

## DEPARTMENT OF STATE REVENUE

04-20160693.LOF  
10-20160692.LOF

**Letter of Findings: 04-20160693; 10-20160692**  
**Sales Tax**  
**Food and Beverage Tax**  
**For the Years 2007 through 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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**

In the face of more than 130 missing sales tax and food and beverage tax returns, the Department acted within its authority when it issued seasonal Food Vendor notices of proposed assessment of tax based on the best information available to the Department.

**ISSUE****I. Sales Tax and Food and Beverage Tax - Best Information Available.**

**Authority:** IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c); IC § 6-8.1-5-1(d); IC § 6-8.1-8-2; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer argues that the Department acted outside its authority in issuing assessments of additional tax based on the "best information available."

**STATEMENT OF FACTS**

Taxpayer is an Indiana business which sells candy and food items. Taxpayer sells its goods at state and county fairs taking place at various locations within the state.

Taxpayer registered to collect and remit Indiana sales tax on a "seasonal" basis reflecting the fact that Taxpayer conducted its business during the summer and early fall months.

Taxpayer also registered to collect and remit food and beverage taxes in the counties in which Taxpayer conducted its business.

The Indiana Department of Revenue ("Department") determined that Taxpayer had failed to file certain required sales tax returns and food and beverage tax returns. In the absence of those returns, the Department issued tax assessments based on the "best information available."

Taxpayer objected to the assessments and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

**I. Sales Tax and Food and Beverage Tax - Best Information Available.****DISCUSSION**

The issue is whether the Department acted outside its authority in assessing sales tax and food and beverage tax based on the best information available.

Taxpayer states that the Department "illegally issued tax warrants respecting the Taxpayer's sales/use tax and/or

food and beverage tax . . . ."

Taxpayer further states that it "paid one hundred percent of the principal sales/use and food and beverage taxes . . ." and that the pending assessments are "fictional obligations." Taxpayer states that it is entitled to an abatement of the assessments.

The proposed assessments - estimated or not - constitutes evidence that the Department's claim for the unpaid tax is valid, and each taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Thus, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

In reviewing a taxpayer's argument, the Indiana Supreme Court has held, that when it examines a statute that an agency is "charged with enforcing . . . we defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party." Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014).

Taxpayer in this instance registered to collect and remit sales tax on a "seasonable" basis reflecting the fact that Taxpayer's Indiana business was conducted during a limited number of months. However, Taxpayer failed to file sales tax returns for each of the months it had designated as falling within its self-defined "season." Instead, Taxpayer apparently filed a single return leaving the Department to speculate as to whether the return was intended to cover that particular year's tax obligation or whether the single return was meant to cover only that particular month's obligation.

The Department issued "proposed assessments" for those months in which required returns were absent. When the "proposed assessments" went unaddressed, the Department issued "demand notices." When the demand notices went unaddressed, the liabilities eventually proceeded to the warrant stage. IC § 6-8.1-8-2.

Similarly, Taxpayer failed to file food and beverage tax returns. In the case of food and beverage tax returns, the problems were compounded because these returns may not be filed on a "seasonal" basis but are required to file monthly even in those situations - such as Taxpayer's - where no business was conducted during a particular month.

At the outset, the Department recognizes that IC § 6-8.1-5-1(d) limits Taxpayer's right to protest proposed assessments and that - as noted above - certain of these liabilities had proceeded to both the "demand" stage and/or to the warrant stage. However, in this case, the Department recognized that Taxpayer - or its representatives - had contacted the Department previously in apparently unsuccessful efforts to resolve the issue and the Department - in an overabundance of caution - treated those initial contacts as timely notices of protest.

The Department does not agree that it acted precipitously or outside its authority in initiating preliminary collection action in the absence of more than 130 tax returns. IC § 6-8.1-5-1(b) provides as follows:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.

(Emphasis added).

The above highlighted language emphasizes that the Department is required to issue proposed assessments in those instances in which there is a reasonable belief that a tax payment has not been made. The Department finds that the total, unexplained absence of a required tax return constitutes a "reasonable belief" that a tax payment has not been made. Given the circumstances, the Department does not agree with Taxpayer's contention that the assessments were facially invalid or that the Department overstepped the bounds of its statutory authority in issuing those assessments. To the contrary, the Department fulfilled its obligation when it issued the proposed assessments.

**FINDING**

Taxpayer's protest is respectfully denied.

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