

**Letter of Findings: 10-20200366**  
**Food and Beverage Tax**  
**For the Years 2013-2018**

**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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 has not met its burden of proof that the Indiana Department of Revenue's ("Department") assessment was incorrect.

### ISSUE

#### **I. Food and Beverage Tax - Adjustment.**

**Authority:** [IC 6-8.1-5-1](#); [IC 6-8.1-5-4](#); [IC 6-9-27-4](#); [IC 6-9-33-5](#); *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).

Taxpayer protests the adjustment of Food and Beverage tax.

### STATEMENT OF FACTS

Taxpayer is a retail merchant that operates a convenience store/gas station in Indiana. Among other convenience store items, Taxpayer sells fountain drinks and coffee products. These products are subject to Food and Beverage Tax ("FAB tax"). Taxpayer was not registered for FAB tax. An audit was conducted for the 2013-2018 tax years. The Department registered Taxpayer for FAB taxes based on the audit. Taxpayer provided some documentation during the audit, but when additional information was requested, Taxpayer failed to provide it. This resulted in the Department making an assessment based on the best information available. Taxpayer protested the assessment, stating the Department's estimates were "grossly overstated." Taxpayer provided sales reports from January - April 2020 along with its official protest. Taxpayer requested an administrative hearing. This Letter of Findings results. Additional facts will be provided as necessary.

#### **I. Food and Beverage Tax - Adjustment.**

### DISCUSSION

The Department determined that Taxpayer owed additional FAB tax during an audit of the 2013- 2018 tax years. Taxpayer provided z-tapes for 2017 and 2018, which contained sections for fountain and coffee products. When a further breakdown of the categories was requested, none was provided. Since Taxpayer did not provide complete documentation upon which to base its determination of taxes due and taxes reported, the Department used the "best information available" to make those determinations. The Department determined that FAB tax had not been properly reported and issued an assessment for the tax years 2013-2016. An average was calculated for tax years 2013-2016 using the z-tape data from the tax years 2017-2018. Taxpayer then provided data from January - April 2020. Taxpayer asserts that soda from the cooler was accidentally included in the z-tape numbers in 2017 and 2018, which was corrected in 2019. Taxpayer states in its protest that because its FAB tax was much lower in the first four months of 2020 than the audit's estimate based on years 2017 and 2018 is "grossly overstated." The Department is compelled to look only at the documentation from 2017 and 2018, since those years are among the audited years.

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 that the Department's claim for the unpaid tax is valid. [IC 6-8.1-5-1\(c\)](#). The burden of proving that 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). An assessment, including Taxpayer's penalty assessment, is therefore presumed valid. A taxpayer must provide documentation explaining and supporting that the Department's position is wrong. Additionally, "[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).

Pursuant to [IC 6-9-27-4\(a\)](#), "A tax . . . applies to a 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 the city or town in which the tax is imposed; and
- (3) by a retail merchant for consideration.

Under [IC 6-8.1-5-4\(a\)](#), "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks."

If the Department reasonably believes a person has not reported the proper amount of tax due, the Department shall make a proposed assessment based on the "best information available." [IC 6-8.1-5-1\(b\)](#).

Taxpayer did not provide any source documentation, such as z-tapes, for the tax years 2013-2016. Taxpayer provided z-tapes for 2017 and 2018, which did contain sections for fountain and coffee products. This documentation was not sufficient to establish which sales were taxable and which were exempt. No other documentation was provided. Consequently, there is no way to verify that sales of bottled soda from the cooler was included with fountain drinks. Therefore, the data provided from 2020 does not change the audit calculations for the tax years at issue. Because Taxpayer did not provide documentation that established that the proposed assessment is wrong, as required by [IC 6-8.1-5-1\(c\)](#), the Department correctly used the best information available to issue an assessment of the tax years 2013-2018.

## FINDING

Taxpayer's protest is respectfully denied.

January 3, 2023

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An [html](#) version of this document.