

## DEPARTMENT OF STATE REVENUE

10-20160092.LOF

**Letter of Findings Number: 10-20160092**  
**County Food and Beverage Tax**  
**For Tax Years 2012-14**

**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 Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.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 was not responsible for collecting county food and beverage tax on frozen dessert sales when it did not provide utensils. County food and beverage tax was therefore not due on those sales during the audit years.

**ISSUE****I. Food and Beverage Tax—Exempt Food Sales.**

**Authority:** IC § 6-2.5-1-20; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-2; IC § 6-2.5-5-20; IC § 6-2.5-11-2; IC § 6-2.5-11-5; IC § 6-2.5-11-6; IC § 6-8.1-5-1; IC § 6-9-20-4; 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); [45 IAC 2.2-5-39](#); [45 IAC 2.2-5-44](#); Sales Tax Information Bulletin 29 (February 2012).

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

**STATEMENT OF FACTS**

Taxpayer operates a fast food style restaurant in Indiana with sales of frozen dessert items. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted county food and beverage tax on all taxable sales during the tax years 2012, 2013, and 2014. The Department therefore issued proposed assessments for county food and beverage tax, penalties, and interest for those years. Taxpayer protested a portion of the proposed assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

**I. Food and Beverage Tax—Exempt Food Sales.****DISCUSSION**

Taxpayer protests the imposition of county food and beverage tax on certain sales which occurred at its restaurant during the tax years 2012-14. Specifically, Taxpayer believes that sales of frozen cakes and desserts from a cold storage case were not subject to county food and beverage tax and so no county food and beverage tax should have been collected and remitted on those sales. The Department determined that the sales of frozen cakes and desserts were taxable sales and that county food and beverage tax should have been collected and remitted on those sales.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department'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). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

IC § 6-9-20-4 provides:

- (a) Except as provided in subsection (c), a tax imposed under section 3 of 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 the county in which the tax is imposed; and
  - (3) by a retail merchant for 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 the merchant's 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).
- (c) The county food and beverage tax does not apply to the furnishing, preparing, or serving of any food or beverage in a transaction that is exempt, or to the extent exempt, from the state gross retail tax imposed by [IC 6-2.5](#). (Emphasis added).

Therefore, a review of how the sales tax is applied to the items in question is necessary to determine if the county food and beverage tax is applicable, as provided by IC § 6-9-20-4(c).

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

Also of relevance is IC § 6-2.5-1-20, which defines "food and food ingredients" as:

"Food and food ingredients" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and that are consumed for their taste or nutritional value. The term does not include alcoholic beverages, candy, dietary supplements, tobacco products, or soft drinks. (Emphasis added).

Also, IC § 6-2.5-5-20 provides:

- (a) Sales of food and food ingredients for human consumption are exempt from the state gross retail tax.
- (b) For purposes of this section, the term "food and food ingredients for human consumption" includes the following items if sold without eating utensils provided by the seller:
  - (1) Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries).
  - (2) Food sold in an unheated state by weight or volume as a single item.
  - (3) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.
- (c) Except as otherwise provided by subsection (b), for purposes of this section, the term "food and food ingredients for human consumption" does not include:
  - (1) candy;
  - (2) alcoholic beverages;
  - (3) soft drinks;
  - (4) food sold through a vending machine;
  - (5) food sold in a heated state or heated by the seller;
  - (6) two (2) or more food ingredients mixed or combined by the seller 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);

(7) food sold with eating utensils provided by the seller, 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);

(8) tobacco; or

(9) dietary supplements.

(Emphasis added).

Additionally, [45 IAC 2.2-5-44](#) provides:

Where a person operates a combination-type business at one location such as an eating place combined with a donut or pastry shop, sales by such retailer of nontaxable grocery items as described in this regulation [\[45 IAC 2.2\]](#) are nontaxable when sold for home consumption. The method used in distributing these items, including the kind and size of the order and the container used, will be considered in determining whether the items are sold for home consumption. For example, bulk sales of donuts or other assorted pastries, sales of whole pies or cakes and bulk sales of ice cream are nontaxable when sold for home consumption. However, individual orders (e.g., an order of ice cream, a single serving of pie or cake, or a single serving bakery item) are taxable regardless of whether sold for consumption on the premises or sold on a "take-out" basis for off-premises consumption. (Emphasis added).

Also of relevance is [45 IAC 2.2-5-39](#), which provides:

(a) The gross retail tax act specifies the items which constitute tax exempt food for human consumption.

(b) A number of items normally sold by grocery stores, supermarkets, and similar type of businesses are classified in this regulation [\[45 IAC 2.2\]](#) under the heading "nontaxable items". These examples are for illustrative purposes and are not intended to be all-inclusive.

"NONTAXABLE ITEMS"

Baby Foods

Bakery Products

Baking Soda

Bouillon Cubes

Cereal & Cereal Products

Chocolate (for cooking purposes only)

Cocoa

Coconut

Coffee & Coffee Substitutes

Condiments

Cookies

Crackers

Dehydrated Fruit & Vegetables

Diet Foods

Eggs & Egg Products

Extracts, Flavoring as an Ingredient of Food Products

Fish & Fish Products

Flour

Food Coloring

Fruit & Fruit Products, including Fruit Juices

Gelatin

Health Foods

Honey

Ice Cream, Toppings, and Novelties

Jams

Jellies

Ketchup

Lard

Marshmallows

Mayonnaise

Meat & Meat Products

Milk & Milk Products

Mustard  
Nuts, including salted, but not chocolate or candy-coated  
Oleomargarine  
Olive Oil  
Olives  
Peanut Butter  
Pepper  
Pickles  
Popcorn  
Potato Chips  
Powdered Drink Mixes (Presweetened or Natural)  
Relishes  
Salad Dressings and Dressing Mixes  
Salt  
Sauces  
Sherbets  
Shortenings  
Soups  
Spices  
Sandwich Spreads  
Sugar, Sugar Products, and Sugar Substitutes  
Syrups  
Tea  
Vegetables & Vegetable Products (Excluding Salad Bars)  
Vegetable Juices  
Vegetable Oils  
Yeast

Some items in the above categories will be subject to tax if they are sold in small quantities and, therefore, are prepared for immediate consumption.  
(Emphasis added).

Also, Indiana is a member of the Streamlined Sales Tax Agreement ("SSTA"). IC § 6-2.5-11-2 states:

As used in this chapter:

(1) "Agreement" means the Streamlined Sales and Use Tax Agreement.

Next, IC § 6-2.5-11-5 provides:

The department may enter into the agreement with one (1) or more states to simplify and modernize sales and use tax administration in order to substantially reduce the burden of tax compliance for all sellers and for all types of commerce. In furtherance of the agreement, the department may act jointly with other states that are members of the agreement to establish standards for certification of certified service providers and certified automated systems and to establish performance standards for multistate sellers. The department may take other actions reasonably required to implement this chapter. Other actions authorized by this section include, but are not limited to, the adoption of rules and the joint procurement, with other member states, of goods and services in furtherance of the cooperative agreement. The department or the department's designee shall represent the state of Indiana before the other states that are signatories to the agreement. (Emphasis added).

Finally, IC § 6-2.5-11-6 provides:

No provision of the agreement authorized by this chapter in whole or in part invalidates or amends any provision of the law of Indiana. Adoption of the agreement by the state of Indiana does not amend or modify any Indiana law. Implementation of any condition of the agreement in Indiana, whether adopted before, at, or after membership of this state in the agreement, must be by the action of this state. (Emphasis added).

Therefore, Indiana is a member of the SSTA and may adopt rules in furtherance of the SSTA, but no Indiana law may be amended or modified by action of membership in the SSTA. The Department considered Taxpayer to function primarily as a restaurant, as classified by the North American Industry Classification System ("NAICS"), and therefore considered all sales of food at Taxpayer's location to be taxable. As its reason for making the

adjustment to sales tax calculations, the audit report stated, "Based on the streamlined sales tax agreement and the taxpayer's primary function being that of a restaurant, all sales are subject to sales tax and food and beverage tax." The Department offered no further explanation regarding how the SSTA caused the sales in question to be subject to sales tax. The Department did state that, "Food and beverage tax has been assessed in accordance with [IC 6-9-20-3](#) which states tax is imposed on food and beverages which is furnished, prepared or served." The correct statute, as provided above, is IC § 6-9-20-4. Also, as provided above, the taxable status of the items for sales tax purposes is determinative for food and beverage tax purposes. Therefore, the taxable status of these sales must be determined by reviewing Indiana's statutes and regulations.

In the course of the protest process, Taxpayer referred to the Indiana SSTA taxability matrix prepared by the Department. That matrix lists the same criteria as listed in IC § 6-2.5-5-20 regarding cakes and ice cream novelties such as the ice cream desserts sold by Taxpayer. Taxpayer also refers to Sales Tax Information Bulletin 29 (February 2012) 20120229 Ind. Reg. 045120091NRA, which during the audit years stated in relevant parts:

**D. Prepared Food**

- (1) All food sold through a vending machine is subject to sales tax regardless of the type of food sold. The fact that the item qualifies as exempt food if sold in another manner does not make the purchase exempt if sold through a vending machine.
- (2) All food items sold with eating utensils provided by the seller are taxable. Food shall be considered to be sold with eating utensils provided by the seller when the food is intended for consumption with the utensils provided. Taxable food therefore includes all food sold by an eating establishment that sells meals, sandwiches, or other food for consumption on or off the premises. Additionally, taxable food includes self-service food such as salad bars or drink islands. The presence of self-service utensils in a facility does not make otherwise exempt food taxable unless it is intended that the food be consumed with those utensils. Further, items provided solely pursuant to sanitary statutes or regulations and not for purposes of consumption do not qualify as utensils.
- (3) All food items sold in a heated state are taxable. Food is also taxable if it was heated by the seller and is ready to eat without further cooking by the purchaser.
- (4) Where two or more food ingredients are mixed or combined by the seller and then sold as a single food item, this item is taxable unless:
  - (a) The item is both sold in an unheated state by weight or volume as a single item and is sold without eating utensils, (e.g., potato salad);
  - (b) The item sold represents food that is only cut, repackaged, or pasteurized by the seller (e.g., vegetable trays); or
  - (c) The item sold contains raw animal foods that require cooking.
- (5) Bakery items are not taxable unless they are
  - (a) Sold through a vending machine;
  - (b) Sold with eating utensils provided by the seller; or
  - (c) Sold in a heated state.

....  
(Emphasis added).

In the instant case, the frozen cakes and desserts were not sold with utensils. During the audit years, as provided by Information Bulletin 29 (February 2012), when prepared food was sold without utensils provided by the seller it was not taxable. Therefore, as provided by IC § 6-2.5-5-20, [45 IAC 2.2-5-39](#), and Information Bulletin 29 (February 2012), cakes and ice cream novelties sold without utensils provided by the seller were not subject to sales tax. However, the Department takes this opportunity to point out that Information Bulletin 29 has been updated to reflect that the Department now considers that utensils including plates, knives, forks, spoons, glasses, cups, napkins, or straws (a plate does not include a container or packaging used to transport the food) shall be considered to be sold with eating utensils provided by the seller when utensils are given to the purchaser or made available for self-service by the purchaser on the seller's premises. Since IC § 6-9-20-5(c) states that items not subject to sales tax are not subject to the county food and beverage tax, and since the items in question were not subject to sales tax during the audit years, Taxpayer has met the burden of proving the proposed assessments incorrect.

**FINDING**

Taxpayer's protest is sustained.

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