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DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 98-0507

SALES AND USE TAX

FOR TAX PERIODS: 1994-1996

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Issue

1. Sales and Use Tax: Unreported Taxable Sales

Authority: IC 6-8.1-5-1 (b).

The taxpayer protests the assessment of sales tax on certain unreported sales.

2. Sales and Use Tax: School Food Service

Authority: IC 6-2.5-2-1 (a), IC 6-2.5-5-20, Sales Tax Information Bulletin #32, August 1997, Hope Lutheran Church v. Chellew, 460 N.E. 2d 1244(Ind.Ct. App.1984), United Artists Theatre Circ., Inc. v. Indiana Department of State Revenue, 459 N.E. 2d 754 (Ind. Ct. App. 1984).

The taxpayer protests the assessment of sales tax on its university food service operations.

3. Sales and Use Tax: Vending Machine Labels

Authority: IC 6-2.5-2-1 (a), IC 6-2.5-5-20, Information Bulletin #45, issued December 1991.

The taxpayer protests the assessment of tax on the gross sales of vending machines.

4. Sales and Use Tax: Consumable Goods

Authority: . IC 6-2.5-2-1 (a), IC 6-2.5-3-2 (a).

The taxpayer protests the assessment of use tax on the use of certain consumable goods.

5. Sales and Use Tax: Capital Purchases

Authority: IC 6-2.5-2-1 (a), IC 6-2.5-3-2 (a).

The taxpayer protests the assessment of use tax on certain capital purchases.

6. **Tax Administration:** Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the imposition of the negligence penalty.

Statement of Facts

The taxpayer, a corporation with its commercial domicile in North Carolina, is a food and beverage service company with revenue derived from cafeterias and vending machines in Indiana. After an audit, the Indiana Department of Revenue ("department") assessed the taxpayer additional sales and use tax, interest and penalty. The taxpayer protested the assessment and a hearing was held. More facts will be provided as necessary.

1. **Sales and Use Tax:** Unreported Taxable Sales

Discussion

All department assessments are presumed to be correct. Taxpayers bear the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b),

The department assessed additional tax on sales from various locations that were not reported during some months. The department used close dates taken from the taxpayer's operation reports in calculating the assessments. The taxpayer contends that the close dates used in the audit were inaccurate. The taxpayer submitted computer runs concerning business activity at the protested locations. Each of the computer runs includes a handwritten note that the operations ceased on a certain date. These documents are not persuasive evidence that the operations closed on the handwritten date. The taxpayer does not sustain its burden of proving that the department used inaccurate close dates for the calculation of sales taxes due.

Finding

The taxpayer's protest is denied.

2. **Sales and Use Tax:** School Food Service

Discussion

Indiana imposes a sales tax on the sale of tangible personal property at retail. IC 6-2.5-2-1 (a). Sales tax is specifically imposed on sales of prepared meals in a retailer's establishment. IC 6-2.5-5-20. Meals sold by schools on school premises to university students are exempt from the sales tax. IC 6-2.5-5-22. This statutory exemption is clarified in Sales Tax Information Bulletin #32, August 1997, as being available to an agent who provides food services on behalf of its principal.

The department considered the taxpayer an independent contractor in providing the food service to the universities. Therefore, the department assessed additional tax on the taxpayer's

university food services. The taxpayer alleged that it was actually the agent of the universities and was entitled to the universities' exemption from sales tax. In Indiana an agency relationship exists when consent to the agency is manifested by the principal, the agent acquiesces to the agency relationship and control is exerted by the principal. Hope Lutheran Church v. Chellew, 460 N.E. 2d 1244(Ind. Ct. App.1984). In this case the taxpayer did not submit any evidence that the universities considered this an agency relationship. In fact, the department cited contracts between the universities and the taxpayer specifically calling the taxpayer an independent contractor. An agency relationship cannot be proved merely by the statements of the agent. United Artists Theatre Circ., Inc. v. Indiana Department of State Revenue, 459 N.E. 2d 754 (Ind. Ct. App. 1984). The taxpayer did submit a previous department decision on a different university food service program. It is not known, however, how that food service operation compared to the taxpayer's food service programs assessed in this audit. The taxpayer did not sustain its burden of proof in establishing that it was in fact operating as an agent rather than an independent contractor.

Finding

The taxpayer's protest is denied.

3. **Sales and Use Tax:** Vending Machine Labels

Discussion

Indiana imposes a sales tax on the sale of tangible personal property at retail. IC 6-2.5-2-1 (a). Sales tax is specifically imposed on sales of food through a vending machine. IC 6-2.5-5-20.

Sales taxes are stated separately from the commodity price. Consumers pay the sales tax. Vendors collect the tax and remit the tax to the state. IC 6-2.5-2-1 (b). Vending machine sales, however, do not lend themselves to the normal collection practices. Therefore, the department has issued the following directions for the collection and remittance of sales tax from vending machines in Information Bulletin #45, issued December 1991.

> Because of the nature of vending machine sales, the sales tax collected by persons responsible to collect the tax cannot be separately stated on a receipt. A person responsible for collecting sales tax on vending machines sales must post a sign on the vending machine stating that sales tax is included in the price.
>
> If no sign is posted, the Department will assume that the price of the item does not include tax. Thus, the Department will expect the responsible person to collect and remit sales tax on the gross sales from the machine.

The auditor personally inspected many of the taxpayer's vending machines and did not find the requisite tags on the machines. Therefore the tax was calculated on the gross sales from the vending machines. The taxpayer alleged that all the machines actually had the requisite tags. In support of this argument, the taxpayer submitted samples of tags and letters to the department written by taxpayer's employees in 1986 asserting that the tags had been applied to the taxpayer's vending machines. The letters indicate that there were tags in 1986. The tax period, however, was 1994-1996. Assertions that there were tags in 1986 does not prove that

there were tags in 1994-1996. The auditor did not see tags in 1998. The taxpayer did not sustain its burden of proving that there were the requisite tags on the machines during the tax period. Therefore the tax was properly calculated on the gross sales of the vending machines.

Finding

The taxpayer's protest is denied.

4. **Sales and Use Tax:** Consumable Goods

Discussion

Indiana imposes a sales tax on the transfer of tangible personal property for consideration in a retail transaction. IC 6-2.5-2-1 (a). Indiana imposes a complementary excise tax, the use tax, on tangible personal property purchased in a retail transaction and used in Indiana. IC 6-2.5-3-2 (a). Payment of sales tax on a retail transaction exempts the use of the purchased item from the use tax.

During the audit, the taxpayer and the department agreed to use a sample method for determination of the amount of use tax due on the consumable goods. Pursuant to this agreement, the department reviewed the taxpayer's available records and gave the taxpayer credit for any sales tax paid during the sample period. The percentage of taxable purchases during the sample period was applied to the total purchases during the entire audit period to determine the proper amount of tax due. This was an appropriate method of computing the taxpayer's use tax liability. The consideration of additional invoices at this time would alter the basis of the original agreement. Therefore, invoices submitted after the hearing will not be used to modify the percentages used in the sample for the determination of use tax properly due to the state.

Finding

The taxpayer's protest is denied.

5. **Sales and Use Tax**: Capital Purchases

Discussion

Indiana imposes a sales tax on the transfer of tangible personal property for consideration in a retail transaction. IC 6-2.5-2-1 (a). Indiana imposes a complementary excise tax, the use tax, on tangible personal property purchased in a retail transaction and used in Indiana. IC 6-2.5-3-2 (a). Proof of payment of the sales tax on a transaction exempts the purchaser from payment of the use tax on the use of the item purchased in the retail transaction.

The taxpayer made several capital purchases throughout the audit period. After the close of the audit, the taxpayer submitted evidence that it had paid sales tax on several of the capital purchases. Since the taxpayer showed that it had paid Indiana sales tax on these items, the taxpayer does not owe use tax on the use of these items.

Finding

The taxpayer's protest to the capital purchases on which Indiana sales tax was paid is sustained.

6. **Tax Administration:** Negligence Penalty

Discussion

The taxpayer also protested 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 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.

The taxpayer is a major corporation with an extensive tax and accounting department. Even so, it failed to follow the department's clear directions concerning the remittance of sales taxes on vending machine sales. Further, the taxpayer failed to set in place systems to assure compliance with the sales and use tax law. This failure "to use such reasonable care, caution or diligence as would be expected of an ordinary reasonable taxpayer" was a breach of the taxpayer's duties under the law. This breach of the taxpayer's duties constitutes negligence.

Finding

The taxpayer's protest is denied.

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