

Letter of Findings: 10-20221064
Food and Beverage Tax
for the Years 2019 and 2020

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 Indiana Department of Revenue'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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Taxpayer is a retail merchant that was assessed food and beverage tax ("FAB"); Taxpayer met its burden of proof that it was not selling items subject to FAB.

ISSUE

I. Food and Beverage Tax - Proposed Assessment.

Authority: IC § 6-9-12-3; 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*, 897 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 29 (July 1, 2019); General Tax Information Bulletin 203, (September 2020).

Taxpayer protests the imposition of food and beverage tax on sales.

STATEMENT OF FACTS

In January of 2022 the Indiana Department of Revenue ("Department") sent a "Compliance Report Summary" to Taxpayer regarding Taxpayer's food and beverage account. The Department's report summary "propose[d] additional tax [being] due" on "[f]ood and beverage tax not reported on sales[.]" Taxpayer, an Indiana retail merchant, filed a "Protest Submission Form" indicating that he was protesting the food and beverage tax assessment and that he was requesting a "Final determination without a hearing." In so doing, as the Protest Submission Form notes, Taxpayer was forgoing an administrative hearing and asking, "the Department to make its decision based on the written protest and documentation (if any) the taxpayer presents along with the protest and waives the right to a hearing."

Taxpayer's submitted protest consisted of the protest form, a letter explaining its position regarding the proposed assessment, and copies of photographs from inside of Taxpayer's store. Additional facts will be provided as necessary below.

I. Food and Beverage Tax - Proposed Assessment.

DISCUSSION

Taxpayer is an Indiana business. The Department's "Explanation of Adjustments" states the following: "The Department received information that you were selling food and beverage subject to food and beverage tax in a jurisdiction where such tax is imposed." The Department's Explanation of Adjustments does not specify what food and/or beverage was subject to the food and beverage tax that Taxpayer was supposedly selling, stating: "It **appears** the taxpayer is selling items subject to food and beverage tax" in "Marion County." (**Emphasis added**).

As a threshold issue, it is Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "[t]he notice of proposed assessment is prima facie evidence that the [D]epartment'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).

Sales Tax Information Bulletin 29 (July 1, 2019), 20190731 Ind. Reg. 045190365NRA, states that "[i]n Indiana, counties or municipalities that have been granted the necessary statutory authority may adopt a local food and beverage tax ("FAB" or "FAB tax")." Additionally, the bulletin states:

FAB taxes and the sales tax operate in a similar manner with regard to how they are imposed on transactions involving food items. For instance, if a transaction is exempt from sales tax, then the transaction is also exempt from any FAB taxes. However, it is not the case that every transaction that is subject to sales tax will also be subject to a FAB. It is important to reiterate that FAB taxes are only imposed on transactions on food and beverages that are sold for consumption at a location or on equipment provided by the retail merchant (including where the food is sold with utensils, sold in a heated state, or is a combination of two or more ingredients). For most restaurants and other eating establishments, it is assumed that a FAB tax would apply to any transaction subject to sales tax because everything they sell is considered a prepared food item. This is true even if the customer was not dining-in because the food is still prepared on equipment provided by the retail merchant. In that vein, for convenience stores and groceries that meet the combination business test (see Appendix B), if an item is considered prepared food, it would be subject to FAB because it was prepared on equipment provided by the retail merchant, whereas the other food items sold by the merchant would not be subject to a FAB tax as it would not be assumed that the food was sold for consumption at the merchant's location.

Taxpayer's business is located within Marion County which, at IC § 6-9-12 *et seq.*, imposes a food and beverage tax. Regarding the food and beverage tax, General Tax Information Bulletin 203, (September 2020), 20201028 Ind. Reg. 045200536NRA, states in pertinent part that taxable transactions include, "Food sold and served by a retail merchant that is performing catering activities[.]" "Food sold at a deli counter in a grocery store that is cooked or heated on the premises[.]" and "Where the seller provides eating utensils, including plates, knives, forks, spoons, glasses, cups, napkins, or straws."

IC § 6-9-12-3 provides that:

(a) Subject to section 4 of this chapter, the tax imposed under this chapter applies to any transaction in which food or beverage is furnished, prepared, or served:

- (1) for consumption at a location, or on equipment, provided by a retail merchant;
- (2) in a county in which a consolidated first class city is located; and
- (3) by a retail merchant for a consideration.

(b) Transactions described in subsection (a)(1) include, but are not limited to transactions in which food or beverage is:

- (1) served by a retail merchant off his premises;
- (2) food sold in a heated state or heated by a retail merchant;
- (3) two (2) or more food ingredients mixed or combined by a retail merchant for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses); or
- (4) food sold with eating utensils provided by a retail merchant, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food).

Taxpayer's protest letter states that "in my store we sell mainly phones and other electronic devices, tobacco products and some snacks (chips and candy) and bottled drinks. We do not sell fountain drinks or hot food."

Taxpayer provided photographs from inside the business; the photographs of the food and beverage items sold within the store are bags of chips, packaged candy, and bottled drinks. Regarding the latter, the drinks are behind glass doors (indicating refrigeration). Given the lack of further specific information in the Department's Explanations of Adjustments and also the language used in the Department's explanation (i.e., "It **appears** the taxpayer is selling items subject to food and beverage tax" (**emphasis added**)), versus the photographs and explanation provided by Taxpayer, this written decision finds that, pursuant to IC § 6-8.1-5-1(c), Taxpayer has met its burden of proof. From the information available as part of the protest, the Department finds that Taxpayer is not selling food in a heated state; Taxpayer is not selling food with eating utensils provided by Taxpayer;

Taxpayer is not selling beverages with cups or straws; and Taxpayer is not selling food or beverages for consumption at the store's location, or on equipment, provided by Taxpayer. Since Taxpayer's protest is being sustained, Taxpayer is also sustained regarding any negligence penalty associated with the protest.

FINDING

Taxpayer's protest is sustained.

August 30, 2022

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