalid. More specifically, the Department asserts that given the terms of the lease agreement between Bonfiglio and Executive Aviation, it is not convinced that Bonfiglio was leasing the aircraft “in the ordinary course of his business.” (See, e.g., Trial Tr. at 44.) See also IND. CODE ANN. § 6-2.5-5-8 (West 1997) (stating that “[t]ransactions involving tangible personal property

are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of his business”). Rather, the Department argues that Bonfiglio’s lease transaction with Executive Aviation was merely an “occasional sale.” (See Mot. To Correct Error Hr’g Tr. at 18-19 (citing to IND. ADMIN. CODE tit. 45, r. 2.2-5-15 (1996)⁶.) In making this argument, the Department relies on the fact that, unlike a “typical lease agreement,” the lease agreement between Bonfiglio and Executive Aviation did not state the amount of consideration to be paid for the lease of the airplane, did not state when or how the lease payments were to be made, and did not state which party was responsible for costs associated with the airplane’s maintenance, fuel, storage, insurance and repairs.⁷ (Trial Tr. at 40; *cf. with* Resp’t Trial Ex. H (footnote added).) The Department also relies on the fact that during its two-year lease term, Executive Aviation flew the airplane for a total of only 25.2 hours. (See Trial Tr. at 11, 23.) Finally, the Department explains that while Bonfiglio only reported \$4,018.00 in total income from the time he acquired the airplane in 1997 to the expiration of the lease with Executive Aviation in June of 2000, he expensed approximately \$80,000.00. (See Trial Tr. at 44.)

⁶ This rule provides that while sales of tangible personal property for resale, rental or leasing are generally exempt from sales tax, “[t]he purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. *Occasional sales . . . shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.*” IND. ADMIN. CODE tit. 45, r. 2.2-5-15(b),(c) (1996) (emphasis added).

⁷ Bonfiglio indicated at trial, however, that despite the agreement’s lack of terms, he and Executive Aviation’s representative were “men of their words” and had verbally agreed that Bonfiglio would provide the fuel for the airplane and Executive Aviation would pay him \$230 for every hour it flew the airplane. (See Trial Tr. at 11-12, 58.)

In presenting this argument to the Court, the Department has provided the Court with no definition of an “occasional sale,” no guidelines for distinguishing an “occasional sale” from an “ordinary course of business” transaction, and no legal analysis as to why Bonfiglio’s lease with Executive Aviation is not a valid lease. See, e.g., *Tri-States Double Cola Bottling Co. v. Indiana Dep’t of State Revenue*, 706 N.E.2d 282, 285 (Ind. Tax Ct. 1999) (stating generally that a lease is “[1] a transfer of the right to possession and use of goods[; 2] for a term[; 3] in return for consideration”).⁸ Rather, the Department has merely pointed out what it deems to be deficiencies in Bonfiglio’s lease agreement and then concludes that such deficiencies render the transaction an “occasional sale.” Conclusory statements, however, do not constitute probative evidence that a transaction is an “occasional sale.” See *Whitley Prods., Inc. v. State Bd. of Tax Comm’rs*, 704 N.E.2d 1113, 1119 (Ind. Tax Ct.1998) (stating that conclusory statements do not constitute probative evidence), *review denied*.

The Court Lacks Subject Matter Jurisdiction

In its final argument, the Department asserts that Bonfiglio should not be released from sales tax liability because although he has already paid the tax and is essentially seeking a refund, “the Department . . . [has] no record of a refund being requested.” (Mot. To Correct Error Hr’g Tr. at 23.) Consequently, the Department

⁸ The Department cites to footnote two in the Court’s initial opinion for the proposition that Bonfiglio never received any consideration from the lease with Executive Aviation. (See Mot. To Correct Error Hr’g Tr. at 19.) The Department misinterprets that footnote: the Court did not state that Bonfiglio did not *receive* any consideration from the lease transaction, rather that he just failed to properly report it. *Bonfiglio*, slip op. at 5 n.2. Furthermore, with respect to the amount of consideration, as long as consideration exists, “it is improper for courts to inquire into the adequacy of consideration.” *Bernstein v. Glavin*, 725 N.E.2d 455, 461 (Ind. Ct. App. 2000) (citation omitted), *trans. denied*.

asserts that this Court not only lacks subject matter jurisdiction to decide the merits of Bonfiglio's motion, it apparently asserts that the Court actually lacked subject matter jurisdiction to issue its initial ruling in January.

As the Court noted in its initial decision, after the Department denied Bonfiglio's claim for exemption in its December, 2004 LOF – but before Bonfiglio initiated his original tax appeal on May 27, 2005 – Bonfiglio paid the tax, penalties, and interest at issue. *Bonfiglio*, slip op. at 2 n.1. As a result, the Department contends that once he paid the tax, Bonfiglio was required to file a claim for refund with the Department – and receive another ruling from the Department – before he could appeal to this Court. (See Mot. to Correct Error Hr'g Tr. at 23.) In other words, the Department is asserting that because Bonfiglio failed to exhaust all his administrative remedies before he filed his appeal with this Court, the Court lacks the subject matter jurisdiction to decide his case.

Every action has three jurisdictional elements: 1) jurisdiction of the subject matter; 2) jurisdiction of the person; and 3) jurisdiction of the particular case. *Carroll County Rural Elec. Membership Corp. v. Indiana Dep't of State Revenue*, 733 N.E.2d 44, 47 (Ind. Tax Ct. 2000). Subject matter jurisdiction is the power of a court to hear and determine the general class of cases to which the proceedings before it belong. *Id.* (quotation and citation omitted). Whether a court has subject matter jurisdiction “depends on whether the type of claim advanced by the petitioner falls within the

general scope of authority conferred upon the court by constitution or statute.”⁹ *Id.* (citation omitted) (footnote added). A judgment rendered by a court lacking subject matter jurisdiction is void and may be attacked at any time.¹⁰ *Foor v. Town of Hebron*, 742 N.E.2d 545, 548 (Ind. Ct. App. 2001) (citation omitted) (footnote added).

Admittedly, this Court has previously stated that compliance with the procedures set forth in the refund statute, Indiana Code § 6-8.1-9-1, “is the exclusive remedy for relief from taxes paid.” See *UACC Midwest, Inc. v. Indiana Dep’t of State Revenue*, 629 N.E.2d 1295, 1298 (Ind. Tax Ct. 1994) (citation omitted). Be that as it may, there are exceptions to the requirement of exhaustion of remedies at the agency level. “For instance, a party is excepted from the exhaustion requirement when the remedy is inadequate or would be futile, or when some equitable consideration precludes application of the rule.” *Smith v. State Lottery Comm’n of Indiana*, 701 N.E.2d 926, 931 (Ind. Ct. App. 1998) (citation omitted), *trans. denied*. This case fits that exception.

To prevail upon a claim of futility, it must be shown “that the administrative agency was powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances.” *Id.* (internal quotation and citation omitted). Here, before Bonfiglio paid the tax, he had protested his assessment and the Department conducted a hearing and subsequently issued a final determination

⁹ This Court has subject matter jurisdiction over all “original tax appeals.” IND. CODE ANN. § 33-26-3-3 (West 2006). An original tax appeal is one that arises under Indiana’s tax laws and is an initial appeal of a final determination made by the Indiana Department of State Revenue, the Indiana Board of Tax Review, and, in limited instances, the State Board of Tax Commissioners or the Department of Local Government Finance. See IND. CODE ANN. § 33-26-3-1 (West 2006); IND. CODE ANN. § 33-26-3-2 (West 2006); 2001 Ind. Acts 198 § 116.

¹⁰ The appropriate means to challenge a court’s subject matter jurisdiction is a Trial Rule 12(B)(1) motion. Ind. Trial Rule 12(B)(1).

thereon. That final determination was, in and of itself, appealable to this Court. To require Bonfiglio to file a claim for refund after he paid the taxes and to essentially *contest the same issue in yet another administrative hearing* would have truly been “fruitless and of no value under the circumstances.”¹¹ Consequently, Bonfiglio is excused from filing a claim for refund in this instance.

CONCLUSION

Upon review and for the foregoing reasons, the Court GRANTS Bonfiglio’s motion to correct error and REVERSES the initial opinion it issued in this case. Accordingly, the Department is now ordered to refund to Bonfiglio the \$4,047.03 in sales tax he has paid on the 1997 purchase of his airplane. (See Pet’r V. Pet. at ¶ 6, 7; Resp’t Answer at ¶ 6.)

SO ORDERED this 8th day of May, 2006.

Thomas G. Fisher, Judge
Indiana Tax Court

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¹¹ Indeed, as evidenced by its position on this motion, the likelihood that the Department would have changed its position on a claim for refund is slim to none.