

**Letter of Findings: 04-20110024**  
**Sales and Use Tax**  
**For Tax Years 2006, 2007, and 2008**

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**ISSUES**

**I. Sales and Use Tax – Food and Food Ingredients.**

**Authority:** IC § 6-2.5-1-1; IC § 6-2.5-1-20; IC § 6-2.5-1-11.5; IC § 6-2.5-1-12; IC § 6-2.5-1-16; IC § 6-2.5-1-26; IC § 6-2.5-5-20; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-1-1](#); Indiana Dept. of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399 (Ind. Tax Ct. 1991) aff'd 599 N.E.2d 588 (Ind. 1992); Sales Tax Information Bulletin 29 (August 2008); Sales Tax Information Bulletin 29 (July 2005).

Retail Merchant protests the assessment of sales and use tax on certain items it believes are non-taxable as food items.

**II. Sales and Use Tax – Manufacturing Exemptions – Photo Processing.**

**Authority:** IC § 6-2.5-5-3; IC § 6-2.5-5-4; IC § 6-2.5-5-5.1; IC § 6-2.5-5-6.

Retail Merchant protests the Department's denial of a credit for sales tax paid on certain purchases of items either consumed or used in its photo processing operation; Retail Merchant argues that the items were subject to the manufacturing exemptions.

**III. Tax Administration – Negligence Penalty.**

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

Retail Merchant protests the imposition of the ten percent negligence penalty.

**STATEMENT OF FACTS**

Retail Merchant, a disregarded entity for federal purposes, operates the Indiana retail locations of a national drugstore chain. Protestant, hereinafter referred to as "Retail Merchant," collects sales tax on behalf of the state on the taxable items Retail Merchant sells to its customers who pay the sales tax. Retail Merchant is itself a taxpayer when it purchases tangible personal property for use in its own operations.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Retail Merchant for the years 2006, 2007, and 2008. As a result of the audit, Retail Merchant was assessed additional sales and use tax, as well as penalty and interest. Retail Merchant protested portions of the assessment. A hearing was held on Retail Merchant's protest. After the hearing, Retail Merchant withdrew its protest of certain issues in a letter dated May 19, 2011, namely "construction contracts" and "cleaning services." This Letter of Findings addresses the remaining issues. Additional facts will be provided as necessary.

**I. Sales and Use Tax – Food and Food Ingredients.**

**DISCUSSION**

Retail Merchant protests the assessment of sales tax on various items that it sold without collecting sales tax. Retail Merchant maintains that the items it sold were exempt because they qualify as the sale of "food and food ingredients" as provided under IC § 6-2.5-5-20.

During the audit, Retail Merchant provided a listing for 2007 of all the products it had coded in its computer system as exempt in Indiana. The exempt listing was reviewed and all pharmaceutical items (which are statutorily exempt) as well as all items for which there was a specific exemption, were eliminated. The remaining items were deemed taxable. The auditor assessed tax on these items because the auditor determined that the items were "dietary supplements, candy, or soft drinks." These items are listed on pages 11 through 19 of the Audit Summary.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

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). The taxpayer claiming exemption has the burden of showing the terms of the exemption statute are met. General Motors Corp. v. Indiana Dept. of State Revenue, 578 N.E.2d 399, 404 (Ind. Tax Ct. 1991) aff'd 599 N.E.2d 588 (Ind. 1992) (Internal citations omitted). Additionally "[e]xemption statutes are strictly construed because an exemption releases property from the obligation of bearing its fair share of the cost of government." Id.

As to the substance of the protest, IC § 6-2.5-5-20 provides:

- (a) Sales of food and food ingredients for human consumption are exempt from the state gross retail tax.
- (b) For purposes of this section, the term "food and food ingredients for human consumption" includes the following items if sold without eating utensils provided by the seller:
  - (1) Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries).
  - (2) Food sold in an unheated state by weight or volume as a single item.
  - (3) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.
- (c) **Except as otherwise provided by subsection (b), for purposes of this section, the term "food and food ingredients for human consumption" does not include:**
  - (1) **candy;**
  - (2) **alcoholic beverages;**
  - (3) **soft drinks;**
  - (4) food sold through a vending machine;
  - (5) food sold in a heated state or heated by the seller;
  - (6) two (2) or more food ingredients mixed or combined by the seller for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses);
  - (7) food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food); or
  - (8) tobacco

**(Emphasis added).**

IC § 6-2.5-1-20 defines "food and food ingredients" as:

"Food and food ingredients" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and that are consumed for their taste or nutritional value. **The term does not include alcoholic beverages, candy, dietary supplements, tobacco products, or soft drinks.**

**(Emphasis added).**

**A. "Dietary Supplements."**

Retail Merchant maintains that certain of the items that the auditor determined were taxable "dietary supplements" do not qualify as such. Retail Merchant states the following in its letter of protest dated January 6, 2011:

The auditor treated various items listed in the Summary as "dietary supplements," including food products under the brands Ensure, Boost, Glean, Golean, Nutrament, Atkins, Balance, CVS generic brand, EAS (Myoplex), Glucerna, Muscle Milk, Power Bars, Slimfast, Zone Perfect, among numerous others.

Retail Merchant argues that if an item has a "Nutritional Facts" label, it is not a "dietary supplement" otherwise it would have had the required "Supplemental Facts" label. Retail Merchant is absolutely correct. If an item does not have a "Supplemental Facts" label on it, it is not, for sales and use tax purposes, a "dietary supplement."

IC § 6-2.5-1-16 defines "dietary supplements" as:

"Dietary supplement" means any product, other than tobacco, that:

- (1) is intended to supplement the diet;
- (2) contains one (1) or more of the following dietary ingredients:
  - (A) a vitamin;
  - (B) a mineral;
  - (C) an herb or other botanical;
  - (D) an amino acid;
  - (E) a dietary substance for use by humans to supplement the diet by increasing the total dietary intake;or
- (F) a concentrate, a metabolite, a constituent, an extract, or a combination of any ingredient described in this subdivision;
- (3) is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in such a form, **is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and**
- (4) **is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box found on the label and as required under 21 CFR 101.36.**

**(Emphasis added).**

However, even if an item is not a "dietary supplement," it does not mean it is automatically a non-taxable food

item. Nor does the presence of a "Nutrition Facts" label automatically mean an item is a non-taxable food item; for example, "candy" and "soft drinks" have "Nutrition Facts" labels, but are not non-taxable food items.

Again, IC § 6-2.5-1-20 defines non-taxable "food and food ingredients" as:

"Food and food ingredients" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and that are consumed for their taste or nutritional value. **The term does not include alcoholic beverages, candy, dietary supplements, tobacco products, or soft drinks.**

**(Emphasis added).**

Pursuant to IC § 6-2.5-1-12, Sales Tax Information Bulletin 29 (August 2008), 20080827 Ind. Reg. 045080658NRA, and the immediately preceding Sales Tax Information Bulletin 29 (July 2005), 28 Ind. Reg. 3071, if an item contains sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces, it is considered to be taxable candy. It does not matter that the item contains ingredients that, if purchased separately, would be exempt food items. However, if an item contains flour as a listed ingredient or if an item requires refrigeration, it is not candy.

Pursuant to IC § 6-2.5-1-26 and Sales Tax Information Bulletin 29, a soft drink is a non-alcoholic beverage that contains natural or artificial sweeteners. A soft drink cannot contain milk or milk products, soy, rice or similar milk substitutes, or more than 50 percent fruit or vegetable juice by volume.

Certain items protested by Retail Merchant are generally marketed as liquid "nutritional" drinks or "nutritional" bars or "nutritional" powders. Retail Merchant provided samples of some of these products at the hearing. In the liquid category, Retail Merchant provided: Boost, Muscle Milk, Ensure, Glucerna shake, and 5-hour Energy. In the "bar" category Retail Merchant provided: Kashi Go Lean Peanut Butter and Chocolate, Dark Double Chocolate Zone Perfect, and Peanut Butter Performance Energy PowerBar. In the powders category: Slim Fast Chocolate Royale Shake powder.

Retail Merchant argues that these are "meal replacements" and should therefore not be subject to tax. However, none of the relevant statutes, regulations, or the information bulletins state such an exempt criteria.

For the items that are in the category of "nutritional" bars, Retail Merchant must demonstrate that each of these items is not "candy" for sales tax purposes. Retail Merchant must demonstrate that these items that contain natural or artificial sweeteners and are in the form of bars, do contain flour and are therefore not candy. The Streamlined Sales and Use Tax Agreement (adopted November 12, 2001 and amended through May 19, 2011), Interpretive Opinion 2009-5 (adopted December 17, 2009) provides guidance in interpreting what constitutes "candy." One of the issues discussed in the Agreement related to certain breakfast cereals and bars that contained sugar and no flour, and the question was whether they should be taxed as "candy." The Streamlined Sales Tax Governing Board adopted the Compliance Review and Interpretations Committee's recommendation that the subject breakfast cereals were not "candy" because they were not sold as "bars, drops, or pieces." However the committee recommended that the subject breakfast bars be treated as "candy" because they were in the shape of bars and did not contain flour. The Streamlined Sales Tax Governing Board commented that the "definitions in the Agreement are meant to be objective tests to determine the classification of an item and the intent of the user is not relevant."

In that light: (1) Kashi Go Lean Peanut Butter and Chocolate bar contains flour therefore not "candy," and not taxable; (2) Dark Double Chocolate Zone Perfect does not contain flour and is therefore "candy" and taxable; (3) Peanut Butter Performance Energy PowerBar contains flour and is therefore not a "candy" and not taxable.

In the same vein, for the items that are in the category of liquid "nutritional" drinks, Retail Merchant must demonstrate that they are not "soda drinks," by showing that the drinks that contain natural or artificial sweeteners, also contain milk or milk products, soy, rice or similar milk substitutes, or more than 50 percent fruit or vegetable juice by volume. IC § 6-2.5-1-26.

In that light: (1) Boost contains a highly filtered milk product and is therefore not a "soft drink" and not taxable; (2) Muscle Milk a highly concentrated milk product and is therefore not a "soft drink" and not taxable; (3) Ensure likewise contains a highly concentrated milk product and is therefore not a "soft drink" and not taxable; (4) Glucerna shake does not contain "milk, milk products, soy, rice or similar milk substitutes, or more than 50 percent fruit or vegetable juice" and is therefore a "soft drink" and taxable; and (5) 5-hour Energy does not contain "milk, milk products, soy, rice or similar milk substitutes, or more than 50 percent fruit or vegetable juice" and is therefore a "soft drink" and taxable.

Finally, Slim Fast Chocolate Royale Shake powder is not a "candy" because it is not sold in the form of a bar, drop, or piece. It is not a "soft drink" because it is not itself a beverage, and also because Sales Tax Information Bulletin 29 lists "powdered drink mixes (including sweetened)" as a non-taxable food item.

Retail Merchant did not provide either sample or relevant documentation for any of the other protested items under this section and therefore the items are taxable.

## **B. "Other Items."**

Retail Merchant protests the assessment of sales tax on its sales of the following categories of items.

### **1. Cocktail mixers.**

Retail Merchant states that the "cocktail mixers" it is protesting are more than 50 percent vegetable or fruit

juice (therefore not soda drinks), that they are sold for human consumption, and do not contain alcohol. After the hearing, Retail Merchant specifically referenced "Bloody Mary mix" which contains anywhere from 71 percent to 95 percent fruit juice.

Information Bulletin 29 states that dry or liquid "cocktail mixers" are taxable.

Retail Merchant's protest of the taxability of this item is denied.

## 2. Apple Caramel Wrap by Concord.

Retail Merchant protests that these items are "... as the packaging indicated, [] food items [] sold as food ingredients, as they can be used for making caramel apples, or as ingredients for cakes, pies and other pastries." At the hearing, Retail Merchant also provided a printout of the label which contains "Nutrition Facts" information.

Again, the fact that a label shows "Nutrition Facts" information only demonstrates that the item is not a "dietary supplement" (which would have a label containing "Supplemental Facts" information), but not that it is definitively a non-taxable food item.

It appears the auditor assessed tax on these items because they are "candy."

IC § 6-2.5-1-12 provides:

"Candy" means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces. The term does not include any preparation:

- (1) containing flour; or
- (2) requiring refrigeration.

While the ingredients that make up this item are akin to ingredients found in candy, these "apple caramel wraps" are not in the form of "bars, drops, or pieces." IC § 6-2.5-1-12. Also Sales Tax Information Bulletin 29 provides useful guidance in its provision on "Candy." The information bulletin states in relevant part:

Baking chocolate and similar products which are intended for use in cooking will be considered exempt food within the meaning of this information bulletin. The method used in packaging, distributing and displaying the product, including the size of container used, will be considered in determining the primary use for which it is sold.

The packaging and description of the subject "apple caramel wraps" by Concord demonstrate that this item is used to make candied caramel apples or as an addition to baked goods.

Retail Merchant's protest of the taxability of transactions involving these items is sustained.

## 3. Maintenance by Medfast.

Retail Merchant protests these purchases claiming that they are "prepared meals sold in an unheated state by volume as a single item, without utensils, for consumption away from the Retail Merchant's premises."

If this is true, then Retail Merchant is correct and these items are not taxable under IC § 6-2.5-5-20; however, Retail Merchant has not provided any documentation that describes and substantiates its claims regarding Medfast.

Retail Merchant's protest of the taxability of this item is denied for lack of substantiation.

## 4. Gift Baskets.

Retail Merchant protests the assessment of sales tax on its sale of gift baskets. Retail Merchant maintains that because the food items make up more than 50 percent of the total price of the gift basket, the gift baskets are not taxable pursuant to Sales Tax Information Bulletin 29. Retail Merchant also cites to the treatment of "bundled transactions" under Streamlined Sales Tax Agreement (Appendix C, PART I) that if 50 percent or more of the bundle is exempt food, then the entire bundle is exempt.

The Information Bulletin provision Retail Merchant cites to is only available in the August 2008 published Sales Tax Information Bulletin 29, 20080827 Ind. Reg. 045080658NRA. The immediately preceding Sales Tax Information Bulletin 29 (July 2005), 28 Ind. Reg. 3071, was in effect for most of Retail Merchant's protested periods and it did not provide for the treatment Retail Merchant references. The August 2008 version incorporates IC § 6-2.5-1-11.5 which is effective for transactions occurring after December 31, 2007.

IC § 6-2.5-1-11.5 provides:

(a) **This section applies to retail transactions occurring after December 31, 2007.**

(b) "Bundled transaction" means a retail sale of two (2) or more products, except real property and services to real property, that are:

- (1) distinct;
- (2) identifiable; and
- (3) sold for one (1) nonitemized price.

(c) The term does not include a retail sale in which the sales price of a product varies, or is negotiable, based on other products that the purchaser selects for inclusion in the transaction.

(d) The term does not include a retail sale that:

- (1) is comprised of:
  - (A) a service that is the true object of the transaction; and
  - (B) tangible personal property that:
    - (i) is essential to the use of the service; and

- (ii) is provided exclusively in connection with the service;
- (2) includes both taxable and nontaxable products in which:
  - (A) the seller's purchase price; or
  - (B) the sales price;of the taxable products does not exceed ten percent (10[percent]) of the total purchase price or the total sales price of the bundled products; or
- (3) includes both exempt tangible personal property and taxable tangible personal property:
  - (A) any of which is classified as:
    - (i) food and food ingredients;
    - (ii) drugs;
    - (iii) durable medical equipment;
    - (iv) mobility enhancing equipment;
    - (v) over-the-counter drugs;
    - (vi) prosthetic devices; or
    - (vii) medical supplies; and
  - (B) for which:
    - (i) the seller's purchase price; or
    - (ii) the sales price;of the taxable tangible personal property is fifty percent (50[percent]) or less of the total purchase price or the total sales price of the bundled tangible personal property.

The determination under clause (B) must be made on the basis of either individual item purchase prices or individual item sale prices.

**(Emphasis added).**

For the protested periods prior to January 1, 2008, a retail "unitary transaction" is one in which items of personal property and services are furnished under a single order or agreement and for which a total combined charge or price is calculated. IC § 6-2.5-1-1(a). A unitary transaction includes all items of property and services for which a total combined selling price is computed irrespective of the fact that the cost of services, which would not otherwise be taxable, is included in the selling price. [45 IAC 2.2-1-1\(a\)](#).

For the transactions occurring after December 31, 2007, if Retail Merchant is correct that the food items equal more than 50 percent of the gift basket, then the subject gift baskets would be exempt. However, Retail Merchant has not provided any documentation supporting its contention that the gift baskets contain at least 50 percent non-taxable food items.

Retail Merchant's protest of the taxability of this item is denied for lack of substantiation.

**5. Food Thickeners.**

Retail Merchant protests the assessment of sales tax on its sales of food thickeners and ingredients developed to prepare food for individuals who have difficulty swallowing.

The definition of "food and food ingredients," IC § 6-2.5-1-20, states that these are items "that are sold for ingestion or chewing by humans and that are consumed for their taste or nutritional value." Apart from a general description of this item, Retail Merchant has not provided any additional documentation to demonstrate what these "food thickeners" are or how they are used.

Retail Merchant's protest of this item is denied for lack of substantiation.

**6. Angostura Bitters.**

Retail Merchant protests the assessment of sales tax on its sales of "angostura bitters" which Retail Merchant describes as "a natural blend of herbs and spices that is used for flavoring in food preparation" and as a food ingredient this item is exempt. At hearing there was discussion that Angostura Bitters may or may not contain alcohol. Retail Merchant stated that it was only protesting Angostura Bitters that did not contain alcohol.

Retail Merchant did not provide any specific references to non-alcoholic Angostura Bitters that it sells. It was later determined by the Department that the only "Angostura Bitters" it is aware of contain 44.7 percent alcohol (as represented on the label) and while not itself consumed as an alcoholic beverage it is most often used to flavor alcoholic drinks, even though it can also be used to flavor foods. This item may be something of a hybrid product, on the one hand a food flavoring and thus exempt, or on the other hand an alcoholic beverage flavor enhancer, itself containing alcohol, and therefore subject to tax.

Given that exemption is to be interpreted narrowly and in favor of taxation, and given the general use of this product, the Department's audit rightly subjected this item to tax.

Retail Merchant's protest of the taxability of this item is denied.

**FINDING**

In subsection I(A), the following items are not taxable: Kashi Go Lean bar, Performance Energy PowerBar bar, Slim Fast powder, Boost drink, Muscle Milk drink, and Ensure drink.

In subsection (B), the following item is not taxable: Apple Caramel Wraps by Concord. All the remaining items are taxable for the various reasons discussed above.

**II. Sales and Use Tax – Manufacturing Exemptions – Photo Processing.**

**DISCUSSION**

Retail Merchant protests that the Department denied a credit for sales and use tax it paid on purchases from a particular vendor ("Vendor") of photo processing equipment, including materials consumed in the production process, items that became component parts of the produced product, and parts for the processing equipment under IC § 6-2.5-5-3, IC § 6-2.5-5-4, IC § 6-2.5-5-5.1; and IC § 6-2.5-5-6. Retail Merchant, however, does not provide additional explanatory statement of exemption.

Retail Merchant's communication on this matter subsequent to the hearing also references credit for tax paid on transactions with another entity ("Vendor 2"). Retail Merchant offered to provide records and states that, for example, the invoices relating to Vendor 2 are voluminous. But, the Department's audit appears to have given credit for leases of photo processing equipment with several entities, including Vendor 2 (see pages 86 through 130 of the Audit Summary). Retail Merchant suggested this documentation could be provided to a supplemental audit, or to the hearing officer if requested.

Retail Merchant requested that a supplemental audit review the documentation relating to this issue. However, before a supplemental audit can do so, there needs to be a finding addressing the legal contentions relating to the manufacturing exemption(s) being claimed by Retail Merchant.

Retail Merchant has not provided a particularized statement of the protest relating to these transactions.

**FINDING**

Because there is no clear direction from Retail Merchant on the particular processes that are being protested as exempt, the protest of this issue is respectfully denied.

**III. Tax Administration – Negligence Penalty.****DISCUSSION**

Retail Merchant also protests the imposition of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[45 IAC 15-11-2](#)(b) further states:

"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 Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Retail Merchant has demonstrated reasonable cause for its underpayment of sales and use tax.

**FINDING**

Retail Merchant's protest of the negligence penalty is sustained.

**SUMMARY**

Retail Merchant is sustained in part and denied in part.

In subsection I(A), the following items are not taxable: Kashi Go Lean bar, Performance Energy PowerBar bar, Slim Fast powder, Boost drink, Muscle Milk drink, and Ensure drink. In subsection I(B), the following item is not taxable: Apple Caramel Wraps by Concord. All the remaining items are taxable for the various reasons discussed above.

In subsection II, Retail Merchant is denied.

Retail Merchant is sustained on its protest of penalty.

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