

Letter of Findings: 10-20221803
Food and Beverage Tax
For the Years 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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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](#); [IC 6-9-12](#) *et seq.*; [IC 6-9-35](#) *et seq.*; *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 that operates a grocery store. In May 2022, the Indiana Department of Revenue ("Department") completed a "compliance review" of Taxpayer's "Food and Beverage tax account" for tax years 2017, 2018, 2019, 2020, and 2021. The Department's "Compliance Report Summary" concluded that Taxpayer owed no tax for 2017 and approximately \$81,500 for tax years 2018, 2019, 2020, and 2021. Taxpayer protested the assessment and requested resolution without a hearing. The 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 accompanying explanation cites [IC 6-9-12-3](#) for the general principal that food and beverage tax must be imposed in Marion County on certain transactions. The only other detail provided by the Department states, "Sales reported on the taxpayer's sales tax returns were used to assess food and beverage tax." The Department then assessed Food and Beverage ("FAB") tax based on Taxpayer's total sales for the tax years 2017 through 2021.

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.**)

The Department notes that the proposed assessment covers tax years 2017 to 2021, a portion of which was 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, the bulletin did contain a general discussion of items subject to sales tax, and Appendix A provided a detailed list of items sold in grocery stores that were considered taxable and non-taxable.

Taxpayer operates a grocery store that sells food items and vegetables in Marion County. Marion County imposes 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 January 17, 2023). 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.*

Transactions not subject to tax include:

- Sales of food that is only cut, repackaged, or pasteurized by the seller; and
- Sales of eggs, fish, meat, and poultry requiring cooking by the consumer. *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 explained that it sells mainly raw food items, vegetables, and personal merchandise. Taxpayer does not operate a soda fountain, vending machine, or restaurant on the premises. Taxpayer indicated that it has never collected FAB taxes since opening in 2017.

Sales Tax Information Bulletin 29 discusses the sales of food and food ingredients. Specifically, Appendix A discusses whether sales tax should be collected on items sold in grocery stores. The collection of the sales tax is separate and distinct from the collection of FAB tax.

A review of the Department's records gives no indication as to how the Department determined Taxpayer was subject to FAB taxes. Additionally, Department records indicate that Department personnel sent an electronic notice to Taxpayer in March 2022 stating that Taxpayer should register for FAB tax. When Taxpayer did not so do, the Department automatically created and registered Taxpayer with a FAB tax account. All of these actions were done in error since Taxpayer has established that it is not selling items subject to FAB tax, and the compliance review has not established that Taxpayer is subject to FAB tax as explained by [IC 6-9-12-3](#).

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.

January 23, 2023

Posted: 06/28/2023 by Legislative Services Agency

