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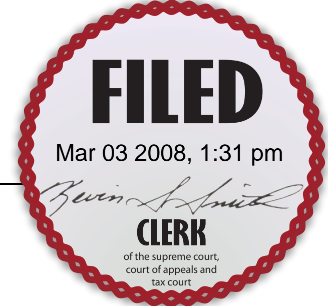
IN THE
INDIANA TAX COURT



KITCHIN HOSPITALITY, LLC,)
)
Petitioner,)
)
v.) Cause No. 49T10-0604-TA-35
)
INDIANA DEPARTMENT OF STATE REVENUE,)
)
Respondent.)

ORDER ON PARTIES'
CROSS-MOTIONS FOR SUMMARY JUDGMENT

NOT FOR PUBLICATION
March 3, 2008

FISHER, J.

Kitchin Hospitality, LLC (Kitchin) challenges the final determination of the Indiana Department of State Revenue (Department) denying its claims for refund of gross retail (sales) tax paid on its electric, water, and gas (utility) purchases during the years ending December 31, 2004 and October 31, 2005 (years at issue). The matter is currently before the Court on the parties' cross-motions for summary judgment.

FACTS AND PROCEDURAL HISTORY

The parties have stipulated to the following facts. Kitchin is a wholly-owned subsidiary of Jameson Inns, Inc. (Jameson). During the years at issue, Kitchin leased fourteen Indiana hotels from Jameson, each of which had identical floor plans consisting primarily of guest rooms and guest accessible common areas (i.e., corridors, lobbies, and fitness rooms).[1,2] The guest rooms were equipped with various electrical amenities such as televisions, alarm clocks, coffee makers, irons, and hair dryers. The guest rooms also contained private restroom facilities and individual HVAC units.

On November 3, 2005, Kitchin filed two claims for refund with the Department, seeking a refund of $89,713.57 in sales tax it remitted on its utility purchases. On January 6, 2006, the Department issued one final determination, which denied both of Kitchin's claims for refund.

On April 5, 2006, Kitchin initiated this original tax appeal. On August 9, 2007, the Department filed a motion for summary judgment. Kitchin filed a motion for partial summary judgment on August 10, 2007. The Court held a hearing on the parties' motions on November 5, 2007. Additional facts will be supplied as necessary.

ANALYSIS AND OPINION

Standard of Review

This Court reviews final determinations of the Department *de novo*. IND. CODE

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[1] Kitchin's hotels, operated as either Jameson Inns or Signature Inns, were located in Carmel, Elkhart, Evansville, Fort Wayne, Indianapolis, Kokomo, Lafayette, Muncie, South Bend, and Terre Haute. (*See* Stip. of Facts ¶¶ 3-5, Ex. 1.)

[2] Specifically, the guest rooms comprise 71.8% of each hotel and the guest accessible common areas comprise 21.8% of each hotel. (*See* Stip. of Facts ¶¶ 6-9, Exs. 2-3.)

ANN. § 6-8.1-9-1(d) (West 2008). Accordingly, neither the evidence nor the issues presented at the administrative level are binding upon the Court. *See Horseshoe Hammond, LLC v. Indiana Dep't of State Revenue*, 865 N.E.2d 725, 727 (Ind. Tax Ct. 2007), *review denied*. Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). Cross-motions for summary judgment do not alter this standard. *Horseshoe Hammond*, 865 N.E.2d at 727.

Discussion

Indiana imposes an excise tax, known as the state sales tax, on retail transactions made within the state. *See* IND. CODE ANN. § 6-2.5-2-1(a) (West 2008). A "retail transaction" is "a transaction of a retail merchant that constitutes selling at retail as described in IC 6-2.5-4-1, that constitutes making a wholesale sale as described in IC 6-2.5-4-2, or that is described in any other section of IC 6-2.5-4." IND. CODE ANN. § 6-2.5-1-2(a) (West 2008). During the years at issue, however, transactions involving tangible personal property were exempt from the state sales tax when:

> the[] person acquiring the property is engaged in the business of renting or furnishing rooms, lodgings, or accommodations in a commercial hotel . . . and [] the property acquired is[] used up, removed, or otherwise consumed during the occupation of the rooms, lodgings, or accommodations by a guest[.]

IND. CODE ANN. § 6-2.5-5-35(2)(A)-(B)(i) (West 2004). Indiana Code § 6-2.5-1-27 defined "tangible personal property" as personal property that: "can be seen, weighed, measured, felt, or touched; or [] is in any other manner perceptible to the senses. The term includes electricity, water, gas, steam, and prewritten computer software." IND. CODE ANN. § 6-2.5-1-27 (West 2004).

The issue before the Court is whether, during the years at issue, Kitchin's utility purchases were exempt from the state sales tax under Indiana Code § 6-2.5-5-35(2)(B)(i) (hereinafter, the tangible personal property exemption). The parties agree that resolution of this issue is dependent upon the answer to two other questions, which the Court restates as: (1) whether utilities were eligible for the tangible personal property exemption; and (2) if so, whether the utilities were to be consumed by hotel guests?

1. Were utilities eligible for the tangible personal property exemption?

Kitchin contends that during the years at issue, utilities were clearly eligible for the tangible personal property exemption. More specifically, Kitchin maintains that because utilities were tangible personal property under the plain language of Indiana Code § 6-2.5-1-27, utilities clearly qualified for the tangible personal property exemption, as it applied to "all types of tangible personal property and [was] not limited to only non-utility tangible personal property." (*See* Pet'r Br. in Supp. of its Mot. for Partial Summ. J. (hereinafter, Pet'r Br.) at 10-11.)

In contrast, the Department argues that utilities were ineligible for the tangible personal property exemption, as that exemption has always been understood to apply to complimentary toiletry items only. (*See* Resp't Br. in Supp. of its Mot. for Summ. J. (hereinafter, Resp't Br.) at 3-8; Resp't Reply to Pet'r Response (hereinafter, Resp't Reply) at 1-5.) To support its argument, the Department points to the legislature's 2007 amendment of the tangible personal property exemption statute, which in relevant part provided that the "exemption . . . does not apply to transactions involving electricity, water, [or] gas[.]" (*See* Resp't Br. at 6-8; Resp't Response to Pet'r Mot. for Partial

Summm. J. (hereinafter, Resp't Response) at 3-4.) *See also* 2007 Ind. Legis. Serv. 211, § 14 (West). The Department claims that the 2007 amendment reflects the legislature's original intent. (*See* Resp't Br. at 7-8.) As such, the Department contends that when the legislature enacted Indiana Code § 6-2.5-1-27, it only intended to bring the State into compliance with the Streamlined Sales and Use Tax Agreement (SSUTA),[3] rather than to render utilities eligible for the tangible personal property exemption. (*See* Resp't Br. at 8; Resp't Response at 2-4 (footnote added).)

When this Court is confronted with a question of statutory construction, its function is to determine and implement the intent of the legislature in enacting that statutory provision. *See Johnson County Farm Bureau Coop. Ass'n, Inc. v. Indiana Dep't of State Revenue*, 568 N.E.2d 578, 580 (Ind. Tax Ct. 1991), *aff'd by* 585 N.E.2d 1336 (Ind. 1992). In general, the best evidence of this intent is found in the actual language of the statute itself. *See id.* at 581. To that end, when the legislature has defined a word used in a statute, this Court is bound by that definition, even if it conflicts with the common meaning of the word and regardless of other possible meanings attributable to the word. *See Consolidation Coal Co. v. Indiana Dep't of State Revenue*, 583 N.E.2d 1199, 1201 (Ind. 1991) (citation omitted); *Tillman v. Snow*, 571 N.E.2d 578, 579-80 (Ind. Ct. App. 1991) (citation omitted). *See also* IND. CODE ANN. § 1-1-4-1(1) (West 2004).

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[3] The SSUTA is a product of the Streamlined Sales Tax Project (SSTP). The SSTP in turn seeks to "simplify and modernize [member states'] sales and use tax collection and administration" schemes through, *inter alia*, its provision of uniform sales and use tax definitions with respect to major sales and use tax concepts. *See* IND. DEP'T OF STATE REVENUE, COMMISSIONER'S DIRECTIVE NO. 21, STREAMLINED SALES TAX AGREEMENT PROVISIONS (Oct. 2007); STREAMLINED SALES AND USE TAX AGREEMENT §§ 102, 1102, *available at* http://www.streamlinedsalestax.org/agreement.htm (follow "Final Agreement - Amended 12-12-07" hyperlink).

During the years at issue, Indiana Code § 6-2.5-1-27 defined "tangible personal property" as electricity, water, and gas. *See* A.I.C. § 6-2.5-1-27. Thus, pursuant to that statute, utilities constituted tangible personal property and were therefore, eligible for the tangible personal property exemption. *See Merritt v. State*, 829 N.E.2d 472, 475 (Ind. 2005) (providing that "statutes concerning the same subject matter must be read together to harmonize and give effect to each[,]" as the legislature intentionally chooses statutory language and that language should be given effect and meaning). To the extent that the legislature's subsequent amendment of the tangible personal property exemption statute rendered transactions involving utilities ineligible for the exemption, that amendment does not apply to the years at issue, as it was not effective until July 1, 2007. *See* 2007 Ind. Legis. Serv. 211, § 14 (West). *See also Indiana Dep't of State Revenue v. Estate of Riggs*, 735 N.E.2d 340, 344 (Ind. Tax Ct. 2000) (providing that "the legislature intended statutes and amendments to operate prospectively only, unless [a contrary] intention is unequivocably and unambiguously shown") (citation omitted). Accordingly, the Court concludes that during the years at issue, utilities were eligible for the tangible personal property exemption.

2. Were the utilities to be consumed by hotel guests?

The next question the Court must answer involves who must consume the utilities in order for the utility purchases to qualify for the tangible personal property exemption. Kitchin argues that the tangible personal property exemption does not require guests to directly consume the property. (*See* Pet'r Br. at 13-25.) As a result, Kitchin claims that all utilities consumed in its hotel's guest rooms and the guest accessible common areas were exempt from the state sales tax. (*See* Pet'r Br. at 13-

25.) The Department, on the other hand, claims that a hotel guest must consume the utilities for the tangible personal property exemption to apply. As such, the Department maintains that Kitchin's utility purchases were taxable because: (1) Kitchin consumed the utilities in the course of operating its hotels; and (2) pursuant to Indiana Code § 6-2.5-4-5, public utilities or power subsidiaries may only furnish utilities to the consumers of the utilities. (*See* Resp't Br. at 9-13; Oral Argument Tr. at 8-12.)

As stated earlier, during the years at issue, the tangible personal property exemption provided in relevant part that the property subject to the exemption must be "used up, removed, or otherwise consumed *during the occupation of the rooms, lodgings, or accommodations by a guest*[.]" *See* A.I.C. § 6-2.5-5-35(2)(B)(i) (emphasis added). The phrase "by a guest" modifies the phrase "during the occupation of the rooms, lodgings, or accommodations." *See Associated Ins. Cos., Inc. v. Indiana Dep't of State Revenue*, 655 N.E.2d 1271, 1275 (Ind. Tax Ct. 1995) (providing that "referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent") (citation omitted), *review denied*. Therefore, the plain language of the tangible personal property exemption statute does not require a hotel guest to directly consume the utilities.[4]

[4] In addition, Indiana Code § 6-2.5-4-5 does not provide that purchasers of utilities must also consume those utilities, as that statute in pertinent part only provides that "[a] power subsidiary or a person engaged as a public utility is a retail merchant making a retail transaction when the subsidiary or person furnishes or sells electrical energy, natural or artificial gas, water, steam, or steam heating service to a person for commercial or domestic consumption." IND. CODE ANN. § 6-2.5-4-5(b) (West 2004). *See also Mynesberge v. Indiana Dep't of State Revenue*, 716 N.E.2d 629, 633 (Ind. Tax Ct. 1999) (providing that "[n]othing in th[e] language [of Indiana Code § 6-2.5-4-5] requires that the purchaser [of electricity] be the one who actually consumes the electricity").

This does not mean, however, that the utilities consumed in Kitchin's guest accessible common areas qualified for the tangible personal property exemption. Rather, in order for utilities to qualify for the tangible personal property exemption, they must be consumed during a guest's *occupation* of a hotel room. *See* A.I.C. § 6-2.5-5-35(2)(B)(i). To the extent that the legislature has not defined the word "occupation," the Court will give it its plain, ordinary, and usual meaning. *See Johnson County Farm Bureau*, 568 N.E.2d at 581. *See also* A.I.C. § 1-1-4-1(1). "Occupation" means "the actual *possession* and use of real estate (as by lease)[.]" *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 1560 (2002 ed.) (emphasis added). "Possession" in turn means "actual physical control or occupancy of property by one who holds for himself and not as a servant of another without regard to his ownership and who has legal rights to assert interests in the property against all others having no better right than himself[.]" *See id.* at 1770.

In applying those definitions within the commercial hotel context, the Court concludes that when a guest reserves a hotel room (i.e., provides consideration to the hotel operator in exchange for a room), the guest receives the right to occupy that room to the exclusion of others. The guest, however, does not receive the exclusive right to occupy the hotel's guest accessible common areas (i.e., corridors, lobbies, or fitness rooms); rather, the guest must share these areas with other individuals. Therefore, the utilities consumed in Kitchin's guest accessible common areas did not qualify for the tangible personal property exemption. *See Merritt*, 829 N.E.2d at 475 (providing that

Courts should give a "statute practical application by construing it in a way favoring public convenience and avoiding absurdity, hardship, and injustice") (footnote omitted).[5]

CONCLUSION

For the above stated reasons, the Court DENIES the Department's motion for summary judgment. The Court, however, GRANTS Kitchin's motion for partial summary judgment in part. Specifically, the Court concludes that during the years at issue, utilities consumed in rooms for which guests had provided consideration qualified for the tangible personal property exemption provided under Indiana Code § 6-2.5-5-35(2)(B)(i). The Court shall set a case management conference to discuss any remaining matters for trial by separate order.

SO ORDERED this 3rd day of March, 2008.

Thomas G. Fisher, Judge
Indiana Tax Court

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[5] Finally, the Court notes that the Department has repeatedly claimed that Kitchin's utility purchases are taxable pursuant to the holding in *Greensburg Motel Associates, L.P. v. Indiana Department of State Revenue*, 629 N.E.2d 1302 (Ind. Tax Ct. 1994). (*See* Resp't Br. at 9-10; Resp't Reply at 5-6; Oral Argument Tr. at 7-11.) The Department, however, is incorrect.

First, and perhaps most importantly, that case involved the sale for resale exemption provided in Indiana Code § 6-2.5-5-8 and not the tangible personal property exemption provided in Indiana Code § 6-2.5-5-35. Second, the Department has misinterpreted the Court's holding in that case. *See Greensburg Motel Assocs., L.P. v. Indiana Dep't of State Revenue*, 629 N.E.2d 1302, 1306 (Ind. Tax Ct. 1994) (holding that a taxpayer's "purchases of consumable items, non-consumable items, and utilities are not exempt from sales tax as a purchase for resale, rental, or lease") (footnote omitted). Finally, the fact that utilities did not appear as an *example* of either non-consumable or consumable items has no bearing upon this matter because nothing within the Court's opinion suggests that those *examples* were comprehensive. *See id.* at 1304 ns.1-3.

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