

Letter of Findings: 10-20160240
Food & Beverage Tax
For Tax Years 2013 & 2014

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana catering company does not owe county food and beverage tax on separately stated food service charges because these amounts are exempt from the state gross retail tax.

ISSUE

I. Food and Beverage Tax - Food Service Charges.

Authority: IC § 6-8.1-5-1; IC § 6-9-12-3; IC § 6-9-12-4; IC § 6-9-12-7; IC § 6-2.5-4-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Lowe's Home Centers, LLC v. Indiana Dep't of State Revenue, 23 N.E.3d 52, 59 (Ind. Tax Ct. 2014).

Taxpayer protests the Department's imposition of food and beverage tax on catering service charges.

STATEMENT OF FACTS

Taxpayer is a limited liability company that provides banquet services. The Indiana Department of Revenue ("Department") conducted an audit of Taxpayer for 2013 and 2014 tax years and issued proposed assessments for additional amounts of tax and interest. The Department determined that Taxpayer failed to collect and remit food and beverage tax on certain transactions; specifically, the Department concluded that Taxpayer owed food and beverage tax on amounts of separately stated service charges on its catering services. Taxpayer protested the audit's assessment of additional food and beverage tax on these service charges. An administrative hearing was held and this Letter of Findings results. Additional facts will be provided as necessary.

I. Food and Beverage Tax - Food Service Charges.

DISCUSSION

Taxpayer disputes the imposition of food and beverage tax on service charges stated on customer invoices for banquet services. Taxpayer entered into contracts with its customers for the service of food at banquets at a location and on equipment provided by Taxpayer. The customers are billed a mandatory 22 percent additional "service charge" for the food service, which is a separately stated charge on customers' invoices.

As an initial matter, the Department notes that all tax assessments are presumed to be accurate and 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).

A food and beverage tax is imposed on the sale of prepared meals and beverages in the county of Taxpayer's banquet facility. IC § 6-9-12-3. Food and beverage tax is imposed in the same manner as sales tax under IC § 6-9-12-7. Any sale of food and beverages that is exempt from the state gross retail tax is also exempt from the food and beverage tax. IC § 6-9-12-4. An exemption from the sales tax is granted under IC § 6-2.5-4-1(g) as follows:

Gross retail income does not include income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. However, the exclusion under this subsection only applies if the charges for the serving or delivery are stated separately from the price of the food and food ingredients when the purchaser pays the

charges.

On initial review, the Department determined that Taxpayer failed to collect and remit the correct amount of food and beverage tax in its catering transactions, and assessed Taxpayer additional food and beverage tax. Taxpayer's invoices include a separately stated, mandatory service charge, and Taxpayer did not collect food and beverage tax on this charge. Taxpayer argues that the service charges are receipts that represent "charges for serving or delivery of food," which are excluded from sales tax—and thus food and beverage tax—under IC § 6-2.5-4-1(g).

The audit report concluded that the service charges represented recovery of overhead costs and were therefore not separately stated charges for the serving or delivery of food. The audit report relied upon the conclusion that because Taxpayer's service charge is not voluntary and is not paid out to its employees as gratuity, the charges represented the recovery of overhead costs, including insurance, depreciation and other operational costs. However, at the hearing and as noted in the audit report, Taxpayer explained that the service charges are intended to cover Taxpayer's variable costs incurred in serving food, including labor related to the set-up and take-down of the facilities and food delivery. Taxpayer further explained that its employees are paid a straight hourly wage and do not receive gratuities from the service charges or otherwise.

The statute plainly states that gross retail income excludes "income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant" so long as those charges are separately stated. IC § 6-2.5-4-1(g). There is no additional qualification as to how that income must be utilized by the taxpayer after it is collected in order to be exempt from gross retail income, or that it must be collected as a gratuity in order to be considered a "separately stated charge given for the serving of food." It is well settled that the Department may not add conditions not contained in a statute. The Indiana Tax Court has stated:

The Department has the authority to adopt rules and regulations that enable it to put into effect the purposes of Indiana's sales and use tax statutes, but it may not make rules and regulations inconsistent with the statute[s] which it is administering, it may not by its rules and regulations add to or detract from the law as enacted, nor may it by rule extend its powers beyond those conferred upon it by law.

Lowe's Home Centers, LLC v. Indiana Dep't of State Revenue, 23 N.E.3d 52, 59 (Ind. Tax Ct. 2014) (internal quotes omitted).

During the protest process, Taxpayer provided copies of customer invoices showing that the 22 percent service charge on food is separately stated on each invoice. Taxpayer has complied with the plain language of IC § 6-2.5-4-1(g) by separately stating charges for the service or delivery of food furnished, prepared and served for consumption at a location and on equipment provided by Taxpayer. How such income is utilized by Taxpayer after it is collected is not relevant under the language of subsection (g). Therefore, the 22 percent service charges for food service are excluded from Taxpayer's gross retail income and are not subject to food and beverage tax.

FINDING

Taxpayer's protest is sustained.

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