

Letter of Findings Number: 05-0507
Sales and Use Tax
For the Tax Period 2003-2004

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ISSUES

I. Sales and Use Tax – Complimentary Meals and Merchandise

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1(a); IC § 6-2.5-1-2(a); IC § 6-2.5-4-1(b); *Monarch Beverage Co., Inc v. Ind. Dep't of State Revenue*, 589 N.E.2d 1209 (Ind. Tax Ct. 1992).

Taxpayer protests the imposition of sales tax on certain meals and merchandise.

II. Tax Administration- Ten Percent Negligence Penalty

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2\(b\)](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer operates a riverboat casino. After an audit, the Indiana Department of Revenue (Department) assessed additional sales and use tax, interest, and penalty for the years 2001-2004. Taxpayer protested the assessments. A hearing was held, and this Letter of Findings results.

I. Sales and Use Tax- Complimentary Meals and Merchandise

DISCUSSION

The Department assessed sales tax on Taxpayer's sales of meals and gift shop items to patrons who paid by presentation of "complimentary vouchers." Taxpayer protested these assessments contending that the transfers were not sales subject to sales tax. Rather, Taxpayer characterized these transfers as nontaxable complimentary transfers.

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. IC § 6-8.1-5-1(b). Taxpayer bears the burden of proving that the assessment is incorrect. *Id.*

Indiana imposes a sales tax on "retail transactions made in Indiana" at IC § 6-2.5-2-1(a).

A "retail transaction" is defined at IC § 6-2.5-1-2(a) as "a transaction of a retail merchant that constitutes selling at retail...."

A transaction constitutes selling at retail if it meets the following elements of a sale at retail pursuant to IC § 6-2.5-4-1(b):

A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

- (1) acquires tangible personal property for the purpose of resale; and
- (2) transfers that property to another person for consideration.

If a retailer purchases tangible personal property in order to resell it and actually transfers that property to another in exchange for consideration, there is a retail sale subject to Indiana sales tax. In this situation, there is agreement that the first element of a retail sale subject to sales tax is met – Taxpayer acquires tangible personal property for resale and transfers the property (meals, drinks, and gift shop merchandise) to others in the ordinary course of its business. The issue to be determined in this case is whether or not Taxpayer receives consideration for the transfer of the food, drinks, and other merchandise and therefore actually sells the items in a retail sale subject to Indiana sales tax.

To determine if Taxpayer actually receives consideration from its patrons in exchange for the meals and merchandise, one must first determine what "consideration" is. In *Monarch Beverage Co., Inc v. Ind. Dep't of State Revenue*, 589 N.E.2d 1209 (Ind. Tax Ct. 1992), the Tax Court discussed the term "consideration" as used in IC § 6-2.5-4-1(b)(2). The court stated,

The concept of consideration evolved from the law of contracts. In order to have a legally binding contract there must generally be an offer, acceptance, and consideration. Consideration is essential to every contract. Indiana has long held that consideration in the form of money is not essential to a binding contract. A mere promise is sufficient as consideration if it is the result of a bargained for exchange. Moreover, a benefit to the promisor or a detriment to the promisee is sufficient as consideration. 'The doing of an act by one at the request of another which may have a detrimental inconvenience, however slight, to the party doing it or may be a benefit, however slight, to the party at whose request it is performed, is legal consideration for a promise by such requesting party.'

In the transactions in question, Taxpayer's patrons pay Taxpayer for prepared meals, drinks, and merchandise by presentation of complimentary vouchers. Patrons earn these by playing at the gaming tables. Patrons present the vouchers for merchandise, food, and drinks at the regularly listed prices.

The vouchers have a specific value regardless of whether they can be exchanged for cash. In the exchange between Taxpayer and the patrons, the patrons who hold the vouchers receive the benefit of the promised tangible personal property—the food, drinks, and merchandise. Taxpayer sustains the obligation of giving the food, drinks, and merchandise to the patrons. This is not a discounted coupon situation. Rather, the patrons use their vouchers to pay full price for the merchandise and meals—minus the sales tax.

Taxpayer's patrons exchange consideration for the meals and merchandise they receive from Taxpayer in the subject transactions. The transactions meet the statutory definition of a retail sale subject to the sales tax. The Department properly imposed sales tax.

FINDING

The Taxpayer's protest is respectfully denied.

II. Tax Administration- Ten Percent Negligence Penalty

DISCUSSION

Taxpayer protests the imposition of the ten percent 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 read 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.

Taxpayer did not address the penalty issue in its protest letter or during the hearing. Taxpayer's protest is denied.

FINDING

The Taxpayer's protest is denied.

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