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Proposed Amendment to Definition of “Candy”

Background

The Streamlined Sales and Use Tax Agreement dated November 12, 2004 (Agreement), provides that a state that exempts food and food ingredients may exclude candy from the exemption.

Appendix C, Part II of the Agreement defines candy as follows:

“Candy” means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. “Candy” shall not include any preparation containing flour and shall require no refrigeration.

The work group that developed this definition found that one of the biggest challenges to states and retailers was determining whether certain products were candy and taxable or cookies and exempt. To solve this problem, the work group, with the goal of radical simplification, recommended that candy not be defined so that if a state exempted food and food ingredients, it would have to exempt candy because it fell within the definition of “food and food ingredients.” That recommendation was not accepted by the Project because of the significant revenue loss states would face should they begin to exempt candy.

The work group, still trying to solve the candy/cookie problem, then recommended that candy be defined to exclude any preparation containing flour. In doing so, the work group believed that the problem would be solved. Members realized that certain products that were currently taxed by states as candy would become exempt under this recommendation (Kit Kat, etc. – Attachment 1), however, it was easier for retailers to determine taxability based on the presence of an ingredient. States did not realize at the time of agreeing to the definition that licorice and other products (considered by most people to be candy) also contained flour, making the products exempt if a state chose to exempt food and food ingredients (Attachment 2).

Amendment

At the Streamlined Sales Tax Implementing States meeting in Phoenix, Arizona on November 19, 2003, Indiana delegate James Turner proposed the following amendment to the Agreement definition of “candy.”

“Candy” means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. ~~“Candy” shall not include any preparation containing flour and shall require no refrigeration.~~ The term does not include any preparation:

- (1) containing flour, if the preparation is labeled in the manner provided by 21 CFR 101 and flour is one (1) of the first (3) ingredients listed on that label; or
- (2) requiring refrigeration.

Mr. Turner gave the following reasons for considering this change:

- Many similar products thought of as candy contain minimal amounts of flour that would render them exempt from tax if a state chose to exempt food and food ingredients and tax candy. For example, an original Milky Way candy bar contains flour in its listed ingredients while a Milky Way Midnight candy bar does not (Attachment 3). It is confusing to purchasers and retailers to see one type of candy bar taxed and a similar one that is exempt.
- Manufacturers could add a trace of flour to products currently considered candy to avoid sales tax on their products.

Mr. Turner indicated he had no objection to changing the level at which the flour ingredient occurs in the listing (e.g., third, fourth, eighth) as long as a trace of flour did not render a product to be something other than candy if that product is commonly thought of as candy.

Rather than act on the amendment, the co-chairs asked that the issue be studied further by the Project.

Additional Research

Attachment 4 includes ingredients lists for a number of products you would find in a grocery store that are not commonly understood to be candy, but would meet the definition of candy except for the presence of flour as an ingredient. Flour in the ingredient list is circled and the level is also noted to the right.

Using the amended definition, please note the following:

- Similar to Mr. Turner's first concern, similar products with minor variations would be taxed differently and confuse purchasers and retailers. For example, Cookies and Twix Crunchy Cookie Bars would be candy while Cookies and Snickers Crunchy Cookie Bars would not. Additional examples include:
 - Certain flavors of Pop Tarts would be candy.
 - Granola bars may or may not be candy depending on the type.
 - Slim-Fast Bars will be candy.
 - Keebler Frosted Animal Crackers would not be candy while Keebler Fudge Shoppe Fudge Lovers' Fudge Sticks would be candy.
 - Girl Scout cookies would not be candy, except for Peanut Butter Sandwich cookies.
- Rather than just knowing that flour is ingredient, a grocer will have to count at which level in the list flour appears which adds an additional level of complexity.