

**Supplemental Letter of Findings: 10-20181183  
Food and Beverage Tax  
For The Tax Years 2014-16**

**NOTICE:** IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Supplemental Letter of Findings.

**HOLDING**

Business was able to establish that one aspect of the Department's calculations was incorrect. Business was not able to establish that the Department's calculations were incorrect in any other way.

**ISSUE**

**I. Food and Beverage Tax—Calculation.**

**Authority:** IC § 6-9-21-6; IC § 6-8.1-5-1; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the Department's calculation of food and beverage tax due.

**STATEMENT OF FACTS**

Taxpayer operates a restaurant in Indiana. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had under-reported food and beverage tax ("FBT") for the tax years 2014, 2015, and 2016. The Department therefore issued proposed assessments for FBT, penalties, and interest for those years. Taxpayer filed a protest of the proposed assessments and an administrative hearing was scheduled. Neither Taxpayer nor its representative appeared or called into the scheduled administrative hearing. Following Departmental policy, the protest was deemed withdrawn and the protest file closed without issuing a written decision on Taxpayer's protest. Subsequently, Taxpayer's representative requested and was granted a rehearing. The rehearing was scheduled via telephone and Taxpayer's representative called in at the appropriate time to present Taxpayer's protest. This Supplemental Letter of Findings results. Further facts will be supplied as required.

**I. Food and Beverage Tax—Calculation.**

**DISCUSSION**

Taxpayer protests the Department's calculations of FBT for the tax years 2014-16. The Department based its determinations of FBT due on its determination in a related audit of Taxpayer's sales tax compliance. In that other audit, the Department used the best information available, since Taxpayer did not keep cash register tapes or other sales records. Rather, Taxpayer kept track of sales in journals, which were supplied to the Department. The Department supplemented the information in the journals with information from Taxpayer's income tax returns, sales tax returns, withholding tax returns, employee W-2s, food and beverage tax returns, and various other financial information from Taxpayer. The Department also used information from Total Systems Services, which provides information regarding businesses and the financial averages in various aspects of those businesses. The Department's calculations resulted in the determination that Taxpayer had additional unreported sales. The Department then concluded that the additional sales resulted in food and beverage tax to Taxpayer. Taxpayer protested the results of the sales tax audit. Taxpayer protested that, while there may have been additional sales, those additional sales were not as high as calculated by the Department.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867

N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . .[courts] 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). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

The food and beverage tax for Taxpayer is administered according to the provisions of IC § 6-9-21-6, which states:

*The tax that may be imposed under this chapter shall be imposed, paid, and collected in the same manner that the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#). However, the return to be filed for the payment of the taxes may be made on separate returns or may be combined with the return filed for the payment of the state gross retail tax, as prescribed by the department of state revenue. (Emphasis added).*

Therefore, the imposition of FBT is determined in the same manner as sales tax. Since the related sales tax protest resulted in Taxpayer being partially sustained and partially denied, that decision flows through to this Supplemental Letter of Findings. Once the Department has recalculated the amount of additional sales as determined in the sales tax protest decision, the Department will also recalculate the amount of FBT due in the instant matter.

### FINDING

Taxpayer's protest is sustained in part and denied in part.

May 31, 2018

*Posted: 07/25/2018 by Legislative Services Agency*  
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