

Memorandum of Decision: 10-20191556R
Food and Beverage Tax
For the Tax Period July 2018

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ISSUE

I. Food and Beverage Tax - Refund Claim.

Authority: IC § 6-9-21-6; IC § 6-8.1-9-1; *P/S, Inc. v. Ind. Dep't of State Revenue*, 853 N.E.2d 1051 (Ind. Tax Ct. 2006).

Taxpayer protests the denial of its claim for refund.

STATEMENT OF FACTS

Taxpayer is a snack shop doing business in Indiana at several locations. The Department failed to receive the Taxpayer's Food and Beverage ("FAB") tax return (form FAB 103) for the tax period July 1, 2018- July 31, 2018. The Indiana Department of Revenue ("Department") issued a "best information available" assessment (the "BIA Assessment") for the estimated FAB tax due. Taxpayer did not protest the BIA Assessment. As a result of Taxpayer's lack of a protest and failure to file an actual return, the BIA Assessment advanced to a demand notice and eventually to a tax warrant.

After Taxpayer's account was levied, Taxpayer filed a FAB return for the tax period referenced. Taxpayer's return reversed the BIA return. Taxpayer subsequently requested a refund of levied amount. The Department denied Taxpayer's refund because "The department shows no record of any overage for the above amount. . . ." Taxpayer protests the denial of its claim for refund. An administrative hearing was held, and this decision results. Additional facts will be provided as necessary.

I. Food and Beverage Tax - Refund Claim.

DISCUSSION

Taxpayer protests the Department's refund denial. A retail merchant who sells taxable food items, collects the tax, and remits it to the Department is, in a sense, a tax collector. As a collector of the food and beverage tax, a retail merchant is subject to the same collection requirements that apply to the collection of sales tax.

Monroe County's food and beverage tax is imposed, paid, and collected in the same manner that the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#). IC § 6-9-21-6. "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." *Id.*

IC § 6-8.1-9-1 states in relevant part:

(a) *If a person has paid more tax than the person determines is legally due for a particular taxable period, the person may file a claim for a refund with the department. Except as provided in subsections (j) and (k), in order to obtain the refund, the person must file the claim with the department within three (3) years after the latter of the following:*

- (1) The due date of the return.
- (2) The date of payment.

For purposes of this section, the due date for a return filed for the state gross retail or use tax, the gasoline tax, the special fuel tax, the motor carrier fuel tax, the oil inspection fee, or the petroleum severance tax is the end of the calendar year which contains the taxable period for which the return is filed. The claim must set forth the amount of the refund to which the person is entitled and the reasons that the person is entitled to the refund.

In this case, the liability advanced through the legally required channels. Taxpayer failed to timely file and pay FAB tax. The Department sent Taxpayer a proposed assessment for FAB tax due based on the best information available to the Department. Further, the Department sent Taxpayer a demand notice for payment of the FAB tax, penalties, and interest identified in the BIA Assessment. When Taxpayer did not pay the demanded amount or show reasonable cause for not paying it, the Department issued a tax warrant for the FAB tax, penalty, interest, and collection fees. Taxpayer filed the appropriate FAB return requesting a refund of the amount levied. The Department denied Taxpayer's refund claim stating, "The department shows no record of any overage for the above amount for location [].".

Taxpayer submitted a protest and provided documentation to show that it does have an overage in its account. After the hearing, an independent review of Taxpayer's account also shows an overage of remitted FAB for the referenced location. Taxpayer's refund request was timely and appropriate. However, Taxpayer is not entitled to the full amount requested.

The Department incurred fees from its third party collection agency, based on a valid Department assessment that advanced to a tax warrant. The fees collected are proper if the fees were paid based on the information available to the Department at the time the fees are collected rather than at some time after collection. The collection fees were not retained by the Department, and therefore, in the absence of Department error, the Department is not able to refund the collection fees.

In *P/S, Inc. v. Ind. Dep't of State Revenue*, the tax court concluded that the taxpayer was responsible for paying collection fees because it had not rebutted the presumption that it received the notices which the Department mailed. *P/S, Inc. v. Ind. Dep't of State Revenue*, 853 N.E.2d 1051, 1054-55 (Ind. Tax Ct. 2006). The court ruled, "when an administrative agency sends notice through the regular course of mail, a presumption arises that such notice is received." *Id.* at 1054. The court further explained that the taxpayer in that case merely asserted that it had not received notice and that the Department had explained that it had not received the notices as returned mail. *Id.*

In this case, the Department had created a BIA assessment that was later reversed when Taxpayer filed its return. Taxpayer provided sufficient evidence to indicate that it was entitled to a refund of base tax. However, Taxpayer was not able to provide that it is entitled to a refund of collection fees. Therefore, Taxpayer is not entitled to any collection fees. However, the Department's refund denial stated that there was no overage for that location. There is sufficient evidence to indicate there is in fact an overage in Taxpayer's account that it is entitled to. The Department's Refund Division is to calculate collection fees for the levy on this account and refund the remaining amount to Taxpayer.

FINDING

Taxpayer's protest is sustained less collection fees.

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