

Letter of Findings: 10-20221215, 10-20221216, 10-20221217
Food and Beverage Tax
for the Years 2016, 2017, 2018, 2019, 2020, and 2021

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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. Taxpayer met its burden of proof that it was not selling items subject to FAB taxes.

ISSUE

I. Food and Beverage Tax - Assessment.

Authority: IC § 6-8.1-5-1; *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); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); Sales Tax Information Bulletin 29 (June 2019); General Tax Information Bulletin 203 (September 2020); <https://www.in.gov/dor/business-tax/food-and-beverage-tax/>.

Taxpayer protests the imposition of Food and Beverage tax on sales.

STATEMENT OF FACTS

Taxpayer is an Indiana company. In March 2022, the Indiana Department of Revenue ("Department") completed a "Compliance Review" of Taxpayer. The Department's "Compliance Report Summary" concluded that Taxpayer owed additional tax for tax years 2016, 2017, 2018, 2019, 2020, and 2021 because "[f]ood and beverage tax was not reported on sales. . . ." Taxpayer protested the assessment. An administrative hearing was held. This Letter of Findings results. Additional facts will be provided as necessary.

I. Food and Beverage Tax - Assessment.

DISCUSSION

The Department's "Explanation of Adjustments" states, "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 explanation then references the specifics required to be taxed under IC § 6-9-12-3 and states, "[h]ot and cold dispensed beverage sales are subject to food and beverage tax. It **appears** the taxpayer is selling items subject to food and beverage tax in the following counties and/or municipalities: Marion County." (**Emphasis added.**) The Department then assessed Food and Beverage ("FAB") tax based on Taxpayer's sales tax returns.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. A proposed assessment is prima facie evidence the Department's claim for the unpaid tax is valid. IC § 6-8.1-5-1(c). The burden of proving the proposed assessment is wrong rests with the person against whom the proposed assessment is made. *Id.*; See e.g. *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). 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 (June 2019), 20190731 Ind. Reg. 045190365NRA, explains the basics of Food and Beverage tax ("FAB"). "In Indiana, counties or municipalities that have been granted the necessary statutory authority may adopt a local food and beverage tax ("FAB" or "FAB tax")." *Id.* The Bulletin further explains:

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). (**Emphasis in original.**)

Taxpayer operates three locations - two in Marion County and one in Hamilton County. Both Marion County and Hamilton County impose FAB taxes. See IC § 6-9-12 *et seq.*; IC § 6-9-35 *et seq.*; <https://www.in.gov/dor/business-tax/food-and-beverage-tax/> (last visited September 8, 2022). General Tax Information Bulletin 203 (September 2020) 20201028 Ind. Reg. 045200536NRA explains "[t]he food and beverage tax applies only to transactions that take place in a county or municipality that adopts the tax." Additionally, taxable transactions include the following:

- 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 of the retail merchant; and
- Where the seller provides eating utensils, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. *Id.*

"The food and beverage tax does not apply to the sale of food and beverages if the transaction is exempt from the sales tax." *Id.*

Taxpayer sells frozen popsicles. This is the only type of product sold by Taxpayer. Taxpayer does not sell ice cream or any other type of frozen items. Taxpayer also does not sell hot or cold dispensed beverages as referenced by the Department in the "Explanation of Adjustments." Taxpayer makes the popsicles and sells the completed, frozen product to customers. No ingredients are combined in its stores, and customers only purchase the final, frozen product. Taxpayer sells the products via its three brick and mortar locations as well as a "food truck" and bicycle carts. Taxpayer also occasionally caters events by providing one of its carts so that guests at the event can "self-serve;" no ingredients are combined at the events and staff are not provided at the catered events.

Additionally, Taxpayer stated during the hearing that it reached out to the Department inquiring whether FAB tax should be collected when the business began approximately ten years ago. Taxpayer was told that it would not need to collect FAB tax. Taxpayer has not changed its product or business model since the business began, nor has there been a change in the underlying statutes and regulations.

Appendix A to Sales Tax Information Bulletin 29, discussing items sold by grocery stores, provides that popsicles are exempt from sales tax. Thus, because Taxpayer is not selling a product that must be heated, is sold with utensils, or requires combining two or more products at the point of sale, and because popsicles are generally exempt from sales tax, Taxpayer is not required to collect and remit FAB taxes to Marion County.

The Department notes that the proposed assessment dates cover tax years 2016 to 2021, prior to when Sales Tax Information Bulletin 29 dated June 2019 was effective. The previous version of Sales Tax Information Bulletin 29 (April 2016) 20160427 Ind. Reg. 045160160NRA did not contain a specific discussion of FAB tax. However, popsicles were still tax exempt under the earlier version. *Id.* at Appendix A.

Finally, the Department's proposed assessment triggered a FAB tax related issue in Hamilton County. Taxpayer is also not subject to collect and remit FAB taxes to Hamilton County. Taxpayer has met its burden pursuant to IC § 6-8.1-5-1(c) showing the Department's assessment is wrong.

FINDING

Taxpayer's protest is sustained.

September 13, 2022

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