DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 00-0103
SALES AND USE TAX
FOR TAX PERIODS: 1996-1998

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1. Sales and Use Tax: Purchase for resale exemption.

Authority: IC 6-2.5-3-2 (a), IC 6-2.5-5-8, IC 26-1-2-106, USAir, Inc. v. Indiana Department of Revenue, 542 N.E.2d 1033 (Tax Court 1989).

Taxpayer protests the imposition of gross retail tax on crayons.

2. Tax Administration: Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 2.2-3-16.

Taxpayer protests the imposition of penalty.

Statement of Facts

Taxpayer owns and operates several restaurants in Indiana and Ohio. After an audit, additional sales and use tax was assessed. Taxpayer protested a portion of the assessment and a hearing was held. Further facts will be provided as necessary.

1. Sales and Use Tax: Purchase for resale exemption.

Discussion

Taxpayer provides crayons and activity sheets to children in its full service restaurants in hopes that the children will be entertained while the parents are ordering and dining. The Indiana Department of Revenue assessed use tax on the crayons. Taxpayer protests this assessment.

IC 6-2.5-3-2 (a) imposes the state gross retail or use tax "on the storage, use, or consumption of tangible personal property in Indiana." There are several statutory exemptions to the use tax. Taxpayer contends that its purchases of crayons qualify for exemption pursuant to IC 6-2.5-5-8 as follows:

> Transactions 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 without changing the form of the property.

Taxpayer argues that it actually sells the crayons as part of the meal. Crayons are offered to all children eating in the restaurants. Taxpayer's policy is to encourage children to use the crayons in the restaurant and then take them home after the dining experience. Taxpayer collects and remits sales tax based upon the total sales price of the meals including crayons.

Taxpayer's situation is similar to the situation of USAir in the case USAir, Inc. v. Indiana Department of Revenue, 542 N.E.2d 1033 (Tax Court 1989). In that case, USAir claimed a resale exemption for the meals which it purchased and served to passengers on its flights. The Court held that passengers did not bargain separately or pay separate consideration for the meals. No passenger would be able to refuse service of the meal and then deduct the cost of his meal from the price of the ticket. Rather the meals were an amenity and ordinary cost of doing business. USAir used the meals in the performance of its business of providing air transportation to passengers. The Court concluded that the meals did not qualify for the resale exemption. Likewise, diners in Taxpayer's restaurants do not bargain separately or pay separate consideration for the crayons. Rather the crayons are an ordinary cost of doing business. Taxpayer uses the crayons in its business of selling meals to families.

Finding

Taxpayer's protest is denied.

2. Tax Administration: Penalty

Discussion

Taxpayer's final point of protest concerns the imposition of the ten per cent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

> Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

In this instance, Taxpayer failed to pay gross retail tax on many items clearly subject to this tax. These items include coffee urns for serving, office supplies, shirts and menu

covers. This breach of its duty to properly report and remit gross retail tax constitutes negligence.

Finding

Taxpayer's protest is denied.

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