DEPARTMENT OF STATE REVENUE

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04-20120251.LOF

Letter of Findings: 04-20120250; 04-20120251
Gross Retail Tax
For the Years 2008 through 2010

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ISSUES

I. Restaurant Exhaust Equipment – Gross Retail Tax.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-5-3; IC § 6-2.5-4-1(b), (c); IC § 6-8.1-5-1(c); Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629 (Ind. Tax Ct. 1999); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991); Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282 (Ind. Tax Ct. 1999); Indiana Dept. of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); 45 IAC 2.2-5-8; 45 IAC 2.2-5-10; 45 IAC 2.2-5-10(g).

Taxpayer argues that its restaurant exhaust systems are exempt from sales/use tax because the exhaust systems are essential and integral to its food production process.

II. Boiler Tank – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c); Graham Creek Farms v. Indiana Dep't of State Revenue, 819 N.E.2d 151 (Ind. Tax Ct. 2004); Guardian Automotive Trim, Inc. v. Indiana Dep't of State Revenue, 811 N.E.2d 979 (Ind. Tax Ct. 2004); 45 IAC 2.2-5-8; 45 IAC 2.2-5-10; 45 IAC 2.2-5-10(g).

Taxpayer maintains that its boiler tank, used to heat water, is exempt from sales/use tax because the boiler tank is a synchronized and integral part of its food production process.

III. Lump Sum Construction Contracts – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(c); 45 IAC 2.2-3-9; Sales Tax Information Bulletin 60 (April 2011).

Taxpayer claims that it is not required to pay sales/use tax on the price it paid for what it categorizes as lump sum construction projects.

IV. Service Contracts – Gross Retail Tax.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-4-1(a); IC § 6-2.5-4-1(b); IC § 6-8.1-5-1(c).

Taxpayer maintains that it was not required to pay sales tax on the price it paid for what it characterizes as a service contract.

V. Exempt Production Equipment – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c); 45 IAC 2.2-5-8; 45 IAC 2.2-5-10.

Taxpayer argues it was not required to pay sales/use tax on the price it paid for various items of equipment because these items are purportedly directly used in Taxpayer's food production process.

VI. Safety Equipment – Gross Retail Tax.

Authority: 45 IAC 2.2-5-8(c)(2)(F); 45 IAC 2.2-5-8(c)(4)(B).

Taxpayer argues that its purchases of certain safety equipment and supplies are exempt.

VII. Laboratory Testing Equipment – Gross Retail Tax.

Authority: 45 IAC 2.2-5-8(i).

Taxpayer maintains that its purchases of certain equipment used to test its food products are exempt.

VIII. Packaging Materials – Gross Retail Tax.

Authority: 45 IAC 2.2-5-16(d)(1).

Taxpayer states that its purchase of adhesives is exempt because the adhesives are used to package Taxpayer's food products.

STATEMENT OF FACTS

Taxpayer operates Indiana fast-food restaurants. Taxpayer also operates a bakery and a meat processing facility. The Department of Revenue ("Department") conducted an audit on two Taxpayer related business entities which necessarily resulted in two audit reports and two proposed assessments. For purposes of this Letter of Findings, the two related entities are simply designated here as "Taxpayer." For purposes of this Letter of Findings, the distinction between the two related entities is irrelevant.

Taxpayer disagreed with certain results contained in the audit reports and filed a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Restaurant Exhaust Equipment – Gross Retail Tax.

DISCUSSION

Taxpayer argues that it was not required to pay sales tax when it purchased ventilation equipment installed in its restaurants. The equipment included exhaust motors, stove hoods, fans, duct work, various parts, and "roof curbs" which Taxpayer explains are the framework on which the roof-top ventilation equipment is installed.

Taxpayer maintains that the ventilation equipment is "essential and integral to an integrated [food] production process..." and that production of Taxpayer's food "could not be conducted without the equipment." Taxpayer explains that without the ventilation equipment, preparation of food would necessarily cease.

As legal authority, Taxpayer cites two regulations. Taxpayer references 45 IAC 2.2-5-8 which states:

(a) In general, all purchases of tangible personal property by persons engaged in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property are taxable. The exemption provided in this regulation [45 IAC 2.2] extends only to manufacturing machinery, tools, and equipment directly used by the purchaser in direct production. It does not apply to material consumed in production or to materials incorporated into tangible personal property produced.

(b) The state gross retail tax does not apply to sales of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the direct production, manufacture, fabrication, assembly, or finishing of tangible personal property.

(c) The state gross retail tax does not apply to purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in the production process provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces tangible personal property.

Taxpayer also references 45 IAC 2.2-5-10 which states:

(a) In general, all purchases of tangible personal property by persons engaged in the processing or refining of tangible personal property are taxable. The exemption provided in this regulation [45 IAC 2.2] extends only to manufacturing machinery, tools, and equipment used in direct production. It does not apply to materials consumed in production or to materials incorporated into the tangible personal property produced. Additionally, the exemption provided in this regulation [45 IAC 2.2] extends to industrial processors. An industrial processor, as defined in IC 6-2.5-4-2, is one who:

(1) acquires tangible personal property owned by another person;

(2) provides industrial processing or servicing, including enameling or plating, on the property; and

(3) transfers the property back to the owner to be sold by that owner either in the same form or as a part of other tangible personal property produced by that owner in his business of manufacturing, assembling, constructing, refining, or processing. (b) The state gross retail tax will not apply to sales of manufacturing machinery, tools, and equipment which are to be directly used by the purchaser in processing or refining tangible personal property.

(c) Purchases of manufacturing machinery, tools, and equipment to be directly used by the purchaser in processing or refining are exempt from tax; provided that such machinery, tools, and equipment are directly used in the production process; i.e., they have an immediate effect on the tangible personal property being processed or refined. The property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which processes or refines tangible personal property. (Emphasis added).

The statutory authority for the above-cited regulation is found at IC § 6-2.5-5-3 which states in part:

Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring that property acquires it for direct use in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining, or finishing of other tangible personal property. IC § 6-2.5-5-3(b) (Emphasis added).

The Department's audit addressed the issue of whether the exhaust ventilation systems and related equipment were subject to sales/use tax and disagreed with Taxpayer's claim that the items were exempt. The audit report stated that:

The exhaust equipment environmentally conditions the kitchen area of the restaurant[s]. The equipment does not operate in an integrated fashion with the food production process and is not essential to making that process possible. The equipment does not have an immediate effect upon the article being produced. There is no exemption available for this equipment. Roof curbs associated with the exhaust systems are also taxable. Heating and ventilation equipment as well as fire system piping are related to health and safety and are not components of the food production process.

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). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" on "the 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). Use means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). 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. Id.; 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. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. Rhoade, 774 N.E.2d at 1048. 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), (c); IC § 6-2.5-3-2(a).

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is wrong. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

In applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dept. of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988). 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 100-101.

The "manufacturing exemption" as set out in IC § 6-2.5-5-3, 45 IAC 2.2-5-8, and 45 IAC 2.2-5-10, like all tax exemption provisions, is strictly construed against exemption from the tax. Tri-States Double Cola Bottling Co. v. Dep't of State Revenue, 706 N.E.2d 282, 283 (Ind. Tax Ct. 1999); Mynsberge v. Dep't of State Revenue, 716 N.E.2d 629, 636 (Ind. Tax Ct. 1999). Nevertheless, the Department is well aware of the countervailing rule that a "statute must not be construed so narrowly that it does not give effect to legislative intent because the intent of the legislature embodied in a statute constitutes the law." General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991).

In order to qualify for the exemption, both the regulation and the statute require that the equipment at issue be "directly used" in "direct production." That means that the equipment or device must have an "immediate effect" on the food items being produced by Taxpayer.

In this case, Taxpayer points out that practical necessity requires that its restaurants utilize exhaust systems. According to Taxpayer, without the restaurant exhaust systems, practical necessity would literally drive both customers and employees out the door of its restaurants. However, practical necessity is not the standard by which the law determines whether or not a particular item of equipment is "directly used in the direct production" of its food products. Food production may require equipment, supplies, facilities, and various paraphernalia, but the law does not make these items necessarily exempt from sales tax. As explained in 45 IAC 2.2-5-10(g):

> The fact that particular property may be considered essential to the conduct of the business of manufacturing because its use is required either by law or by practical necessity does not, of itself, mean that the property "acts upon and has an immediate effect on the tangible personal property being processed or refined". Instead, in addition to being essential for one of the above reasons, the property must also be an integral part of an integrated process which produces tangible personal property.

Taxpayer's ventilation equipment is mandated by the practical necessities arising from the preparation of Taxpayer's food products. However, Taxpayer has failed to demonstrate that the equipment is directly used in the direct production of Taxpayer's food products or that the equipment has an immediate effect on those products.

FINDING

Taxpayer's protest is respectfully denied.

II. Boiler Tank – Gross Retail Tax.

DISCUSSION

Taxpayer purchased a boiler tank. The boiler tank is used to heat water. The heated water is used to power wash and sanitize equipment in Taxpayer's meat processing facility. Taxpayer maintains that the boiler tank functions as a "synchronized and integral part of the [meat] production process." Taxpayer concludes that if the food processing equipment was not properly sanitized, it would be unable to produce quality meat products for its restaurants.

As explained in Part I above, Taxpayer relies on the "manufacturing exemption" set out in 45 IAC 2.2-5-8 and 45 IAC 2.2-5-10.

In the case of the boiler tank, Taxpayer places particular reliance on Tax Court decisions found in Guardian Automotive Trim, Inc. v. Indiana Dep't of State Revenue, 811 N.E.2d 979 (Ind. Tax Ct. 2004) and Graham Creek Farms v. Indiana Dep't of State Revenue, 819 N.E.2d 151 (Ind. Tax Ct. 2004).

In Guardian Automotive, the Tax Court considered whether the equipment used to clean petitioner's paint masks was exempt from tax. Both parties agreed that the petitioner's paint masks that covered and protected the

petitioner's electroplated parts were exempt. Guardian Automotive, 811 N.E.2d at 984. By extension, the court held that the equipment subsequently used to clean excess over-sprayed paint from the masks was also exempt because cleaning the masks was "an integral part of Guardian's manufacture of the automotive trim parts." Graham Creek, N.E.2d at 164,

In Graham Creek Farms, the court found that the purchase of glass cleaning supplies used to "keep the windows of [petitioner's] combine clean while harvesting" was exempt because the glass cleaner had a purportedly immediate effect on the soybeans being harvested. Id. at 164.

As noted in Part I above, in order to establish that the boiler tank is exempt from sales tax, Taxpayer is required to establish that the proposed assessment is wrong. IC § 6-8.1-5-1(c). It is also worthwhile to again here note that "tax exemptions are strictly construed in favor of taxation and against the exemption." Kimball, 520 N.E.2d at 456. The principal is long established that "[t]he statutes of this state relating to the assessment and collection of taxes are liberally construed in favor of the taxing powers." Fell v. West, 73 N.E. 719, 722 (Ind. App. 1905).

Taxpayer points out that practical necessity and simple common sense require that its meat production equipment be regularly and thoroughly cleaned and sanitized. It is also quite reasonable to assume that Taxpayer's meat processing facility would run afoul of either – or both – federal and state health regulations unless the meat processing machinery was regularly and thoroughly cleaned. However, "necessity" and "practicality" are not the standards by which one obtains the exemption. See 45 IAC 2.2-5-10(g). Is the boiler tank " directly used in the direct production" of the food Taxpayer produces in its restaurants? Does the boiler tank have an " immediate effect" on the food Taxpayer serves to its customers? The answer to both questions is "no" because the boiler tank does not directly touch on or directly affect Taxpayer's food products.

FINDING

Taxpayer's protest is respectfully denied.

III. Lump Sum Construction Contracts – Gross Retail Tax.

DISCUSSION

Taxpayer argues the prices it paid to have awnings installed, a glass restaurant partition constructed, and exterior landscaping completed were not subject to sales tax because the projects were performed under "lump sum contracts" with the various vendors and contractors.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

A "lump sum contract" for an improvement to realty is defined as "a contract in which all of the charges are quoted as a single price." Sales Tax Information Bulletin 60 (April 2011), 20110427 Ind. Reg. 045110247NRA.

Specifically, IC § 6-2.5-2-1 provides as follows:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2(a) provides for the complementary use tax:

An excise tax, known as the use tax, is imposed on the 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.

The responsibility for paying sales tax on materials used in construction projects is addressed at 45 IAC 2.2-3-9 which provides:

A contractor may purchase construction material exempt from the state gross retail tax only if he issues either an exemption certificate or a direct pay certificate to the seller at the time of purchase.

(b) A contractor who purchases construction material exempt from the state gross retail tax or otherwise acquires construction material "tax-free", is accountable to the Department of Revenue for the state gross retail tax when he disposes of such property.

(c) A contractor has the burden of proof to establish exempt sale or use when construction material, which was acquired tax free, is not subject to either the state gross retail or use tax upon disposition.

(d) Disposition subject to the state gross retail tax. A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:

(1) Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction material and the cost for the labor and other charges (only the gross proceeds from the sale of the construction materials are subject to tax), or

(2) Construction material sold over-the-counter. Over the counter sales of construction materials will be treated as exempt from the state gross retail tax only if the contractor receives a valid exemption

certificate issued by the person for whom the construction is being performed or by the customer who purchases over-the-counter, or a direct pay permit issued by the customer who purchases over-the-counter.

(e) Disposition subject to the use tax. With respect to construction materials a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:

(1) He converts the construction material into realty on land he owns and then sells the improved real estate;

(2) He utilizes the construction material for his own benefit; or

(3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

(f) A disposition under C. [subsection (e)(3) of this section] will be exempt from the use tax only if the contractor received a valid exemption certificate, not a direct pay permit, from the ultimate purchaser or recipient of the construction material (as converted), provided such person could have initially purchased such property exempt from the state gross retail tax.

Under a "lump sum contract," the contractor/vendor is responsible for paying use tax on the price paid for the materials incorporated into the customer's realty.

If a construction contractor purchases construction materials pursuant to a lump sum contract, the construction contractor pays either (1) sales tax at the time the construction materials are purchased; or (2) use tax at the time the construction materials are incorporated into real property if the contractor purchased or acquired the construction materials exempt from sales tax and the owner of the real property could not have purchased the materials exempt from sales tax (as evidenced by a customer's properly completed ST-105 General Sales Tax Exemption Certificate). Sales Tax Information Bulletin 60 (April 2011).

Pursuant to IC § 6-8.1-5-1(c), Taxpayer has provided sufficient information to establish that the invoices for the purchase and installation of awnings and for the purchase and installation of glass partitions were lump sum contracts for which it was the contractors' responsibility to pay sales tax when the contractors bought the materials or to self-assess use tax when the contractors incorporated the materials into Taxpayer's property.

Taxpayer has not met its burden of demonstrating that the invoice for a landscape project is the result of a "lump sum contract." The invoice plainly represents a "time and materials contract" and Taxpayer is required to pay sales tax on the cost of the materials.

FINDING

Taxpayer's protest is sustained in part and denied in part.

IV. Service Contracts – Gross Retail Tax.

DISCUSSION

Taxpayer hired a company called "Prime Coat" to install epoxy floor covering. Taxpayer maintains it was not required to pay sales tax when it paid the subsequent invoice because Prime Coat only provided installation services.

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

A transaction subject to the state's sales tax necessarily involves the transfer of "tangible personal property." A review of the invoice and accompanying purchase order are sufficient to establish that Prime Coat was hired to install epoxy floors and that the transaction did not involve the transfer of tangible personal property (the epoxy flooring material). Under IC § 6-8.1-5-1(c), Taxpayer has met its burden of establishing the transaction was not subject to sales/use tax.

FINDING

Taxpayer's protest is sustained.

V. Exempt Production Equipment – Gross Retail Tax.

DISCUSSION

Taxpayer argues that it purchased certain items – included in the audit sample – which should be removed because the items are directly used in Taxpayer's production process. As noted in Part I above, Taxpayer relies on the "manufacturing exemption" as set out in 45 IAC 2.2-5-8 and 45 IAC 2.2-5-10. As noted above, IC § 6-8.1-5-1(c) requires that the Taxpayer demonstrate that the proposed assessment of tax is "wrong."

Taxpayer has supplied information sufficient to establish that equipment or parts purchased from the following vendors were exempt from sales tax because the items are directly involved in the production of Taxpayer's food products. The amount of tax at issue is listed following the name of the vendor.

Hudelson Machine; $8.57

Kirby Risk Electrical; $45.50; $50.72

Jasper Bolt & Screw; $3.86.

FINDING

Insofar as the vendors and tax amounts listed immediately above, Taxpayer's protest is sustained.

VI. Safety Equipment – Gross Retail Tax.

DISCUSSION

Taxpayer purchased items for use in its food processing facilities which it now argues are exempt safety equipment or supplies. 45 IAC 2.2-5-8(c)(2)(F) states that equipment required to allow workers to participate in the production process without injury is exempt from Tax. However, equipment primarily for the workers' comfort and convenience is taxable. 45 IAC 2.2-5-8(c)(4)(B).

Taxpayer has supplied information sufficient to establish that items purchased from the following vendors were exempt from sales tax because the items are required to permit Taxpayer's employees to participate in the food production process. The amount of tax at issue is listed following the name of the vendor.

Lab Safety Supply; $4.45

Hantover; $39.64; $17.66; $9.42.

FINDING

Insofar as the vendors and amounts listed immediately above, Taxpayer's protest is sustained.

VII. Laboratory Testing Equipment – Gross Retail Tax.

DISCUSSION

Taxpayer argues that it purchased testing equipment used in its food production process and that the testing equipment is exempt from sales/use tax. Taxpayer presumably relies on 45 IAC 2.2-5-8(i). That specific portion of the regulation provides:

Machinery, tools, and equipment used to test and inspect the product as part of the production process are exempt.

Taxpayer has provided information sufficient to establish that purchases from the following vendor are exempt pursuant to 45 IAC 2.2-5-8(i).

Weber Scientific; $8.92; $15.16.

FINDING

Insofar as the vendors and amounts listed immediately above, Taxpayer's protest is sustained.

VIII. Packaging Materials – Gross Retail Tax.

DISCUSSION

Taxpayer purchased "hot melt adhesives" used to close and seal boxes containing Taxpayer's food products. The products are prepared at one of Taxpayer's food processing facilities and sent to one of the Taxpayer's restaurants. Taxpayer maintains that the "hot melt adhesives" are exempt from sales and use tax. Taxpayer presumably relies on 45 IAC 2.2-5-16(d)(1) which sets out the circumstances in which "nonreturnable wrapping material" is exempt.

To qualify for this exemption, nonreturnable wrapping materials and empty containers must be used by the purchaser in the following way;

(A) The purchaser must add contents to the containers purchased; and

(B) The purchaser must sell the contents added.

Taxpayer uses the adhesives to package food products which it ships to its restaurants. In this instance however, the food products are not being sold to its restaurants. If the packaged food were being sold to one of Taxpayer's restaurant customers, the exemption would apply. In this instance, Taxpayer does not sell the enclosed contents to its restaurants and the exemption is inapplicable.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

As set out in Part III above, the price Taxpayer paid for the purchase and installation of awnings and a glass partition is exempt; as set out in Part IV above, the price Taxpayer paid to have epoxy flooring material applied is exempt; as set out in Parts V, VI, and VII, the amounts Taxpayer paid to the stipulated vendors and for the designated amounts of tax are exempt and Taxpayer's protest is sustained; in all other respects, Taxpayer's protest is respectfully denied.

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