JOHN Q. HAMMONS HOTELS MONTGOMERY LTD. 4243 Hunt Road Cincinnati, Ohio 45242, Taxpayer, v. STATE OF ALABAMA DEPARTMENT OF REVENUE.	STATE OF ALABAMA DEPARTMENT OF REVENUE ADMINISTRATIVE LAW DIVISION DOCKET NO. S. 96-484

FINAL ORDER

The Revenue Department assessed sales tax against John Q. Hammons Hotels Montgomery Ltd. ("Taxpayer"), d/b/a Embassy Suites, for August 1995 through June 1996. The Taxpayer paid the tax and petitioned for a refund. The Department denied the refund, and the Taxpayer appealed pursuant to Code of Ala. 1975, '40-2A-7(c)(5)a. A hearing was conducted on May 28, 1997. CPA Ed Schreiber represented the Taxpayer. Assistant Counsel Wade Hope represented the Department.

The Taxpayer owns and operates the Embassy Suites hotel in Montgomery, Alabama. The disputed issue is whether the Taxpayer is liable for sales tax on food and beverages purchased at wholesale and subsequently withdrawn from inventory and provided free to its hotel guests. That issue turns on whether the withdrawal and use of the food and beverages by the Taxpayer constituted a retail sale under Alabama's sales tax "withdrawal" provision, Code of Ala. 1975, '40-23-1(a)(10).

A guest that rents a room at the Taxpayer's hotel is also entitled to a complimentary breakfast buffet and complimentary beverages in the evening. The Taxpayer charges a lump-sum price for the room, regardless of whether the guest eats

the free breakfast or has free drinks.

The Taxpayer purchased its food and beverages tax-free at wholesale during the audit period. The Taxpayer charged sales tax on the food and beverages resold at retail in its restaurant, bar, or by room service. The Taxpayer failed, however, to remit sales tax on the complimentary food and beverages provided to its guests as part of the room package.

The Department audited the Taxpayer and assessed sales tax on the Taxpayer's wholesale cost of the complimentary food and beverages. The Department argues that the withdrawal and use of the items by the Taxpayer constituted a retail sale under '40-23-1(a)(10). That section defines "retail sale" to include the withdrawal of property previously purchased at wholesale for the "personal and private use or consumption" by the wholesale purchaser. See generally, Sizemore v. Dothan Progress, 605 So.2d 1221 (Ala. 1992).

The Taxpayer argues the withdrawal provision does not apply because it resold the food and beverages at retail to the hotel guests. The Taxpayer also argues that impermissible double taxation would result if sales tax is assessed on the food and beverages because lodgings tax was paid on the room charge, which included the Taxpayer's cost of the food and beverages. I disagree with both arguments.

First, the Taxpayer did not resell the food and beverages at retail. The food and beverages were not separately invoiced, and the lump-sum room charge was the same whether the guest ate the complimentary breakfast or drank the free drinks.

Rather, the Taxpayer used the free food and beverages to attract customers, and its cost of the food and beverages was an operating cost, the same as its cost of "free" soap, shampoo, and other complimentary items provided with each room. The only reason the Taxpayer did not pay sales tax when it purchased the food and beverages, as it did when it purchased the soap, shampoo, and other supplies, was because an unidentifiable portion of the food and beverages was later resold at retail.

The Taxpayer also cites State v. Hertz Skycenter, Inc., 317 So.2d 319 (Ala.Civ.App. 1975), for its position that the food and beverages were being resold at retail. However, Hertz Skycenter can be factually distinguished from this case.

In Hertz Skycenter, Hertz sold food to United Airlines for consumption by United's passengers. If a passenger failed to receive a meal on a designated "meal flight," the passenger received either a complimentary meal at the airport or cash. The Department attempted to tax the sale by Hertz as a retail sale. The Court held, however, that the sale by Hertz to United was a tax-free wholesale sale for resale to United's passengers. The Court emphasized that its finding was based on the agreed statement of facts:

> We wish to emphasize that the agreed statement of facts entered into by the parties to this appeal constituted the evidence before the trial court and provides that the food items sold to United by Hertz were for consumption by United's passengers, and should a passenger not receive a meal on a "meal flight" he would be entitled to compensation either in the form of a comparable meal at the airport or in cash.

Hertz Skycenter, 317 So.2d at 323.

This case can be distinguished because, unlike the facts in Hertz Skycenter, a

hotel guest that does not eat the complimentary breakfast or drink free beverages is not entitled to a comparable meal or beverages or a cash refund. In that respect, this case is similar to the Illinois Supreme Court case discussed in Hertz Skycenter, at 321, which was also distinguished on the facts. See, American Airlines, Inc. et al. v. The Department of Revenue, 319 N.E.2d 28 (1974).

"Although it is the general rule in this state that double taxation will be avoided, if possible, such taxation is permissible and not unconstitutional unless such double taxation is confiscatory, discriminatory, or results in an unreasonable pyramiding of taxes." Starlite Lanes, Inc. v. State, 214 So.2d 324, 326 (1968).

Impermissible double taxation does not result if the two taxes are levied on separate taxpayers or transactions. The taxpayer in Starlite Lanes operated a bowling alley. It paid sales tax when it purchased bowling shoes that it subsequently rented to customers. The Department also assessed the taxpayer for the gross receipts sales tax on the receipts from the shoe rentals. See, Code of Ala. 1975, '40-23-2(2) (then Title 51, '786(3)(b)). The taxpayer argued that a second tax would constitute impermissible double taxation. The Supreme Court disagreed because the two taxes were on different transactions and parties:

> It should also be noted that the burden of the "gross receipts" tax does not fall upon the (taxpayer), as this tax is required by law to be added to the total gross receipts and passed on to the customers of (taxpayer). Thus, the burden of the sales tax falls upon the (taxpayer) when he buys the shoes and the "gross receipts" tax upon the (taxpayer's) customers when they rent the shoes. Although there is double taxation in the sense that two taxes have been paid on the same item, the two taxes do not fall upon the same person. We do not feel that this is objectionable in

the present case.

Starlite Lanes, 214 So.2d at 327.

Likewise, this case does not involve impermissible double taxation because the sales tax in issue was levied against the Taxpayer on the withdrawal of the food and beverages from inventory. The tax was an additional operating cost incurred by the Taxpayer.

On the other hand, the Alabama lodgings tax, like the gross receipts sales tax in Starlite Lanes, is levied against the customer and must be passed on by the Taxpayer to its guests. See, Code of Ala. 1975, '40-26-16. Consequently, different transactions and taxpayers are being taxed, and impermissible double taxation does not result.

Based on the above, the Taxpayer correctly paid sales tax on its wholesale cost of the complimentary food and beverages provided to its guests. The Department correctly denied the refund in issue.

This Final Order may be appealed to circuit court within 30 days pursuant to Code of Ala. 1975, '40-2A-9(g).

Entered July 30, 1997.

BILL THOMPSON
Chief Administrative Law Judge