

**Letter of Findings: 10-20232169**  
**Food and Beverage Tax**  
**For the Year 2022**

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 This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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

Business met its burden of proof that it was not selling items subject to food and beverage tax.

**ISSUE**

**I. Food and Beverage Tax - Assessment.**

**Authority:** [IC 6-8.1-5-1](#); [IC 6-9-44](#) et seq; *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*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 29 (June 2019); General Tax Information Bulletin 203 (September 2020).

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

**STATEMENT OF FACTS**

Taxpayer is an Indiana gas station and convenience store. In 2023, Taxpayer was audited by the Indiana Department of Revenue ("Department"), which resulted in an assessment for unpaid food and beverage tax. Taxpayer protested the assessment. An administrative hearing was held, and this Letter of Findings results. Additional facts will be provided as necessary.

**I. Food and Beverage Tax - Assessment.**

**DISCUSSION**

The Department received information that Taxpayer was selling food and beverage subject to food and beverage tax in a jurisdiction where such tax is imposed. The Department then issued a notice of proposed assessment for Food and Beverage ("FAB") tax based on Taxpayer's sales tax returns. Taxpayer protests that it does not sell those types of items and is not required to collect and remit the tax at issue.

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 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')." (June 2019), 20190731 Ind. Reg. 045190365NRA. 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.**)

*Id.*

Taxpayer operates the location at issue in an Indiana community which imposes a FAB tax. See [IC 6-9-44](#) et seq. General Tax Information Bulletin 203 explains "[t]he food and beverage tax applies only to transactions that take place in a county or municipality that adopts the tax." (December 2019) 20200401 Ind. Reg. 045200145NRA. Additionally, the bulletin lists the following as taxable transactions:

- 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.*

During the hearing, Taxpayer explained that its business location is connected to a separate, large fast-food retail business. Because the businesses are physically connected, Taxpayer advised that it has a contract with the fast-food retailer to refrain from selling fountain beverages, hot coffee, pastries, hot dogs, etc. Taxpayer provided photos which reflect that it only sells prepackaged candy, chips, and other snacks, as well as bottled soda, water, and juice. Taxpayer does not sell any items that are cooked and heated on the premises, nor does it provide any eating utensils with any of its sales. Thus, Taxpayer is not required to collect and remit FAB taxes. 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.

December 5, 2023

*Replaces Finding Document at: New*

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