

August 12, 2011

By U.S. Mail and Email to [Scott.Peterson@taxadmin.org](mailto:Scott.Peterson@taxadmin.org)

Scott Peterson, Executive Director  
Streamlined Sales Tax Governing Board  
Post Office Box 7081  
Pierre, SD 57501

Dear Mr. Peterson:

I am submitting the attached interpretation/definition request on behalf of my company. We are respectfully requesting expedited treatment, as we are currently engaged in appealing this issue with two state authorities.

Please do not hesitate to contact me with any questions, or additional information needed.

Sincerely,

A handwritten signature in cursive script that reads "Ken Nogueira". The signature is written in black ink and is positioned above the printed name.

Ken Nogueira

**Streamlined Sales Tax Governing Board, Inc.**  
**Compliance Review and Interpretations Committee**

**INTERPRETATION/DEFINITION REQUEST**

Complete each section

1. Name(s) of Requestor(s): Ken Nogueira\_\_\_\_\_
2. Contact Person: Name Ken Nogueira\_\_\_\_\_
- Address 12 Emily Dr\_\_\_\_\_
- Franklin, MA 02038\_\_\_\_\_
- Telephone 617-530-9139\_\_\_\_\_
- Email knogueira@comcast.net\_\_\_\_\_

3. Agreement Section(s) involved: Appendix C (definition of “food and food ingredients”)

4. Statement of Background Facts (be succinct): \_\_\_\_\_
- The Company is a restaurant company that features “wood-grilled” items on its menu. The Company purchases Hickory wood chunks to be used as an ingredient to flavor items on its menu. During the cooking process, the Hickory wood chunks are soaked in water and placed in a smoker under the grill. As the smoldering wood burns, it releases compounds that impart a unique flavor and are a key ingredient in a number of “wood-grilled” items on its menu.

5. Issue:
- Whether sales/purchases of wood chunks used for flavoring in cooking for ingestion by humans qualifies as “food or food ingredients”.
- \_\_\_\_\_

6. Proposed Interpretation:
- Wood chunks sold/purchased for flavoring in cooking qualifies as a “food or food ingredient” for sales and use tax purposes. (See additional detail attached)
- \_\_\_\_\_

7. Is expedited consideration requested? \_\_\_\_ No \_\_\_X\_\_\_ Yes
- A request for interpretation/definition normally requires a minimum 60-day comment period. The comment period may be shortened to 10 days if the Committee grants a request for expedited consideration. See Governing Board Rule 902(D) and (H).

8. Date this Request is submitted: August 12, 2011\_\_\_\_\_

Submit to: Scott Peterson, Executive Director  
Streamlined Sales Tax Governing Board  
Post Office Box 7081  
Pierre, SD 57501  
605-945-0052  
Scott.Peterson@taxadmin.org

## **Intrepretative/Definition Request: Tax Treatment of Hickory Wood Purchases**

### **Facts**

The Company is a restaurant company that features “wood-grilled” items on its menu. The Company purchases Hickory wood chunks to be used as an ingredient to flavor many of the items on its menu. During the cooking process, the Hickory wood chunks are soaked in water and placed in a smoker under a gas grill. As the smoldering wood burns, it releases compounds that impart a unique flavor and are a key ingredient in a number of “wood-grilled” items on its menu. It should also be noted that these items are cooked on a gas grill; the wood is not used as a “fuel” in the cooking process, but only as an ingredient to impart a specific flavoring to each item sold.

### **Requested Ruling:**

Company requests a ruling that sales/purchases of wood chunks for flavoring in cooking qualifies as a “food or food ingredient” for sales and use tax purposes.

### **Science of Wood Smoke**

The Streamlined Sales and Use Tax Agreement as amended through May 19, 2011 (SSUTA) defines “food and food ingredients” as “substances, whether in liquid, concentrated, solid, frozen, dried or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.”

The SSUTA’s listing of a broad range of forms that food or food ingredients can take is clearly intended to indicate that the form of the item does not determine its classification. If an item is ingested by humans, for its taste, it is classified as “food or food ingredients” in whatever form it takes. The wood chunks the Company purchases to use during the cooking process clearly change the taste of the items sold. During the cooking process, the wood smoke releases compounds that become an ingredient and change the flavor of the item being prepared. It is in this “form” that the wood chunks become a food ingredient and are ingested by humans for taste. The science of how “wood” becomes a “flavoring agent” is outlined in several excerpts outlined below:

### **Handbook of Meat, Poultry and Seafood Quality by Leo M. L. Nollet, Terri Boylston, et al ISBN: 978-0-8138-2446-8 March 2007, Wiley-Blackwell (Chapter 15 Wood Smoke Flavor By Keith R. Cadwallader) (pp 201-202)**

“Wood smoke has been used for tens of thousands of years to impart flavor, aroma, and color to foods, as well as to preserve them (Baltes et al. 1981, Pszezola 1995)...

Wood smoke flavor is generated by the controlled pyrolysis (burning) of the major components of wood, namely cellulose, hemicellulose and lignin....The thermal degradation of lignin gives rise to the most important class of smoke flavor compounds, the phenols. These include guaiacol, phenol and 4-methylguaiacol, and syringol among many others.”

### **Meat Science and Applications (ISBN: 0-8247-0548-3) By Y.H. Hui, Yiu H. Hui. Marcel Dekker, Inc., New York, 2001 (pp. 510-512)**

“Smoke is an additive to the food processing system as is salt, sugar, water and spices. The three major constituents of wood are cellulose, hemicellulose and lignin in a respective ratio of 2:1:1.... ..The pyrolysis (burning) of lignin produces phenolic compounds that play a prominent role in flavor development. Three of the primary phenolic compounds are guaiacol, 4-methyl guaiacol and syringol.

Guaiacol is the phenolic primarily associated with smoke flavor, and syringol is the phenolic primarily associated with smoke odor. Along with these three primary phenolic compounds are many minor phenolic compounds and smoke extractives that contribute to the characterization of smoke flavor and odor. These minor compounds number in the hundreds.”

### **On Food & Cooking: The Science and Lore of the Kitchen**

**Harold McGee (2004) Scribner. ISBN 0-684-80001-2. (pp. 448–450)**

Wood Smoke and Charred Wood:

“...cooks often use burned or burning wood as flavoring agents...

Wood consists of three primary materials: cellulose and hemicellulose, which form the framework and the filler of all plant cells walls and lignin, a reinforcing material that binds neighboring cell walls together and gives wood its strength. Cellulose and hemicellulose are both aggregates of sugar molecules.

### **How Burning Transforms Wood into Flavor**

Burning temperatures transform each of the wood components into a characteristic group of compounds. The sugars in cellulose and hemicellulose break apart into many of the same molecules found in caramel, with sweet, fruity, flowery, bready aromas. And the interlocked phenolic rings of lignin break apart from each other into a host of smaller, volatile phenolics and other fragments, which have specific aromas of vanilla (vanillin) and clove (isoeugenol) as well as a generic spiciness, sweetness and pungency. Cooks get these volatiles into solid foods, usually meats and fish, by exposing the foods to the smoky vapors emitted by burning wood.”

### **Food and Drug Administration Definition**

The Federal Food and Drug Administration (FDA) specifically identifies many of these compounds as “food additives” and “flavoring agents” supporting the interpretation of “food ingredient”.

Per the Code of Federal Regulations Title 21 Chapter I Subchapter B—“Food for Human Consumption” Part 172—Food Additives permitted for direct addition to food for human consumption

Subpart F—Flavoring Agents and related Substances

Sec. 172.515 Synthetic flavoring substances and adjuvants

Synthetic flavoring substances and adjuvants may be safely used in food in accordance with the following conditions.

- a) They are used in the minimum quantity required to produce their intended effect, and otherwise in accordance with all the principles of good manufacturing practice.
- b) They consist of one or more of the following, used alone or in combination with flavoring substances and adjuvants generally recognized as safe in food...

Included in the list of approved substances are guaiacol, 4-ethylguaiacol, isoeugenol and vanillin which are all compounds created from the pyrolysis (burning) of wood chunks. Clearly, the FDA definition supports the assertion that wood chunks used in the cooking process are a “flavoring agent”, or “food ingredient”.

## **Law & Analysis:**

### **Florida:**

The state of Florida has specifically addressed this issue.

Per the Florida Department of Revenue Standard Industry Guide for Restaurants & Bars (pg 21), under Rule 12-A-1.059 of the Florida Administrative Code, fuels including cordwood are taxable.

“However, please distinguish that specially chosen woods consumed by cooking and utilized to impart a particular flavor on the food, thus becoming an integral part of the food itself, may be deemed to be an ingredient, e.g. hickory barbeque ribs, apple-wood smoked bacon, oak-fire seared steaks. “ and therefore tax exempt. (See Exhibit 1)

### **Missouri:**

Similarly, the state of Missouri has also addressed this specific issue.

Per the Missouri Code of State Regulations (CSR) Chapter 110—Sales/Use Tax Exemptions

CSR 10-110.200 Ingredient or Component Part Exemption: “ingredients or component parts are exempt from tax if they blend with the final product and are intended to and do become a part of the finished product”. The CSR provides the following example (4)(B): A restaurant purchases apple wood to use in the smoking of foods. The restaurant burns the wood in a closed chamber called a smoker in which it places the food. The burning wood releases compounds, and small but measurable quantities of the compounds enter and permeate the food. Because a part of the wood, in the form of smoke particles, blends with and remains as part of the finished product, the apple wood may be purchased tax exempt as an ingredient or component part.” (See Exhibit 2)

### **Texas:**

According to Texas Administrative Code Rule 3.293 (a) Definitions (7) Food and food ingredients:

“Substances, whether in liquid, concentrated, solid, frozen, dried or dehydrated form that are sold for ingestion or chewing by humans and are consumed for taste, aroma, or nutritional value.”

(A) Food and food ingredients....such as the following... spices condiments and salt...”

Two letter rulings from the Comptroller of Public Accounts in Texas also address the issue of wood used in cooking. The first letter dated March 23, 1988 states in part “Thank you for your letter concerning the taxability of mesquite, hickory and pecan wood used in restaurants for cooking food. The wood used in cooking food for sale qualifies for exemption from sales tax.” The Second letter dated January 14, 1992 states in part “Thank you for your letter regarding the taxability of mesquite wood used in restaurants for cooking food...The wood used in cooking food for sale qualifies for exemption from sales tax.” (See Exhibit 3)

### **California:**

The Company uses Hickory wood chunks to impart the hickory flavoring into its specific menu items. Also commercially available in grocery stores are a number of “Liquid Smoke” seasoning products that provide this flavoring. Attached as Exhibit 4 is one example of these types of products, “Wright’s All Natural Hickory Seasoning Liquid Smoke”. The ingredients of this “seasoning” are water and natural hickory wood smoke concentrate”; the same flavoring that the Company achieves through the use of Hickory wood chunks. Attached as Exhibit 5 is a letter ruling dated August 24, 1964 from the California State Board of Equalization which ruled that “Liquid Smoke is considered to be sold for resale to a restaurant or other customer who applies the Liquid Smoke as an ingredient for barbecuing meats, which are to be sold. The theory is that the smoke or certain ingredients contained in it become physically incorporated into the food providing flavor to it.”

**Kansas:**

According to Publication KS-1540 (Rev 1/11) Kansas Business Taxes for Hotels, Motels and Restaurants (pg 15), the state of Kansas defines very broadly the concept of purchases for resale as it relates to restaurant related items. The relevant passage: “Every food item that will be sold to a restaurant’s customer as part of the meal or drink served may be purchased tax exempt...This includes not only the ingredients of the meal itself, but also any condiments such as herbs, salt, pepper, catsup, mustard, relish, seasonings, etc.” (See Exhibit 6)

**Ohio:**

The state outlined in Ohio Department of Taxation Information Release ST 2004-1 “Food Definition – Issued May, 2004-Revised June, 2007 that “ingredients used in baking goods that are consumed by humans for taste or nutritional value are not taxable as food. Ingredients such as vanilla extract, food coloring, sugar, sweetener, flour, gelatin, chocolate, peanut butter, cake mixes, marshmallows, nuts, spices, and similar items are not taxable. Clearly the Ohio definition of “spices and similar items” would include Hickory wood chunks used as a flavoring during the cooking process. (See Exhibit 7)

**Minnesota:**

The state outlined in Minnesota Revenue Sales Tax Fact Sheet 102A “Food and Food Ingredients” examples of nontaxable food and food ingredients including the following items: “Flavorings, seasonings, herbs (seasonings), spices, gelatin, sweeteners, baking powder, condiments, and cooking oil.” Again it is clear that the Minnesota definition would include Hickory wood chunks used as a flavoring during the cooking process. (See Exhibit 8)

**Tennessee:**

The state details in Sales & Use Tax Guide (February, 2011) (Pg 17) examples of food and food ingredients including the following items: baking powder, condiments, cooking oil, herbs and spices, shortening. The state also notes that “this list is not all-inclusive”. Tennessee’s definition would also support inclusion of Hickory wood chunks used as a flavoring during the cooking process. (See Exhibit 9)

**West Virginia:**

In Publication TSD-419 “Application of the Reduced West Virginia Consumer Sales and Service Tax to Food”, the West Virginia State Tax Department list of “food and food ingredients” includes Condiments, Cooking oil, Lard, herbs (Seasonings) and Extracts and flavorings intended as a cooking ingredient. Once again, Hickory wood chunk purchases by the Company should be considered “flavorings intended as a cooking ingredient”. (See Exhibit 10)

**Arkansas:**

In the “Food and Food Ingredients” State Sales and Use Tax Guide includes the following examples of food items: Condiments, Cooking Oil, Lard and Shortening, Extracts and flavorings used as cooking ingredients, Seasonings and spices. Hickory wood chunk purchases by the Company would be included as a “Extracts and flavorings” used as a cooking ingredient. (See Exhibit 11)

**Massachusetts:**

Per M.G.L. Chapter 64H Section 6 Exemptions: “The following sales and the gross receipts there from shall be exempt from the tax imposed by this chapter:

(h) “Sale of food products for human consumption. “Food Products” includes...herbs, spices and salt, sugar and sugar products...”

In addition, we would like to reference Code of Massachusetts Regulations 830 CMR 64H.6.5 Sales Tax on Meals. (4) Food Products, (a) Definitions, 3. Ice.

“Ice sold for uses other than household consumption is subject to tax. The sale of ice to restaurants and bars for use exclusively as crushed ice in drinks is a sale for resale and is not subject to sales tax...” Just as “crushed ice” that melts becomes part of a drink (a sale for resale), the compounds from the hickory wood chunks become a part of the menu item sold (a sale for resale) and therefore not subject to tax.

The hickory wood chunks should be considered as an herb or spice that provides flavor into the dish and is therefore tax exempt as a “food product” or “food ingredient”. Similar to a bay leaf or a cinnamon stick (neither of which is directly eaten, nor would be taxable), the hickory wood is a flavoring that during the cooking process becomes a key ingredient of the dish to be sold.

Additional reference materials that also support this definition are outlined below.

According to “*Epicurious.com*” Food Dictionary (Copyright Barron’s Educational Services, Inc. 1995 based upon the “*The Food Lover’s Companion, 2<sup>nd</sup> edition*”, by Sharon Tyler Herbst).

The definition of spices is as follows: “Pungent or aromatic seasonings obtained from the bark, buds, fruit, roots, seeds or stems of various plants and trees”

According to the “*Handbook of Spices, Seasonings and Flavorings, 2nd Edition*” By Susheela Raghavan (CRC Publishing October 23, 2006) “The definition of spice should include “all parts of a plant that provide flavor, color and even texture”; since all parts of a plant-- leaf, seeds, root, fruit, bark, buds, rhizome, and stalks-- are used.” (Page 56)

### **Indiana:**

Per Information Bulletin #11 Sales Tax (December, 2002): “Application of Sales Tax to Restaurant Owners Including Fast Food Operations and Caterers” the state in Section IIA outlined exempt purchases by restaurants. “All purchases by restaurants of tangible personal property to be resold are exempt from sales tax. This exemption shall apply to all types of food, beverages, and other tangible personal property which are to be sold at retail. The purchase of tangible personal property that will act directly on the food during preparation is exempt from sales tax....Transactions involving tangible personal property are exempt from sales tax if the property is used consumed or removed in the service or consumption of the food...” The hickory wood chunks purchased by the Company do “act directly” on the food during preparation and are “consumed” during the process; they are clearly exempt from tax. (See Exhibit 12)

### **Wisconsin:**

According to Publication 201 (11/10) Wisconsin Sales and Use Tax Information (pp 72-73), the state of Wisconsin specifically exempts wood used in the wood smoking process. Part 14D outlines “Exemption for Ingredients, Component Parts, and Consumable items: Effective August 1, 2009, items are exempt from Wisconsin sales and use tax if the items...become an ingredient or component part of the article of tangible personal property, or item or property or which are consumed, destroyed, or lose their identity in manufacturing the article of tangible personal property, or item, or property destined for sale...” The document then includes the following example: “Examples of items which are consumed, destroyed or lose their identity are...wood used to smoke products.” (See Exhibit 13)

### **Louisiana:**

Per Revenue Ruling No. 09-002 September 17, 2009, cooking oils and butter used as an integral ingredient in the product were tax exempt. The ruling notes “material was purchased for the purpose of further processing into the finished product...become a “recognizable, integral part” of the finished product. The ruling references a Kentucky Fried Chicken case (Al-Tom Investment Inc. vs. Director of Revenue) noting...”Just as flour, salt or spices become a part of the food item during preparation; the

cooking oil and shortening become a part of the food during the cooking portion of the preparation. The court concluded the cooking oil and shortening were ingredients of the products sold, and thus such purchases were made at wholesale and nontaxable.” Similarly, the smoke compounds from the wood chunks become a “recognizable, integral part” and become “a part of the food” of the finished menu item to be sold. (See Exhibit 14)

**South Carolina:**

Similarly, Commission Decision # 95-11 held that cooking oil and shortening are not subject to tax: “The cooking oil and shortening are absorbed by the food. The cooking oil is used as a part of the food being sold. Just as flour, salt or spices become a part of the food item during preparation, the cooking oil and shortening become a part of the food during the cooking portion of the preparation. The Department’s established view is that restaurants are making purchases at wholesale when they purchase ingredients of food products sold to customers. We find and conclude the cooking oil and shortening are ingredients of the food products sold, and thus such purchases are made at wholesale and are nontaxable.” (See Exhibit 15)

**Virginia:**

Per Letter Ruling 89-291, October 27, 1989, cooking oil was ruled to be tax exempt in the state of Virginia. The ruling states in part, “Inasmuch as the cooking oil in question becomes a component part of the products being sold by the restaurant, such oil may be purchased exempt of the tax by the restaurant”. (See Exhibit 16).

While Virginia, Letter Ruling 97-151, March 28, 1997 held that purchases of hickory firewood used to cook barbecue are taxable, it specifically cited that the “Taxpayer uses the firewood as the fuel source for cooking the barbecue...I cannot agree that the primary purpose for using the firewood is to flavor the barbecue”. Since the Company uses a gas grill to cook its dishes, the Hickory wood chunks are used solely as a flavoring ingredient and “component part” of the products being sold. (See Exhibit 17)

**Conclusion:**

The Company respectfully requests a ruling stating that sales/purchases of wood chunks for flavoring in cooking qualify as a “food or food ingredient”, thus being exempt for sales and use tax purposes. The significant amount of case law specifically related to wood used in cooking, as well as similar seasonings/flavorings, the reference literature and Food and Drug Administration definitions provided all support the assertion that the definition of food ingredients should include wood chunks used for flavoring in cooking and therefore rendering such product exempt for sales and use tax purposes.

Intrepretative/Definition Request: Tax Treatment of Hickory Wood Purchases

APPENDIX

- Exhibit 1: Florida Department of Revenue Standard Industry Guide for Restaurants & Bars (pg 21)
- Exhibit 2: Missouri Code of State Regulations (CSR) Chapter 110—Sales/Use Tax Exemptions
- Exhibit 3: Letter rulings Texas Comptroller of Public Accounts
- Exhibit 4: Wright’s All Natural Hickory Seasoning Liquid Smoke
- Exhibit 5: Letter ruling California State Board of Equalization
- Exhibit 6: Publication KS-1540 Kansas Business Taxes for Hotels, Motels and Restaurants (pg 15)
- Exhibit 7: Ohio Department of Taxation Information Release ST 2004-1 Food Definition
- Exhibit 8: Minnesota Revenue Sales Tax Fact Sheet 102A Food and Food Ingredients
- Exhibit 9: Tennessee Sales & Use Tax Guide (February, 2011) (Pg 17)
- Exhibit 10: Publication TSD-419 “Application of the Reduced West Virginia Consumer Sales and Service Tax to Food
- Exhibit 11: Arkansas “Food and Food Ingredients” State Sales and Use Tax Guide
- Exhibit 12: Indiana Information Bulletin #11 Sales Tax (December, 2002): “Application of Sales Tax to Restaurant Owners Including Fast Food Operations and Caterers”
- Exhibit 13: Publication 201 (11/10) Wisconsin Sales and Use Tax Information (pp 72-73)
- Exhibit 14: Louisiana Revenue Ruling No. 09-002 September 17, 2009
- Exhibit 15: South Carolina Commission Decision # 95-11
- Exhibit 16: Virginia Letter Ruling 89-291, October 27, 1989
- Exhibit 17: Virginia Letter Ruling 97-151, March 28, 1997

# Florida Department of Revenue



## Restaurants and Bars Standard Industry Guide



## PURPOSE

This guide provides an auditor with information on the subject industry. This information will assist an auditor in recognizing areas to test for compliance with Florida sales and use tax laws.

After reviewing this guide, an auditor will be better able to understand issues involving:

- Tax implications affecting the subject industry;
- Sales tax issues likely to surface relating to the subject industry; and
- Relevant statutes, rules, court cases and other technical documents

Auditors should keep in mind that if an issue arises during an audit where the proper application of the law to a given set of facts is unclear, they can and should submit a request for technical advice pursuant to Rule 12-11.011, F.A.C.

Helpful tax publications provided by the Department of Revenue available online:

### Industry Specific:

[Sales and Use Tax on Bars and Lounges](#)  
[Sales and Use Tax on Restaurants and Catering](#)

### General:

[Audit Information](#)  
[Florida Sales and Use Tax](#)  
[Discretionary Sales Surtax](#)  
[Sales and Use Tax on Tangible Personal Property Rentals](#)  
[Sales and Use Tax on Amusement Machines](#)  
[Sales and Use Tax on Vending Machines](#)

These reference materials and the technical documents cited herein have been provided as informational guidelines for performing tax audits and are intended to be used as internal management memoranda. They are not rules, orders, or policy statements of general applicability, and as such, do not represent the formal position of the Florida Department of Revenue. No representation is made regarding the Department's opinion of the precedential value of the court cases cited herein. They are provided for informational purposes only. Statutes, rules, court cases, or other technical documents subject to change are current as of the publication date of this document. Refer to the Tax Law Library for an updated listing of such documents. The Tax Law Library can be accessed through the Department of Revenue web site:

<http://www.myflorida.com/dor/>

**TABLE OF CONTENTS**

*OVERVIEW OF METHODS OF OPERATION* ..... 5

    RESTAURANTS ..... 5

*Authority to Tax Restaurants* ..... 5

*Relevant Statutes and Rules* ..... 5

    BAR/LOUNGES/ PACKAGE STORES ..... 5

*Bar/Lounges*..... 5

*Bars and Package Stores* ..... 6

*Package Stores*..... 7

*ACCOUNTING SYSTEMS*..... 7

*REGISTRATION/ FILING REQUIREMENTS*..... 8

    GENERAL TAX ..... 8

    COLLECTION OF TAX ..... 8

    CREDIT FOR RETURNED GOODS..... 9

    RATE OF TAX/ SURCHARGES ..... 9

    BRACKET SYSTEM ..... 9

    COLLECTION ALLOWANCE ..... 11

    SELF-ACCRUING ..... 11

    PENALTIES AND INTEREST ..... 12

*SPECIAL CONSIDERATIONS*..... 13

    SPECIAL NOTE: CALCULATION OF SALES TAX..... 14

    GRATUITIES/ TIPS ..... 15

    MEALS SOLD TO EMPLOYEES ..... 16

    CATERERS ..... 16

*INDUSTRY SPECIFIC ISSUES*..... 17

    ADVERTISING ..... 17

    AIRPORTS ..... 17

    BAKERY ITEMS ..... 17

    BANQUET FACILITIES..... 17

    BURGLAR PROTECTION/ SECURITY ..... 18

    NON-RESIDENTIAL CLEANING/JANITORIAL/ PEST CONTROL SERVICES ..... 18

    COOLERS WALK IN/STAND IN ..... 18

    COMPS ..... 18

    TAX EXEMPT FOOD PACKAGED WITH OTHER TAXABLE ITEMS ..... 18

    BEVERAGE TASTING..... 18

    DONATED FOOD PRODUCTS ..... 19

    COMPLIMENTARY FOOD AND BEVERAGES ..... 19

    CONCESSIONAIRES ..... 19

    COVER CHARGES ..... 19

    DELI ITEM ..... 20

    DELIVERY ..... 20

    DINNER CRUISE..... 20

    DISPLAYS/RACKS/SHELVING..... 20

    E-COMMERCE ..... 20

    EQUIPMENT RENTAL ..... 20

    EVENTS GENERALLY ..... 20

    FAIRS..... 21

FIREWOOD ..... 21

FRANCHISES ..... 21

FUND RAISING EVENTS ..... 21

LEASE OF TPP ..... 21

LEASE/RENTAL OF RP ..... 22

MAINTENANCE/REPAIRS ..... 22

MULTI-USE PROPERTY - (OR MULTIPLE USE) ..... 22

PREPARATION ON/OFF THE PREMISES ..... 22

PARKING FEES/SERVICES ..... 22

RAW FOOD KITS ..... 22

SEATING AREA TO ACCOMMODATE DINERS..... 22

SHOP SUPPLIES & MATERIALS/ CONSUMABLES ..... 22

SOFT DRINKS ..... 23

TAKE-OUT/TO GO ..... 23

VENDING MACHINES ..... 23

*Notice Requirement*..... 24

*Full Service/ Non-Full Service Determination*..... 24

*Special Tax Considerations* ..... 24

*Gambling/Amusement Machines*..... 26

*Registration Requirements* ..... 26

WATER ..... 26

*EXEMPT TRANSACTIONS* ..... 27

    GENERAL EXEMPTIONS ..... 27

*SPECIFIC EXEMPTIONS*..... 28

    DIPLOMATS/OFFICIALS ..... 28

    FEDERAL GOVERNMENT/ MILITARY BASES ..... 28

    LOCAL AND STATE GOVERNMENT ENTITIES ..... 28

    NATIVE AMERICAN ..... 28

    NOT-FOR-PROFIT ORGANIZATION ..... 28

    PORTS ..... 28

    RESIDENTIAL FACILITY FOR THE AGED ..... 28

    GENERAL GROCERIES - ..... 28

    HOSPITAL MEALS AND ROOMS ..... 28

    MEALS PROVIDED BY CERTAIN NON-PROFIT ..... 28

    RELIGIOUS INSTITUTIONS ..... 28

    K-12 SCHOOLS ..... 28

    SCHOOLS, COLLEGES, AND UNIVERSITIES ..... 29

    501(C)3 ORGANIZATIONS ..... 29

    SCHOOL BOOKS AND SCHOOL LUNCHES ..... 29

    TASTING BEVERAGES ..... 29

    PROFESSIONAL SERVICES..... 29

    VENDING MACHINES SPONSORED BY NONPROFIT/CHARITABLE ORGANIZATIONS ..... 29

    COMPLIMENTARY MEALS ..... 29

    COMPLIMENTARY ITEMS ..... 29

    DONATED FOODS OR BEVERAGES ..... 29

*DOCUMENTATION OF EXEMPT SALES* ..... 29

    RESALE GOODS ..... 29

    FRAUDULENT RESALE CERTIFICATES ..... 30

*GLOSSARY OF TERMS* ..... 31

- Property leased, let, or licensed to a person providing food and drink concessionaire services within the premises of a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center, publicly owned recreational facility, or any business operated under a permit issued pursuant to Chapter 550, F.S. (See *Concessionaires*), and
- Separately stated charges imposed by a convention hall, exhibition hall, auditorium, stadium, theater, arena, civic center, performing arts center, or publicly owned recreational facility upon a lessee or licensee for food, drink, or services required or available in connection with a lease or license to use real property, including charges for laborers, stagehands, ticket takers, event staff, security personnel, cleaning staff, and other event-related personnel, advertising, and credit card processing

### *Fairs*

Food vendors should remit the tax at the rate of 6.59% of gross receipts. See *Concessionaires*.

### *Firewood*

Under Rule 12A-1.059, F.A.C., fuels, including cordwood are taxable. However, please distinguish that specially chosen woods consumed by cooking and utilized to impart a particular flavor on the food, thus becoming an integral part of the food itself, may be deemed to be an ingredient, e.g. hickory barbeque ribs, apple-wood smoked bacon, oak-fire seared steaks. While no formal test has been adopted, advertising the type of wood in the product description or menu itself would satisfy the ingredient standard.

### *Franchises*

Regulation of franchises: leases, rentals, sales tax, etc. (See Section 686.403, F.S., and Section 686.402(9), (10), (11) F.S.).

### *Fund Raising Events*

Barbecues, fish fries and similar dinners are taxable even if the entire proceeds are used for charitable purposes.

If a club or similar organization charges its members or guests a greater amount at their luncheon meetings and dinners than it pays the caterer or restaurant that furnishes the meals, the tax may be computed on the charge made by the caterer or restaurant.

In the case of fund raising events when the charge to the patron or customer bears no relationship to the actual value of that which is received, such as a \$50 per place dinner, the tax base shall be the total amount charged by the caterer or restaurateur to the sponsoring organization.

### *Lease of TPP*

See applicable SIG

**Title 12—DEPARTMENT OF REVENUE**  
**Division 10—Director of Revenue**  
**Chapter 110—Sales/Use Tax—Exemptions**

**12 CSR 10-110.200 Ingredient or Component Part Exemption**

*PURPOSE: Section 144.030.2(2), RSMo exempts from taxation certain materials, goods, machinery and parts. This rule explains the requirements for this exemption.*

- (1) In general, purchases of ingredients or component parts are exempt from tax if they blend with the final product and are intended to and do become a part of the finished product. In addition, certain materials that are consumed in the manufacture of steel products intended to be sold ultimately for final use or consumption are exempt from tax.
- (2) Definition of Terms.
  - (A) Component part—a constituent element of a manufactured or fabricated product.
  - (B) Ingredient—an element in a mixture or compound.
  - (C) Interacting—means that the materials and component parts or ingredients act upon each other in manufacturing a steel product.
  - (D) Reacting—means that the materials cause a chemical change in the component parts or ingredients in manufacturing a steel product.
  - (E) Steel product—the product made entirely of steel resulting from:
    1. Smelting and refining molten pig iron, scrap steel or other metals; or
    2. Rolling, drawing, casting or alloying steel.
- (3) Basic Application of Exemption.
  - (A) Materials, manufactured goods, machinery, and parts that become a component part or ingredient of new personal property to be sold ultimately for final use or consumption are not subject to tax. Purchases of ingredients or component parts are exempt from tax if they are intended to and do become a part of the finished product. The exemption does not apply to materials that are totally consumed and are not intended to and do not become a part of the final product. In order to qualify for this exemption, the material in question must be intended to remain in the finished product in at least trace amounts for a specific purpose.
  - (B) Materials, including without limitation, slagging materials and firebrick, which are consumed in the manufacturing process by blending, reacting or interacting with or by becoming, in whole or in part, component parts or ingredients of steel products to be sold ultimately for final use or consumption are exempt from tax.

(C) If any portion of purchased material qualifies as an exempt ingredient or component part; the entire purchase is exempt from tax. The material is exempt even if a significant portion is consumed in the manufacturing process.

(D) Materials purchased to be used as an ingredient or component part to repair existing property does not qualify for these exemptions because the property produced from the repair work does not constitute “new personal property.”

(4) Examples.

(A) A toy manufacturer purchases wood, glue, paint and sandpaper to use in the manufacturing of wooden rocking horses. The purchases of wood, glue and paint are exempt from tax. The purchase of sandpaper is taxable.

(B) A restaurant purchases apple wood to use in the smoking of foods. The restaurant burns the wood in a closed chamber called a smoker in which it places the food. The burning wood releases compounds, and small but measurable quantities of the compounds enter and permeate the food. Because a part of the wood, in the form of smoke particles, blends with and remains as part of the finished product, the apple wood may be purchased tax exempt as an ingredient or component part.

(C) An automobile manufacturer purchases soap and wax to wash and wax all automobiles as they leave the manufacturing plant. Some soap residue remains with the automobiles when they leave the plant. The soap does not qualify as an ingredient or component part because it is not intended to remain with the product. The wax does qualify as a component part because it is intended to remain with the product.

(D) A steel mill purchases firebrick and various gases to be used in the production of steel. These purchases are exempt.

(E) A steel fabricator purchases welding rods and gases for use in fabricating a product out of steel plates. The welding rods are exempt because it becomes a component part of new personal property. Even though the gases are consumed in the fabrication process, the gases are not exempt because the new personal property does not qualify as a steel product.

(F) A foundry creates a steel product by casting molten steel. After casting, a cleaning solution is poured over the product to remove impurities from the surface. The cleaning solution is not exempt because it does not blend, react or interact with a component part or ingredient of the steel product.

*AUTHORITY: section 144.270, RSMo 1994.\* Original rule filed Aug. 30, 2000, effective March 30, 2001.*

*\*Original authority: 144.270, RSMo 1939, amended 1941, 1943, 1945, 1947, 1955, 1961.*

*The Doe Run Resource Company, d/b/a/ Doe Run Company Smelting Division, et al., S.W.2d (Mo. banc 1998). The issue was the taxability of coke used in the processing of lead. The*

*Missouri Supreme Court found the case to be analogous to the facts in **Sipco, Inc v. Director of Revenue**, 875 S.W.2d 539 (Mo. banc 1994). In that case the court held natural gas used in a singer to remove hair from hog carcasses before butchering did not qualify as an ingredient or component part, because no part of the natural gas used in Sipco's singer remained as an essential or necessary element of a finished pork product. The Court in **Sipco** concluded that no part of the natural gas used in Sipco's singer remained as an essential or necessary element of the finished pork product. Accordingly, the purchase was not tax exempt.*

***Spacewalker, Inc., v. Director of Revenue** (AHC 1997). The purchase of shielding gas used in welding was held taxable. The purpose of the shielding gas was to shield the puddle (molten metal) from the atmosphere and not to become mixed with the metal. The AHC referenced the **Al-Tom** decision, which found that if any part of a material is intended and does remain as an essential or necessary element of the finished product, the entire purchase is exempt. Because the shielding gases were present in the finished product, incidentally or accidentally, they were not exempt as component parts. The Missouri Court of Appeals affirmed the decision by the AHC.*

***Concord Publishing House, Inc. d/b/a Cape Mississippi Development, Inc., d/b/a Southeast Missourian v. Director of Revenue** (AHC 1995). The taxpayer, a newspaper publisher and printer, claimed an ingredient or component part exemption on its toner. The AHC held that the toner and toner cartridges did not qualify for exemption because the toner became a component part of the layout from which the photonegative was developed. The toner was not physically present in the newspaper sold to the public.*

***Robertson's Creative Photography**, (AHC 1994). The Commission held that the taxpayer as a commercial photographer was subject to sales tax on its purchases of film. The film was not a component part or ingredient because it did not remain as an essential or necessary element of the finished product.*

EXHIBIT 3

Texas Comptroller of Public Accounts STAR System

8803L0882B09  
COMPTROLLER OF PUBLIC ACCOUNTS  
STATE OF TEXAS  
AUSTIN, 78774

BOB BULLOCK  
Comptroller

March 23, 1988

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\*\*\*\*\*  
\*\*\*\*\*

Dear \*\*\*\*\*:

Thank you for your letter concerning taxability of mesquite, hickory, and pecan wood used in restaurants for cooking food.

The wood used in cooking food for sale qualifies for exemption from sales tax.

A properly completed exemption certificate must be obtained from the purchaser in lieu of tax.

This opinion is based on the facts presented. If there are additional or different facts, the opinion may change.

If you have any questions or need more information, please call our toll-free number 1-800-531-5441. The regular number is 512/463-4600. You may write me at the Tax Policy Division.

Sincerely,  
(Mrs.) Jo Ann Dieck  
Tax Policy Division

ACCESSION NUMBER: 8803L0882B09  
SUPERSEDED: N  
DOCUMENT TYPE: L  
DATE: 03/01/1988  
TAX TYPE: SALES

9201L1151C13

January 14, 1992

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Dear \*\*\*\*\*:

Thank you for your letter regarding the taxability of mesquite wood used in restaurants for cooking food. I hope you will accept my apology for the delay in answering your question.

The wood used in cooking food for sale qualifies for exemption from sales tax. A properly completed exemption certificate must be obtained from the purchaser in lieu of tax.

This opinion is based on the facts presented. If there are additional or different facts, the opinion could change.

If you have any questions, please don't hesitate to write the Tax Administration Division or call one of our tax specialists toll free at 1-800-252-5555.

Sincerely,

Joan Hale  
Tax Administration Division

ACCESSION NUMBER: 9201L1151C13  
SUPERSEDED: N  
DOCUMENT TYPE: L  
DATE: 01/14/1992  
TAX TYPE: SALES

EXHIBIT 4



get to know our family

OUR BRAND



Home Recipes What is Liquid Smoke Usage Tips Products

Select a product to view nutritional information and delicious recipes

View Food Service Items →

Where to Buy →



Wright's Hickory Liquid Smoke

Available in 3.5 oz, 32 oz and 1 gallon containers

Nutritional Information

view recipes

close

Nutrition Facts

Serving Size 1 tsp (5 mL)

Servings per Container:

Amount per Serving

Calories 0 Calories From Fat 0

% Daily Value\*

Total Fat 0g 0%

Sat Fat 0g 0%

Polyunsaturated Fat 0g

Monounsaturated Fat 0g

Trans Fat 0g

Cholesterol 0mg 0%

Sodium 0mg 0%

Total Carbohydrate 0g 0%

Dietary Fiber 0g 0%

Sugars 0g

Protein 0g

Not a significant source of Sat Fat, Trans Fat, Cholesterol, Fiber, Sugars, Vitamin A, Vitamin C, Calcium, and Iron.

\*Percent Daily Values are based on a diet of 2,000 calories.

INGREDIENTS: WATER, NATURAL HICKORY SMOKE CONCENTRATE



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**STATE BOARD OF EQUALIZATION**

August 24, 1964

[T]  
P.O. Box XXXX  
--- ---, California

Attention: Mr. [T]  
Division Secretary

B-XXXXXX

Gentlemen:

In answer to your letter of August 13, 1964, we advise that "Liquid Smoke" is considered to be sold for resale to a restaurant or other customer who applies the Liquid Smoke as an ingredient for barbequing meats, which are to be sold. The theory is that the smoke or certain ingredients contained in it become physically incorporated into the food providing flavor to it.

The Attorney General issued an opinion a number of years ago which is still applicable, and we are enclosing a copy. Our opinion on your question is based upon the assumption that the Liquid Smoke is used in a manner comparable to that upon which the Attorney General based his opinion.

Very truly yours,

E. H. Stetson  
Tax Counsel

EHS:fb  
Enclosure

cc: --- --- – District Administrator



A Salina restaurant buys 5 booths from a Wichita supplier for her restaurant. As the final consumer of the booths, the restaurant owner must pay the sales tax on the total cost to the Wichita supplier. The rate of tax charged will be the rate where Salina restaurant takes delivery of the booths.

Equipment, fixtures and supplies typically purchased by a restaurant or club that are subject to sales tax include: Air-conditioners, appliances, ashtrays, building materials, carpet, cash registers, chairs, clocks, cloth napkins, coffee makers, computers, cookware, countertops, curtains, desks, dishes, dishwashers, DVDs, furniture, furnaces, glassware, keys, kitchen equipment, lamps, locks, menus, microwaves, mirrors, mixers, napkin dispensers, office equipment, office supplies, ovens, paint, signs, silverware, sinks, stoves, tables, televisions, and water-heaters.

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### LABOR SERVICES

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Following are representative examples for restaurants of the sales tax treatment of their purchases of taxable labor services as defined and discussed on page 8.

#### Repair of property



A Pittsburg, Kansas restaurant operator calls an appliance repair company to repair a stove. Since the labor fee charged for performing the repair work is subject to sales tax (at the rate in effect where the customer takes delivery or first uses the repair service), the Pittsburg restaurant operator must pay sales tax on the total charge for parts and labor for the repair work.

#### Original Construction



A restaurant contracts to have an additional seating area constructed. Since this project is the addition of an entire room or floor to an existing building, no sales tax is due on the contractors' labor fees for constructing the new seating area.



A restaurant's kitchen area is damaged by fire. Although commercial remodel labor is normally taxable, this labor is exempt since the repair is because of a fire.

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### EXEMPT PURCHASES

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The three exemptions discussed on pages 9 and 10 for hotels – resale, ingredient/component part and consumed in production – also apply in many ways to restaurant operations.

### Purchases for Resale

The most common exemption that a restaurant would claim is its purchase for resale of the food items served to customers. The restaurant will collect sales tax from its customers when the food is resold as a prepared meal. Restaurants would provide their food suppliers with a completed Kansas Resale Exemption Certificate, (ST-28A) on page 34 of this publication.



Your restaurant buys most of the food items served from a wholesale grocer. You should provide your food vendor with a completed Resale Exemption Certificate and collect sales tax on the gross receipts received from the sale of the prepared meal.

Every food item that will be sold to a restaurant's customer as part of the meal or drink served may be purchased tax exempt with a Kansas Resale Exemption Certificate. This includes not only the ingredients of the meal itself, but also any condiments such as herbs, salt, pepper, catsup, mustard, relish, seasonings, etc.

### Exempt Purchases - Ingredient/Component Part

This exemption allows items to be purchased without sales tax when the items are disposable in nature and are provided to the restaurant's customers when they purchase a meal or drink. When so used, these items are an ingredient or component part of the meal and as such, are exempt from sales tax.

**Disposable** items that a restaurant typically purchases that are provided to their customers may include: plastic dinnerware (plates, cups, & utensils); drinking straws, paper napkins, paper bags, and takeout boxes. To buy these items without tax, the restaurant must provide its vendor(s) with a completed Ingredient or Component Part Exemption Certificate (ST-28D), found on page 33 of this guide.



**CAUTION:** To qualify for the exemption, the item must be disposable, and not returned or reused by the restaurant. Restaurants may purchase plastic silverware and paper napkins without tax. However, restaurants buying china, silverware and cloth table linens that will be washed or laundered and reused are buying a business asset and as the final consumer must pay the sales or use tax on them.

Water (a utility) may also be exempt as an ingredient/component part.



Five percent (5%) of the water purchased by an Emporia restaurant actually becomes an ingredient or component part of beverages and meals served (soups, stews, etc.). This water usage is exempt. The remainder (95%) of its water usage is taxable - water used to wash dishes, in the rest rooms and for general cleaning.

**INFORMATION RELEASE \* ST 2004-1**

**Food Definition – Issued May, 2004 - Revised June, 2007**

The purpose of this information release is to address the definition of "food" in Ohio Revised Code ("R.C.") section 5739.01(EEE). It is being revised to eliminate references to the definition of food that existed in Ohio law prior to July 2004 and to correct some inconsistent statements within the earlier version of this release dealing with the percentages of fruit or vegetable juice needed to exclude a beverage from the definition of a soft drink. Information is also being added to address questions arising from certain types of sales of coffee or tea. What constitutes food is important because food consumed off the premises is not subject to Ohio sales tax.

R.C. 5739.01 (EEE)(1) that provides the following:

“Food” means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. "Food" does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.

Generally, if a substance, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form is consumed by humans for nutritional value or taste, then it is “food.”

The statute specifically excludes alcoholic beverages, dietary supplements, soft drinks, and tobacco from the definition of “food.” These exceptions are discussed below.

**Alcoholic Beverages**

R.C. 5739.01(EEE)(2)(a) provides:

"Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half of one per cent or more of alcohol by volume.

Beer, wine, and liquor are not considered food and are subject to sales tax.

The term “alcoholic beverages” does not include non-alcoholic beers that contain less than one-half (0.5%) of one per cent of alcohol by volume. Also, “alcoholic beverages” do not include nonalcoholic mixers, whether in liquid, powdered or frozen form. However, some of these items may be considered “soft drinks” as discussed below.

Additionally, items that contain alcohol but are not used as beverages, such as vanilla extract and cooking wines, are not considered alcoholic beverages.

### **Dietary Supplements**

R.C. 5739.01(EEE)(2)(b) provides:

"Dietary supplements" means any product, other than tobacco, that is intended to supplement the diet and that is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in such a form, is not represented as conventional for use as a sole item of a meal or of the diet; that is required to be labeled as a dietary supplement, identifiable by the "supplement facts" box found on the label, as required by 21 C.F.R. 101.36; and that contains one or more of the following dietary ingredients:

- (i) A vitamin;
- (ii) A mineral;
- (iii) An herb or other botanical;
- (iv) An amino acid;
- (v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake;
- (vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in divisions (EEE)(2)(b)(i) to (v) of this section.

The simplest method to determine whether a particular product is a dietary supplement, as that term is defined above, is to look for the "Supplement Facts" label on the product. If that box appears on the label, the product is a dietary supplement and not a food. Tax would apply to sales of dietary supplements.

Nutritional products and diet foods such as Ensure® or Slimfast® that contain a "Nutrition Facts" box on the label are food products, not dietary supplements.

### **Soft Drinks**

R.C. 5739.01(EEE)(2)(c) provides:

"Soft drinks" means nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contains greater than fifty per cent vegetable or fruit juice by volume.

It is important to note that the definition of a “soft drink” is not controlled by whether or not the beverage is carbonated. Any sweetened nonalcoholic beverage, whether sweetened naturally or artificially, is a soft drink unless it either contains milk products or a milk substitute or it contains greater than fifty percent (50%) fruit or vegetable juice by volume. Tax applies to the sale of soft drinks.

Soft drinks include traditional soda pop beverages, but also include many fruit drinks or fruit punches that contain fifty percent (50%) or less juice by volume. Bottled tea and coffee drinks, which have been considered food items, will be considered soft drinks and taxable if they contain sweeteners, unless they also contain milk or milk substitutes.

### **Tobacco**

R.C. 5739.01(EEE)(3)(d) provides:

"Tobacco" means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

This represents no change in Ohio sales tax law as tobacco and tobacco products have never been considered “food.” Tax applies to sales of tobacco and tobacco products.

### **Exemption for Off-premise Consumption**

The sale of food and food ingredients for human consumption off the premises where sold is exempt from sales tax under R.C. 5739.02 (B)(2). Food consumed on the premises is taxable.

### **Questions and Answers**

The following is a summary of typical questions being asked along with the Department’s responses based on the provisions of the Ohio Revised Code. The responses should be used as a guide to understanding the application of the law. For purposes of these questions, the use of “non-taxable” presumes the food is consumed off-premises.

#### **A) When is food taxable?**

Food consumed on the premises remains taxable. Only food that is consumed off the premises is non-taxable. For example, food consumed in restaurants remains taxable.

#### **B) Is bottled water, flavored water, carbonated water, or flavored carbonated water “food” under the new definition?**

Since water is a liquid substance ingested by humans for taste or nutritional value, these items would generally be considered food. Food, if purchased for consumption off the

premises where sold, is not subject to Ohio sales tax. Water that contains natural or artificial sweeteners is a "soft drink" under R.C. 5739.01(EEE)(2)(c) and excluded from the definition of food.

**C) Are prepackaged (canned or bottled) tea and coffee beverages considered food?**

Prepackaged beverages that are artificially or naturally sweetened are "soft drinks" and taxable under R.C. 5739.01(EEE)(2)(c). Prepackaged teas and coffees that are sweetened are not food and will be taxable as "soft drinks" unless they contain milk, milk products or a similar substitute for milk such as soy or rice.

As used in this response, "prepackaged" refers to a beverage that is sold to the ultimate consumer in the same container (e.g. bottle or can) in which it is received by the vendor from its supplier.

**D) I make and sell coffee, tea, hot chocolate and other beverages to customers in my restaurant. In some cases, I will add a flavored syrup to coffee or tea. Other times I will add steamed milk or whipped cream. Are these products food?**

A cup of plain coffee or tea is a food. If the vendor sells plain coffee or tea and provides consumers with sugar or other sweeteners or flavorings that the consumer can add to the beverage at no charge, the coffee or tea will still be considered a food. In such a case, the beverage will not be taxable if it is sold for off-premises consumption.

If the vendor, for a charge, adds a sweetened flavoring, the beverage becomes a soft drink and would be taxable regardless of where it is consumed. If the vendor adds milk or a milk product, such as whipped cream, or a milk substitute, the beverage would be a food and not taxable if it is sold for off-premises consumption. If the vendor adds both a sweetened flavoring and a milk product or milk substitute, the beverage would still be food.

Hot chocolate that contains milk, a milk product or a milk substitute would be a food and would not be taxable if sold for off-premises consumption.

**E) I operate a restaurant that also has a drive-through window. When a customer at the drive-through window orders coffee or tea and requests a sweetener, as a convenience and at no charge, I will add the sweetener to the beverage rather than provide a packet of sweetener to the customer. Is the sweetened coffee or tea sold in this manner food or a soft drink?**

As noted in the answer to Question D above, a cup of plain coffee or tea is food and not taxable if sold for consumption off the premises. In the situation described, where the sweetener is added as a convenience to the consumer at no additional charge, the department will consider the sale to be a sale of the coffee or tea only and not a sale of a soft drink. It will be treated as a food and, since it is being consumed off the premises where sold, not subject to sales tax. If a charge is made for the sweetener, the sweetened

beverage would be a taxable soft drink unless a milk product or milk substitute was also added.

**F) Are powdered drinks taxable?**

If the resulting beverage would be considered a soft drink then the drink mix is taxable. If milk or a milk substitute would normally be added, the powdered mix is considered a food.

**G) Are drink concentrates taxable?**

If the reconstituted form of the beverage would be considered a soft drink then the drink concentrate is taxable.

**H) Is non-alcoholic beer food?**

If it contains less than one-half (0.5%) of one percent alcohol per volume then it is considered to be food under the new definition and it is not taxable. But if the non-alcoholic beer contains one-half percent or more of alcohol per volume then it is taxable as an alcoholic beverage. However, non-alcoholic beer like all other foods is still taxable if consumed on the premises.

**I) Are protein drinks considered to be food or a dietary supplement?**

Most protein drinks have a “Supplement Facts” box on their label therefore they would be a dietary supplement and not food. However, the taxability of protein drinks depends on how they are labeled. If the label has a “Supplement Facts” box, the product is not a food but a dietary supplement and taxable. If the label contains a “Nutrition Facts” box then the product is food and not taxable.

**J) Are diet products food or nutritional supplements?**

If the diet product is a capsule, tablet, or any other item that contains a “Supplement Facts” box on its label then the product is not a food. A beverage or nutrition bar that contains a “Nutrition Facts” box on its label is a food.

**K) Are over-the-counter drugs taxable?**

Yes. Over-the-counter drugs such as nicotine gum, other tobacco cessation products, pain relievers, cough medicine, cough drops, and antacids are taxable. Products with a “Drug Facts” box on the label are taxable as an over-the-counter drug.

**L) Are candy, chewing gum and breath mints considered to be food?**

Yes. These substances ingested or chewed for their taste and are food within the meaning of R.C. 5739.01(EEE)(1).

**M) Are ingredients used in baking taxable?**

Ingredients used in baking goods that are consumed by humans for taste or nutritional value are not taxable as food. Ingredients such as vanilla extract, food coloring, sugar, sweetener, flour, gelatin, pectin, chocolate, peanut butter, cake mixes, marshmallows, nuts, spices, and similar items are not taxable.

**N) Is baking soda taxable?**

If baking soda is sold for use in baking or cooking then it is considered food and not taxable. However, baking soda that is sold for any other purpose, such as a deodorizer, is taxable since it is not being purchased to be ingested by humans for taste or nutritional value. Since vendors may not know how the consumer will use the product, the taxability will be determined based primarily on the marketing materials placed on the packaging. For example, if the packaging primarily markets the product for washing clothes or as a deodorizer, the product is taxable.

**O) Are cooking wines and extracts taxable or exempt?**

Although cooking wines and extracts contain alcohol, they are not meant for drinking. They are used in food preparation and are an ingredient that is within the definition of a food and not taxable.

**P) Are condiments such as ketchup and mustard considered food?**

Since condiments are substances ingested by humans for taste or nutritional value, these items would be considered food and not taxable. Ketchup, mustard, mayonnaise, salad dressing, barbecue sauce, cocktail sauce, and hot sauce are just a few examples of condiments.

**Q) Are vegetable and herb plants taxable?**

Yes. If it is sold in potted form (e.g. in potting soil) then it is taxable as a plant. But, if an herb is cut and packaged for consumption then it is food and not taxable.

**R) Fruit, vegetable, and flower seeds are sometimes eaten. How do we differentiate between these types of seeds and seeds sold for gardening?**

If the seeds are sold for eating, they are food and not taxable. Seeds sold for gardening are not food and taxable.

**S) Will ice be considered food?**

Generally, ice will be considered food and not taxable. However, ice that is sold for cooling purposes is not food and therefore taxable. For administrative purposes, ice sold by grocery, convenience, and similar stores will be presumed to be food and no tax should be charged. A single purchase of ice used for dual purposes, such as to cool beverages before being dispensed and also being placed in a container for consumption, will be considered food and not subject to tax.

**T) Are fruit and vegetable juices food for sales tax purposes?**

Sweetened beverages with fifty percent (50%) or less fruit or vegetable juice are soft drinks and taxable. If the fruit or vegetable juice content is more than fifty percent (50%) or more by volume then the beverage is a food. In the case of a beverage concentrate, the fifty percent (50%) test by volume is based upon the reconstituted beverage.

**U) Are carbonated beverages excluded from the definition of food as “soft drinks”?**

Carbonation is not the determinative factor on whether a beverage is considered to be a soft drink or not. In general, the determinative factor is whether the beverage is sweetened or not. If beverages are sweetened naturally or artificially, then they are taxable soft drinks unless they also contain milk, a milk products, or similar substitute for milk such as soy or rice. Also, if the beverage contains more than fifty percent fruit or vegetable juice, it is a food regardless of whether it is carbonated.

**V) Some items, such as salt, have multiple uses. How will they be taxed?**

Since vendors may not know how the consumer will use the product, the taxability will be determined based primarily on the marketing materials placed on the packaging. For example, table salt, including such things as Kosher salt, canning salt, and sea salt, are food products. Salt marketed to be used primarily for ice cream freezers or to melt snow is not food and is taxable.

**W) Is dog and cat food taxable?**

Yes. Only food that is consumed by humans is not taxable. Food purchased for household pets is taxable.

**X) Does the definition of food affect what items can be purchased with food stamps?**

No. The definition of food does not affect the eligibility of items that can be purchased with food stamps. Federal law governs what items may be purchased with food stamps and that determination is independent of Ohio’s definition of “food.” If you have any further questions regarding food stamps, please contact the Food and Nutrition Service (United States Department of Agriculture regional office (Columbus: 614-469-

6864;Cleveland: 216-522-4990; or Cincinnati: 513-684-3568) or visit their website at [www.fns.usda.gov](http://www.fns.usda.gov).

Note that under R.C. 5739.02(B)(16), any purchase of “food” as defined by the Food Stamp Act of 1977, 91 Stat. 958, 7 U.S.C. 2012, that is made using food stamps is exempt from Ohio sales tax regardless of whether the item meets the Ohio definition of “food.”

### **Reference Chart**

Below is a list of items that have been categorized according to whether they are food or not under R.C. 5739.01(EEE) . This list is not all-inclusive but is intended as a guideline.

<b>Food</b>	<b>Non-food</b>
Bottled Water (including carbonated, distilled, and mineral)	Water-Sweetened (including artificially)
Tea-Unsweetened	Bottled Tea or Coffee-Sweetened (including artificially )-Without milk or milk substitute
Coffee-Unsweetened	Coffee-Sweetened (including artificially )
Coffee (with milk or milk product)	Soda Pop
Fruit Juice (more than 50% juice content )	Fruit Juice (50% or less juice content)
Vegetable Juice (more than 50% juice content)	Vegetable Juice (50% or less juice content)
Ice (sold at a grocery, convenience, or similar stores)	Ice (used as a refrigerant and not sold at a grocery, convenience, or similar stores)
Milk and milk products (including ice cream)	Sweetened beverages without milk or milk substitutes
Non-alcoholic beer (less than 0.5% alcohol content per volume)	Alcoholic beverages (with 0.5% or more alcohol per volume)
Soy products	Sports/Energy Drinks (e.g. Gatorade ®, Powerade ®)
Bakery Items (e.g. cake, cookies, pastry, etc.)	Vitamins
Cocoa, tea bags, coffee beans	Pet food
Nuts (All types)	Cough drops
Popcorn	Cod Liver Oil
Chips and other snacks	Antacids
Pudding/gelatin	Over-the-counter-drugs
Condiments (ketchup, mustard, etc)	Nicotine Gum
Baking ingredients	Gelatin Capsules
Cereals and cereal products	Diet drugs and supplements
Sugar and sugar substitutes	Mineral Oil
Popsicles/Sno-Cones	Powdered Drink Mixes-if sweetened and not more than fifty percent fruit or vegetable juice when prepared (Tang®, Kool-Aid® etc.)
Cooking oils (vegetable, canola, olive, etc.)	Lemonade
Extracts (vanilla, peppermint, almond, etc.)	Protein Drinks (with Supplemental Facts box)
Candy, chewing gum, breath mints	Toothpaste and Mouthwash

\*\*\*\*\*

If you have any questions regarding this information release, please call the dedicated toll free number for the Streamlined Sales Tax at 1-800-304-3211, or contact Taxpayer Services at 1-888-405-4039, or e-mail us through our web site: [www.tax.ohio.gov](http://www.tax.ohio.gov).

**OHIO RELAY SERVICES FOR  
THE HEARING OR SPEECH IMPAIRED  
Phone: 1-800-750-0750**

# Food and Food Ingredients

Also See Fact Sheets 102B, 102C, 102D and 102E

**102A**Sales Tax  
Fact Sheet

**Food and food ingredients are exempt.** *Food and food ingredients* mean substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.

## Examples of nontaxable food and food ingredients

The following items are generally exempt. However, if any of these items are prepared by the seller, sold with eating utensils provided by the seller, or sold through vending machines, they are taxable.

- baking powder
- baking soda
- beverage powders (unless dietary supplement)
- bread
- cakes
- cereals
- chip dip
- chips (potato, corn, etc.)
- cocoa
- coffee
- condiments
- cookies
- cooking oil
- dairy products
- dried fruit (without sweeteners)
- eggs
- fish
- flavorings
- flour
- food coloring
- frozen meals
- fruit juices
- fruits
- gelatin
- gravies
- herbs (seasoning)
- ice cream, sherbet, and frozen yogurt, including prepackaged novelties
- ice cubes or blocks
- malted milk powder
- margarine
- meat
- nuts
- peanuts
- pies
- popcorn
- popsicles
- poultry
- pumpkins
- raisins
- relishes
- saccharin
- salad dressing
- salt
- sauces
- seasonings
- shortening
- spices
- sugar (including colored)
- sunflower seeds
- sweeteners
- tea (bags, leaves, or powdered)
- vegetables
- water

## Taxable items

The exemption for *food and food ingredients* does not include candy, soft drinks, food sold through vending machines, prepared foods, alcoholic beverages, dietary supplements, and tobacco. Following is a list of items that are taxable because they fall into these subcategories that are specifically excluded from the food exemption. The taxable subcategory is noted in parentheses.

- baking chips, sweetened
- baking bars, candy-coated items (candy)
- beer (alcoholic beverage)
- breath mints (candy)
- cake decorations (candy)
- dried fruit with sweeteners (candy)
- fruit drinks with 50% or less fruit juice (soft drink)
- gum (candy)
- herbal supplements (dietary supplement)
- honey roasted and honey coated nuts (candy)
- lozenges (candy)
- marshmallows (candy)
- party trays (prepared food)
- soda pop (soft drinks)
- sweetened baking bars or chips (candy)
- sweetened bottled water (soft drink)
- tobacco products, except cigarettes which are not taxed at retail (tobacco)
- vitamins and minerals (dietary supplement)

## Gift baskets and other combination packages (bundled transactions)

Prior to January 1, 2008, sales of gift baskets and other combination packages (bundled transactions) were taxable if one of the items included in the package was taxable. Example: The sale of a fruit basket (fresh fruit packed in a wicker basket) was taxable because the wicker basket is a taxable item.

However, beginning January 1, 2008, when a bundled transaction includes food and food ingredients special

rules apply and the sale may or may not be taxable. The sale is taxable if:

1. the seller's purchase price of the taxable items in the transaction is more than 50% of the total purchase price of all of the items in the transaction, or
2. the seller's sales price of the taxable items in the transaction is more than 50% of the total sales price of the transaction.

Sellers cannot use a combination of the purchase price and sales price when making the 50% determination for a transaction.

Also, beginning January 1, 2008, use tax is due on the seller's cost of taxable items included in the bundle if:

- 1) the retail sale of the bundled transaction is not taxable, **and**
- 2) the seller's purchase price of all taxable items in the bundled transaction is more than \$100.

Example 1. A grocery store assembles and sells fruit baskets. The store purchases the baskets for \$5.00 each and puts a variety of fruit into each basket that cost the store \$7.00 per basket. Each fruit basket is sold for \$20.00. Sale of the fruit baskets are not taxable, because the taxable item (the basket) costs less than 50% of the total purchase price of all of the items in the transaction. The store does not owe use tax on the purchase of the fruit baskets, because the store's purchase price of the basket included in each sale is less than \$100.00.

Example 2. A children's store makes gift packages for new parents. The package sells for \$300.00 and includes baby formula and other nontaxable items along with a baby monitor and a car seat. The transaction qualifies for the 50% test because baby formula is a food or food ingredient. The store uses its purchase price of the items in the transaction to determine the taxable percentage of the sale. The store's purchase price of the nontaxable items in the gift package is less than 50% of the total purchase price of all the items in the package so the sale of the gift package is taxable. Since the retail sale is taxable, the store does not owe use tax on the taxable items included in the gift package.

Example 3. Same as Example 2, except that the store's purchase price of the taxable items in the package is less than 50% of the total purchase price of all the items in the package. However, the cost of the taxable items in the package is more than \$100.00. In this situation, the sale of the gift package is not taxable, but the store owes use tax on their cost of all taxable items included in the gift package.

#### References

M. S. 297A.61, Subd. 3(d) & (e), Definitions  
M. S. 297A.61, Subd. 31, Prepared food  
M. S. 297A.61, Subd. 32, Soft drinks  
M. S. 297A.61, Subd. 33, Candy  
M. S. 297A.61, Subd. 34, Food sold through vending machines  
M. S. 297A.61, Subd. 38, Bundled transaction  
M. S. 297A.63, Subd. 1(d), Use of tangible personal property or taxable services  
M. S. 297A.67, Subd. 2, Food and food ingredients  
M. S. 297A.67, Subd. 32, Cigarettes  
MN Rule 8130.4700, Food, Drinks and Meals  
MN Rule 8130.4705, Food Sold with Eating Utensils

#### Fact sheets that may be of interest:

Candy, #102B  
Soft Drinks and Other Beverages, #102C  
Prepared Food, #102D  
Dietary Supplements, #102E  
Food Stamps, #115  
Local Sales and Use Taxes, #164  
Restaurants and Bars, #137  
Vending Machines and Other Coin-Operated Devices, #158



REVENUE ...  
*Working For You*

# Sales and Use Tax Guide

February 2011

## SALES AND USE TAX

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Dear Tennessee Taxpayer,

This business tax guide is intended as an informal reference for taxpayers who wish to gain a better understanding of Tennessee business tax requirements. It is not an all-inclusive document or a substitute for Tennessee business tax statutes or rules and regulations. The information in this guide is current as of the date of publication. Tax laws, their interpretation, and their application can change due to legislative action, reviews, and court decisions.

Periodically, registered taxpayers are mailed information letters with updates on tax laws and policies. Be sure to read any letter you receive carefully; this information may save you time and money. Informational publications are also available for specific industries. Contact the Taxpayer and Vehicle Services Division to obtain these publications.

The Department of Revenue offers a toll-free tax information line for Tennessee residents. The number is (800) 342-1003. If calling from Nashville or outside Tennessee, you may call (615) 253-0600. The Department of Revenue also offers a telecommunications device for the deaf (TDD) line at (615) 741-7398.

If you have questions, please do not hesitate to contact any of the offices listed below.

Sincerely,

Taxpayer and Vehicle Services Division

Tennessee Department of Revenue  
Taxpayer and Vehicle Services Division  
Andrew Jackson Building, 3<sup>rd</sup> Floor  
500 Deaderick Street  
Nashville, Tennessee 37242-1099

Toll-Free: (800) 342-1003  
Out-of-State: (615) 253-0600  
TDD: (615) 741-7398

### Regional Offices

Nashville:  
1321 Murfreesboro Road  
Nashville, TN 37217  
(615) 360-0423

Chattanooga:  
540 McCallie Avenue  
Suite 350  
Chattanooga, TN 37402  
(423) 634-6266

Jackson:  
Lowell Thomas State Office Building  
225 Dr. Martin L. King Jr. Drive  
Suite 340  
Jackson, TN 38301  
(731) 423-5747

Johnson City:  
204 High Point Drive  
Johnson City, TN 37601  
(423) 854-5321

Knoxville  
531 Henley Street  
Room 606  
Knoxville, TN 37902  
(865) 594-6100

Memphis  
3150 Appling Road  
Bartlett, TN 38133  
(901) 213-1400

# SALES AND USE TAX

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## TABLE OF CONTENTS

<b>Sales or Use Tax</b>	<b>7</b>
Sales or Use Tax	7
Local Option Sales or Use Tax	8
Sales Tax Application to the Lease or Rental of Tangible Personal Property	8
Who Must Have a Sales or Use Tax Registration?	9
Who is Liable for Sales Tax?	9
Who is Liable for Use Tax?	9
How to Register	9
Tennessee Retailers	9
Out-of-state Retailers	9
Revocation of Certificate of Registration	11
Changes in Ownership, Address, or Business	11
Additional References	11
<b>Definitions</b>	<b>12</b>
Computer Software	12
Occasional and Isolated Sales	13
Single Article	14
Motor Vehicles	14
Boats	14
Manufactured Homes	14
State Tax on Purchases of Single Article	14
Computing Sales Tax Due on Single Articles	14
Tangible Personal Property	15
Third Party Drop Shipment	15
Specified Digital Products	15
<b>Food and Food Ingredients</b>	<b>17</b>
What Are “Food and Food Ingredients?”	17
Examples of “Food and Food Ingredients”	17
Items Not Taxable at the 5.5% Food Rate	17
Candy	17
Dietary Supplements	17
Meal Substitutes	18
Prepared Food	18
<b>Tax Credits</b>	<b>19</b>
Credits	19
Sales or Use Tax Paid in Another State	19
Emerging Industry Credit	19
Fuel or Petroleum Products Sold to Air Common Carriers	21
<b>Taxable and Non-taxable Property and Services</b>	<b>22</b>
Taxable Tangible Personal Property	22
Specified Digital Products	22
Prepaid Telephone Calling Cards	22
Services	22
Taxable Services	22
Non-taxable Tangible Personal Property	23
Non-taxable Services	23
<b>Exemptions Requiring Certificates</b>	<b>24</b>
Documenting Exemptions	24
Blanket Certificate of Resale	24
Direct Pay Permits	25
Government Certificate of Exemption	25
Certificate of Exemption for Nonprofit Organizations	26
Certificate of Exemption for Call Centers	26
Agricultural Exemption Certificate	27

# SALES AND USE TAX

---

## TABLE OF CONTENTS

<b>Exemptions Requiring Documentation</b>	<b>28</b>
Removal from Tennessee by Buyer	28
Exemption for Railroad Track Materials and Locomotive Radiators	28
Exemption for Rural Electric Cooperatives, Community Service Cooperatives and Governmental Utility Districts	28
Exemption for Electric Generating and Distribution Systems, Resource Recovery Facilities, or Coal Gasification Plants	28
<b>Agricultural Exemptions</b>	<b>29</b>
Agricultural Exemption Certificate	29
Agricultural Exemptions	29
Sales by Farmers and Nursery Operators	30
Purchases of Livestock Drugs by Veterinarians	30
<b>Exemptions and Reduced Rates for Qualified Manufacturers</b>	<b>32</b>
Industrial Machinery	32
Industrial Machinery Authorization	32
Pollution Control Equipment	32
Energy Fuel and Water	32
Computers	33
Material Handling and Racking Systems Equipment	33
Industrial Materials	33
Headquarters Facility	33
Food Service Establishments	34
<b>Other Exemptions from Sales or Use Tax</b>	<b>35</b>
Aircraft Parts and Supplies	35
Amusements	35
Automobiles	35
Computer Software	36
Design Professionals	36
Display Property	36
Energy	36
Exemptions for Tennessee Sales for Out-of-state Consumer Use	36
Films	37
Food	37
Fuel	37
Leased Vehicles	37
Medical Equipment and Supplies	37
Miscellaneous Nonprofit Sales	38
Motor Vehicles Used by Common Carriers	39
Packaging	39
Pollution Control	39
Preservation of Historic Property	39
Publications	39
Railroad Cars	39
Sales in Interstate Commerce	39
Sales Tax Holiday	40
Specified Digital Products	40
Telephone Cooperatives	40
Telecommunications	40
Transactions between Parent Companies and Wholly Owned Subsidiaries	40
Time-share Accommodations	40
Used Property	40
Utility Poles	40
Vending Items	41
Warranty Services	41
Watershed Districts	41

# SALES AND USE TAX

---

## TABLE OF CONTENTS

<b>Flea Markets</b>	<b>42</b>
Flea Market Registration	42
Sales on Less than Permanent Basis	42
Submission of Flea Market Returns	42
Dealers Registering Annually	42
Dealers Registering Quarterly or Monthly	42
Penalty for Late Filing	42
<b>Contractors</b>	<b>44</b>
Contractors as Consumers	44
Liability for the Sales or Use Tax	44
Exemptions	44
Tax on Fabricated Materials	44
Asphalt Fabricators	45
Installation of Industrial Machinery	45
Lump Sum or Unit Price Contracts on Realty in Effect on July 15, 2002	45
Property Owned by the United States Government	46
Qualified Disaster Restoration	46
<b>Returns and Payments</b>	<b>48</b>
Returns and Payment	48
Electronic Data Interchange (EDI)	48
Electronic Funds Transfer (EFT)	49
Online Filing	49
Mailing Date	49
Penalty and Interest	49
Audits and Assessments	50
Right to a Conference	50
Keeping Records	50
<b>Tennessee Taxpayer Bill of Rights</b>	<b>52</b>

## SALES AND USE TAX

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### FOOD AND FOOD INGREDIENTS

[Tenn. Code Ann. Sections 67-6-102, 67-6-228]

Tennessee sales or use tax law provides that sales of food and food ingredients are subject to a state rate of 5.5% plus the applicable local tax rate. [Tenn. Code Ann. Section 67-6-228]

#### What Are “Food or Food Ingredients?”

In specifying that food and food ingredients remains at the 5.5% state rate, the law defines “food and food ingredients” to mean “substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.”

The law also specifies that the 5.5% rate does not apply to candy, dietary supplements, or prepared food.

#### Examples of “Food or Food Ingredients”

The following is a partial listing of items that meet the requirements to be considered food and food ingredients and are subject to the 5.5% state rate, if not prepared by the seller. This list is not all-inclusive.

Baking powder, baking soda, bread, cakes and pies, cereal, chip dip, chips, cocoa and beverage powders other than dietary supplements, coffee, condiments, cookies, cooking oil, dairy products, fruit (fresh or dried), eggs, fish and meats, flour, frozen meals, fruit juices, gelatin, gravies and sauces, herbs and spices, ice cream, sherbet, frozen yogurt, ice, margarine and shortening, nuts, popcorn, poultry, pumpkins, raisins, relishes, salad dressing, salt and pepper, soft drinks, sugar, sweeteners, vegetables, tea, and water.

The following is a partial list of items that are not considered food or food ingredients and are taxed at the 7% rate. This list is not all-inclusive.

Baking chips, baking bars, candy-coated items, beer, alcoholic beverages, breath mints, cake decorations, cigarettes and other tobacco items, cough drops and lozenges, dried fruit with sweeteners, gum, herbal supplements, honey roasted or coated nuts, marshmallows, party trays, vitamins, and minerals.

### Items Not Taxable at the 5.5% Food Rate

#### Candy

“Candy” is defined as a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruit, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces. Candy does not include any preparation containing flour and must require no refrigeration. If an item requires refrigeration or has the word “flour” as an ingredient on the label, it is not candy.

Examples of items that are considered to be candy (the list is not all-inclusive) are breath mints; candy bars; chocolate chips; fruit roll-ups; marshmallows; caramel corn; caramel apples; chocolate- or carob-covered raisins or nuts; sweet or semi-sweet cooking bars or chips; gum; honey roasted or beer nuts; trail mix that includes candy; peanut brittle; sugarless candy; and yogurt-covered raisins or nuts.

#### Dietary Supplements

In order to be considered a dietary supplement, a substance must meet all of these criteria:

“Dietary supplements” contain one or more of the following dietary ingredients: a vitamin; a mineral; an herb or other botanical; an amino acid; a dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or a concentrate, metabolite, constituent, extract, or combination of the ingredients listed.

Dietary supplements are also intended for ingestion as a tablet, capsule, powder, softgel, gelcap, or liquid form. If it is not intended for ingestion in one of these forms, it is not represented as conventional food and is not represented to be the sole item of a meal or diet.

Dietary supplements must be labeled as a dietary supplement, identifiable by the “Supplement Facts” box found on the label and required by federal regulations. Any item that is required to have a “Supplement Facts” label is taxable at the full 7% state rate plus the applicable local rate.

These items include amino acids; antioxidants; bee pollen; enzymes; garlic capsules; ginseng;



## **Application Of The Reduced West Virginia Consumer Sales and Service Tax To Food**

Effective January 1, 2012, the Sales Tax and Use Tax is reduced from 3% to 2% on the sales, purchases and uses of food and food ingredients intended for human consumption. However, the reduced rate of tax does not apply to sales, purchases and uses by consumers of prepared food, food sold through vending machines and soft drinks. The purpose of this publication is to explain and clarify the application of the Sales and Use Taxes to sales of food.

Please note that applicable definitions are found at the end of this document.

**A number of items sold by grocery stores, supermarkets, and similar type businesses are classified in this document under the headings "Food Items" and "Prepared Food Items." Food Items fall within the definition of "food and food ingredients" and are subject to the Sales Tax at the reduced rate of 3% (2% effective January 1, 2012) and Prepared Food Items, food sold through vending machines and soft drinks are subject to the Sales Tax at the regular rate of 6%. The following examples are for illustrative purposes and are not intended to be all-inclusive.**

### **I. FOOD ITEMS**

The Sales Tax rate of 3% (2% effective January 1, 2012) applies to the sale of food and food ingredients listed below if sold unheated and without eating utensils provided by the seller.

- Baby food
- Bakery items (including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas).
- Baking chocolate (whether liquid, powder, or solid)
- Baking soda or other forms of leavening agents
- Beverages containing greater than 50% fruit or vegetable juice or containing milk, milk products or milk substitutes
- Broths and bouillons (whether liquid, instant, freeze dried, or cubes)
- Butter
- Candy and confections including breath mints
- Cereal and cereal products
- Cheese
- Chewing Gum
- Chip dip
- Chocolate covered nuts
- Cocoa
- Coconut (whether whole, shredded, sweetened, processed or raw)
- Coffee and coffee substitutes (coffee beans, ground coffee, freeze dried coffee, coffee in brewing bags and instant coffee)
- Condiments
- Cooking oil
- Cooking wine (that exceeds alcohol content of .5%, that is intended for use in cooking and that is not an alcoholic beverage)
- Dairy products
- Deli items when sold unheated by weight or volume as a single item
- Dried fruit
- Eggs and egg products or substitutes
- Extracts and flavorings intended as a cooking ingredient
- Fish and fish products (including all other forms of seafood)
- Flour (including wheat, whole wheat, rye, corn, rice, barley, buckwheat, soy or other forms of milled grains or nuts)
- Food coloring
- Food sold by a seller whose primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries)
- Food sold unheated by weight or volume as a single item
- Food only sliced, repackaged, or pasteurized by the seller such as meat from a deli counter, sliced and wrapped for a customer
- Frozen meals such as pizza or french fries
- Fruit and fruit products (whether fresh, frozen, canned or dehydrated, but excludes fruit on salad bars)
- Gelatins (whether powdered or prepared)
- Gravies
- Herbs (seasonings)
- Honey
- Ice except block or dry ice (which remain taxable at 6%)
- Ice cream (including prepackaged novelties)
- Jams and jellies (including marmalades and preserves)
- Ketchup
- Lard

Margarine  
 Marshmallows (including marshmallow crème)  
 Meat and meat products (whether fresh, frozen, cured, canned, or dehydrated)  
 Meatloaf - uncooked  
 Milk and milk products  
 Mustard  
 Nuts (including salted nuts)  
 Olive oil  
 Packaged popcorn  
 Pasteurized eggs  
 Peanut butter  
 Pepper  
 Pickles  
 Popsicles  
 Powdered drink mixes (including sweetened mixes)  
 Pumpkins except pumpkins decorated at the time of sale (which remain taxable at 6%)  
 Relishes  
 Salad dressings and mixes  
 Salad purchased for resale and repackaged in smaller containers by the seller unless heated and/or sold with eating utensils  
 Salads or other deli dishes unless heated and/or sold with eating utensils  
 Salt except rock salt (which remains taxable at 6%)  
 Sauces  
 Seasonings  
 Sherbets and sorbets  
 Shortenings  
 Soups  
 Snack chips and pieces (includes potato chip or crisp type chips, corn chips, pork rinds, pretzels and trail mixes)  
 Spices  
 Sandwich spreads  
 Sugar, sugar products and sugar substitutes  
 Sunflower seeds  
 Syrups (including molasses and dietetic syrups and similar products)  
 Tea (bags, leaves, or instant only)  
 Vegetables and vegetable products (whether fresh, frozen, canned or dehydrated, but excludes food on salad bars)  
 Vegetable oils  
 Water

Sales of dietary supplements are subject to the reduced Sales Tax rate of 3% (2% effective January 1, 2012). The term "dietary supplements" means any product that:

- (a) is intended to supplement the diet;
- (b) contains one or more of the following ingredients:
  - (i) vitamins,
  - (ii) minerals,
  - (iii) herbs or other botanicals,
  - (iv) amino acids,
  - (v) a dietary substance for use by humans to increase the total dietary intake,
  - (vi) concentrates, metabolites, constituents, extracts or a combination of any of the above ingredients;
- (c) is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in the above form, is not represented as a conventional food and is not represented for use as a sole item of a meal or of the diet; and
- (d) is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box found on the label and as required under 21 CFR 101.36.

Dietary supplements include products such as Figurines, Carnation Diet Drinks, Slimfast, Slender, and Ensure.

## II. PREPARED FOOD ITEMS

The Sales Tax rate of 6% applies to the sale of prepared food items listed below **if prepared by the seller**:

All food sold in a heated state or heated by the seller  
 Bakery items if sold with eating utensils provided by the seller

Bakery items sold in a heated state  
Cold soups, casseroles, beans, potatoes, etc.  
Combined raw meats - that do not require cooking  
Drinks prepared by the seller (coffee, tea, etc.)  
Fried chicken  
Frozen yogurt dispensed as cones, sundaes, etc.  
Fruits cut and combined by the seller (fruit tray)  
Ice cream novelties, cakes or pies  
Ice cream or ice milk dispensed as cones, sundaes, etc.  
Marinated raw meats - that do not require cooking  
Marinated raw seafood - that do not require cooking  
Party trays  
Rotisserie chicken  
Salad greens mixed by the seller  
Salads and deli items if heated and/or sold with eating utensils  
Sandwiches  
Soups, casseroles or meals sold warm  
Warmed nuts

- (1) All food sold with eating utensils provided by the seller including plates, knives, forks, spoons, glasses, cups, napkins or straws. Food is considered to be sold with eating utensils provided by the seller when the food is intended for consumption with the utensils provided. Prepared Food Items therefore includes all food sold by an eating establishment that sells meals, sandwiches, or other food for consumption on or off the premises. Additionally, Prepared Food Items includes self-service food such as salad bars or drink islands. The presence of self-service utensils in a facility does not change Food Items (taxable at 3%, 2% effective January 1, 2012) into Prepared Food Items (taxable at 6%) 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.
- (2) Prepared Food Items remain taxable at 6% if previously heated by the seller and are ready to eat without further cooking by the purchaser.
- (3) Food that is only sliced, repackaged or pasteurized by the seller is not considered to be prepared Food and remains taxable at 3% (2% effective January 1, 2012).
- (4) Two or more food ingredients that are mixed or combined by the seller and then sold as a single food item.

Heated food sold in combination with unheated food is taxable at 6%. For example, hot chicken prepared by the seller with a pint of potato salad that was not prepared by the seller is sold for a single price.

- (5) Food sold by a seller whose proper primary NAICS classification is 311, food manufacturing (except subsector 3118, bakeries), if:
  - (a) sold with eating utensils provided by the seller; or  

If the manufacturer, rather than the seller, provides an eating utensil with the food, such food is not considered to be provided with eating utensils. For example, a box of crackers and cheese that includes a spreader is subject to the 3% (2% effective January 1, 2012) rate because the spreader is not provided by the seller.
  - (b) sold in a heated state

**If these conditions in (a) and/or (b) exist, these items would be classified as Prepared Food and therefore taxable at the Sales and Use Tax rate of 6%.**

### III. OTHER ITEMS

The Sales Tax rate of 6% applies to the sale of the items listed below:

- All food sold through vending machines
- Alcoholic beverages and nonintoxicating beer
- Cocktail mixes (dry or liquid)
- Cooking utensils
- Liver Oils
- Lozenges
- Over the counter medicines
- Paper products
- Pet food and supplies
- Soap and soap products
- Soft drinks
- Tobacco and tobacco products
- Tonics
- Toothpaste and mouthwash

### IV. BUNDLED TRANSACTIONS

When an item subject to the rate of 6% is sold with an item subject to 3% (2% effective January 1, 2012), for a single non-itemized price, the purchase amount is subject to the rate of 6%.

Example:

Popcorn prepared by the seller and sold with a drink and candy for one price is a bundled transaction subject to the 6% rate. However, if the popcorn, drink and candy are sold individually, the popcorn and drink are subject to the 6% rate while the candy is subject to the 3% (2% effective January 1, 2012) rate.

### V. DEFINITIONS

West Virginia Code § 11-15B-2(b) provides the following selected definitions.

**“Food and food ingredients”** mean substances, whether in liquid, concentrated, solid, frozen, dried or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. “Food and food ingredients” does not include alcoholic beverages, prepared food, or tobacco.

**“Prepared food”** means:

- Food sold in a heated state or heated by the seller;
- Two or more food ingredients mixed or combined by the seller for sale as a single item; or
- Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food.

**“Prepared food”** does not include 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 Food and Drug Administration in chapter 3, part 401.11 of its Food Code of 2001 so as to prevent food borne illnesses.

Additionally, **“prepared food,”** as defined in this subdivision does not include:

- Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsection 3118 (bakeries);
- Food sold in an unheated state by weight or volume as a single item; or
- Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, tortillas.

**“Soft drink”** means nonalcoholic beverages that contain natural or artificial sweeteners. “Soft drinks” do not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of vegetable or fruit juice by volume.

**“Vending machine”** means a machine or other mechanical device that accepts payment.

**WEST VIRGINIA (3%) CONSUMERS SALES TAX RATE CHART FOR "FOOD" EFFECTIVE JULY 1, 2008 - POST NEAR REGISTER**

AMOUNT OF SALE	TAX	AMOUNT OF SALE	TAX	AMOUNT OF SALE	TAX
\$ 0.01 to \$ 0.16	NONE	\$ 10.17 to \$ 10.49	\$ 0.31	\$ 20.17 to \$ 20.49	\$ 0.61
0.17 to 0.49	\$ 0.01	10.50 to 10.83	0.32	20.50 to 20.83	0.62
0.50 to 0.83	0.02	10.84 to 11.16	0.33	20.84 to 21.16	0.63
0.84 to 1.16	0.03	11.17 to 11.49	0.34	21.17 to 21.49	0.64
1.17 to 1.49	0.04	11.50 to 11.83	0.35	21.50 to 21.83	0.65
1.50 to 1.83	0.05	11.84 to 12.16	0.36	21.84 to 22.16	0.66
1.84 to 2.16	0.06	12.17 to 12.49	0.37	22.17 to 22.49	0.67
2.17 to 2.49	0.07	12.50 to 12.83	0.38	22.50 to 22.83	0.68
2.50 to 2.83	0.08	12.84 to 13.16	0.39	22.84 to 23.16	0.69
2.84 to 3.16	0.09	13.17 to 13.49	0.40	23.17 to 23.49	0.70
3.17 to 3.49	0.10	13.50 to 13.83	0.41	23.50 to 23.83	0.71
3.50 to 3.83	0.11	13.84 to 14.16	0.42	23.84 to 24.16	0.72
3.84 to 4.16	0.12	14.17 to 14.49	0.43	24.17 to 24.49	0.73
4.17 to 4.49	0.13	14.50 to 14.83	0.44	24.50 to 24.83	0.74
4.50 to 4.83	0.14	14.84 to 15.16	0.45	24.84 to 25.16	0.75
4.84 to 5.16	0.15	15.17 to 15.49	0.46	25.17 to 25.49	0.76
5.17 to 5.49	0.16	15.50 to 15.83	0.47	25.50 to 25.83	0.77
5.50 to 5.83	0.17	15.84 to 16.16	0.48	25.84 to 26.16	0.78
5.84 to 6.16	0.18	16.17 to 16.49	0.49	26.17 to 26.49	0.79
6.17 to 6.49	0.19	16.50 to 16.83	0.50	26.50 to 26.83	0.80
6.50 to 6.83	0.20	16.84 to 17.16	0.51	26.84 to 27.16	0.81
6.84 to 7.16	0.21	17.17 to 17.49	0.52	27.17 to 27.49	0.82
7.17 to 7.49	0.22	17.50 to 17.83	0.53	27.50 to 27.83	0.83
7.50 to 7.83	0.23	17.84 to 18.16	0.54	27.84 to 28.16	0.84
7.84 to 8.16	0.24	18.17 to 18.49	0.55	28.17 to 28.49	0.85
8.17 to 8.49	0.25	18.50 to 18.83	0.56	28.50 to 28.83	0.86
8.50 to 8.83	0.26	18.84 to 19.16	0.57	28.84 to 29.16	0.87
8.84 to 9.16	0.27	19.17 to 19.49	0.58	29.17 to 29.49	0.88
9.17 to 9.49	0.28	19.50 to 19.83	0.59	29.50 to 29.83	0.89
9.50 to 9.83	0.29	19.84 to 20.16	0.60	29.84 to 30.16	0.90
9.84 to 10.16	0.30				

**CUT ALONG THE LINE**

Assistance may be obtained by calling

Compliance and Taxpayer Services Division  
(304) 558-3333 or 1-800-WVA-TAXS (1-800-982-8297)

A TDD Service is available for the hearing impaired by calling  
1-800-2TAXTDD (1-800-282-9833)

To order forms or publications call the automated information system at:  
(304) 344-2068 or 1-800-422-2075

Or visit our website: <http://www.wvtax.gov>

The following locations may also be contacted for assistance

BECKLEY, WV 25801  
407 Neville Street, Suite 109  
Phone – (304) 256-6764

HUNTINGTON, WV 25701  
2699 Park Avenue, Suite 230  
Phone – (304) 528-5568

CHARLESTON, WV 25301  
1206 Quarrier Street  
Phone – (304) 558-3333 or  
1-800-WVA-TAXS (1-800-982-8297)

MARTINSBURG, WV 25404  
397 Mid Atlantic Parkway, Suite 2  
Phone – (304) 267-0022

CLARKSBURG, WV 26301  
Huntington Bank Building  
230 West Pike Street, Suite 201  
Phone – (304) 627-2109

PARKERSBURG, WV 26101  
400 5th Street  
Phone – (304) 420-4570

WHEELING, WV 26003  
40 14th Street  
Phone – (304) 238-1152

AMOUNT OF SALE	TAX	AMOUNT OF SALE	TAX	AMOUNT OF SALE	TAX	AMOUNT OF SALE	TAX
\$30.17 to \$30.49	\$0.91	\$38.17 to 38.49	1.15	\$46.17 to 46.49	1.39	54.17 to 54.49	1.63
30.50 to 30.83	0.92	38.50 to 38.83	1.16	46.50 to 46.83	1.40	54.50 to 54.83	1.64
30.84 to 31.16	0.93	38.84 to 39.16	1.17	46.84 to 47.16	1.41	54.84 to 55.16	1.65
31.17 to 31.49	0.94	39.17 to 39.49	1.18	47.17 to 47.49	1.42	55.17 to 55.49	1.66
31.50 to 31.83	0.95	39.50 to 39.83	1.19	47.50 to 47.83	1.43	55.50 to 55.83	1.67
31.84 to 32.16	0.96	39.84 to 40.16	1.20	47.84 to 48.16	1.44	55.84 to 56.16	1.68
31.17 to 32.49	0.97	40.17 to 40.49	1.21	48.17 to 48.49	1.45	56.17 to 56.49	1.69
32.50 to 32.83	0.98	40.50 to 40.83	1.22	48.50 to 48.83	1.46	56.50 to 56.83	1.70
32.84 to 33.16	0.99	40.84 to 41.16	1.23	48.84 to 49.16	1.47	56.84 to 57.16	1.71
33.17 to 33.49	1.00	41.17 to 41.49	1.24	49.17 to 49.49	1.48	57.17 to 57.49	1.72
33.50 to 33.83	1.01	41.50 to 41.83	1.25	49.50 to 49.83	1.49	57.50 to 57.83	1.73
33.84 to 34.16	1.02	41.84 to 42.16	1.26	49.84 to 50.16	1.50	57.84 to 58.16	1.74
34.17 to 34.49	1.03	42.17 to 42.49	1.27	50.17 to 50.49	1.51	58.17 to 58.49	1.75
34.50 to 34.83	1.04	42.50 to 42.83	1.28	50.50 to 50.83	1.52	58.50 to 58.83	1.76
34.84 to 35.16	1.05	42.84 to 43.16	1.29	50.84 to 51.16	1.53	58.84 to 59.16	1.77
35.17 to 35.49	1.06	43.17 to 43.49	1.30	51.17 to 51.49	1.54	59.17 to 59.49	1.78
35.50 to 35.83	1.07	43.50 to 43.83	1.31	51.50 to 51.83	1.55	59.50 to 59.83	1.79
35.84 to 36.16	1.08	43.84 to 44.16	1.32	51.84 to 52.16	1.56	59.84 to 60.16	1.80
36.17 to 36.49	1.09	44.17 to 44.49	1.33	52.17 to 52.49	1.57	60.17 to 60.49	1.81
36.50 to 36.83	1.10	44.50 to 44.83	1.34	52.50 to 52.83	1.58	60.50 to 60.83	1.82
36.84 to 37.16	1.11	44.84 to 45.16	1.35	52.84 to 53.16	1.59	60.84 to 61.16	1.83
37.17 to 37.49	1.12	45.17 to 45.49	1.36	53.17 to 53.49	1.60	61.17 to 61.49	1.84
37.50 to 37.83	1.13	45.50 to 45.83	1.37	53.50 to 53.83	1.61	61.50 to 61.83	1.85
37.84 to 38.16	1.14	45.84 to 46.16	1.38	53.84 to 54.16	1.62	61.84 to 62.16	1.86

FOR SALES NOT SHOWN MULTIPLY THE WHOLE DOLLAR AMOUNT BY 0.04 AND ADD THE FOLLOWING FOR THE FRACTIONAL PART OF THE AMOUNT

\$ 0.01 to \$ 0.16	NONE
0.17 to 0.49	\$ 0.01
0.50 to 0.83	0.02
0.84 to 0.99	0.03

TAXPAYER SERVICES DIVISION  
WV STATE TAX DEPARTMENT  
CHARLESTON, WEST VIRGINIA 25305  
TELEPHONE (304) 558-3333  
TOLL-FREE NUMBER 1-800-982-8297 (WVA-TAXS)



# “Food and Food Ingredients”

## State Sales & Use Tax Guide

**ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION  
SALES AND USE TAX SECTION  
P.O. BOX 1272  
LITTLE ROCK, AR 72203-1272**

**Phone:** (501) 682 – 7104  
**Fax:** (501) 682 – 7904  
**Email:** [sales.tax@rev.state.ar.us](mailto:sales.tax@rev.state.ar.us)  
**Website:** [www.arkansas.gov/dfa](http://www.arkansas.gov/dfa)

This guide is designed to offer general guidance and information. Depending on the specific circumstances of a particular transaction, the information in this guide may not provide an accurate statement of the taxability of an item(s). Sellers must familiarize themselves with Rule 2007-3 entitled “Special Rules for Sales of Food and Food Ingredients and Prepared Food.” Sellers should contact the Department of Finance and Administration for a written legal opinion concerning specific transactions.

To request a written legal opinion, please contact the Office of Revenue Legal Counsel, P.O. Box 1272, Room 2380, Little Rock, AR 72203.

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## **Introduction**

This guide is intended to help businesses, organizations, and individuals understand how state sales and use tax is applied to food and food ingredients, prepared food, and other non-food items. The information contained in this guide is based on the Arkansas Code and Rules in effect on July 1, 2007.

Beginning July 1, 2007, the state sales and use tax rate on food and food ingredients will be reduced to 3.0%. Local city and county sales and use taxes will continue to apply to all sales of food and food ingredients and prepared food.

**“Food and food ingredients”** is defined as:

“substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.”

“Food and food ingredients” includes most common grocery type food items and foods packaged by a manufacturer for home consumption.

## **Examples of Common Food Items Purchased at Your Local Grocery and Eligible for the Reduced State Sales and Use Tax Rate**

Baby food (including baby cereal and formula)	Honey and syrups
Bakery items (unheated, not made by the seller)	Ice (exclude dry ice)
Bread (unheated, not made by the seller)	Ice cream (packaged, not made or served by the seller, including toppings and novelties)
Baking ingredients, whether liquid, powder or solid (e.g., chocolate chips, baking morsels)	Jams, jellies, marmalades, and preserves
Baking mixes (e.g., cake mixes, muffin mixes)	Lard and shortening
Baking soda and leavening agents	Margarine and butter
Beans and peas (fresh, dried, canned, or frozen)	Marshmallows and marshmallow crème
Beverages (prepackaged and sealed – e.g., cans, bottles, cartons, or pouches)	Meat and meat products (raw, frozen, cured, canned, or dehydrated)
Birthday cakes (not baked or decorated by seller)	Milk, yogurt, and cheese products
Bottled water and flavored water	Nutritional Meal Replacements (liquids, bars, and powders - must have Nutrition Facts Box on product label)
Breakfast Bars (must have Nutrition Facts Box on product label)	Pasta and noodles (not prepared or served by seller)
Broth and bouillon (liquid, instant, freeze dried, or cubes)	Peanut butter
Butter and margarine	Peas and beans (fresh, dried, canned, or frozen)
Candy, gum, and breath mints	Powdered drink mixes (e.g., cocoa, lemonade)
Cereal and cereal products	Raisins, nuts, and sunflower seeds
Coconut (whole, shredded, sweetened, or canned)	Rice and other grains
Coffee (beans, ground, freeze dried, bags, or instant)	Salad dressings and mixes
Condiments (e.g., ketchup, mayo, mustard, and relishes)	Salt and pepper (exclude rock salt)
Cooking oil (e.g., canola, olive, vegetable)	Sauces and gravy (bottled, canned, or mixes)
Cookies (not baked or decorated by the seller)	Seasonings and spices (e.g., cinnamon, basil)
Deli meats and cheeses (not heated, combined or served by seller - sliced and repackaged only)	Sherbets and sorbets (not made by the seller)
Eggs and egg substitutes	Soft Drinks, soda, and powdered drink mixes
Extracts and flavorings used as cooking ingredients	Soup (packaged, canned, dried, or frozen)
Fish and Seafood (raw, frozen, cured, canned, or dehydrated)	Snack foods (packaged crackers, potato chips, corn chips, pork rinds, and pretzels)
Flour and corn meal	Sugar and alternative sweeteners
Food coloring	Syrups (including molasses, sugar-free syrups, flavored syrups, and similar products)
Frozen Entrees (e.g., frozen dinners, frozen pizza)	Tea (bags, leaves, and instant )
Fruit and fruit juices (fresh, frozen, canned, or dehydrated)	Vegetables and vegetable products (fresh, frozen, canned or dehydrated, exclude items on food and/or salad bars)
Gelatin (not prepared by the seller)	

**Examples of Items Purchased at Your Local Grocery and  
Subject to the Full State Sales and Use Tax Rate**

Alcoholic beverages

Foods sold with eating utensils.

Non-food items (e.g., paper goods, detergents,  
soap, foil, plastic wrap, cosmetics, toothpaste)

Foods heated, combined or sold with utensils  
provided by the seller

Bakery items made by the seller

Cakes made or decorated by the seller

Candy made by the seller

Coffee (ready to drink)

Decorated pumpkins or other decorated food item

Dietary supplements (e.g., vitamins, minerals, amino  
acids, botanicals – will have Supplemental  
Facts Box on label)

Deli trays and foods combined by the seller

Dry ice

Food baskets

Food sold at one, non-itemized price which  
includes one or more items of prepared food.

Fountain drinks and dispensed beverages

Over-the-Counter Medicinal Products

Pet foods and products

Rock salt

Rotisserie chicken and foods heated by the seller

Salad bar and salads made by the seller

Seeds (unless marked for human consumption)

Tobacco Products and Cigarettes

**“Food and food ingredients” does not include:**

- Alcoholic beverages
- Tobacco products
- Dietary supplements
- Prepared foods

**“Alcoholic beverage”** means a beverage that is suitable for human consumption and contains one-half of one percent (0.5%) or more of alcohol by volume.

**“Tobacco”** means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

**“Dietary supplement”** means any product, other than tobacco, intended to supplement the diet that contains one (1) or more of the following dietary ingredients: a vitamin; a mineral; an herb or other botanical; an amino acid; a dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or a concentrate, metabolite, constituent, extract, or combination of any ingredient described herein and is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet.

- A dietary supplement is required to be labeled as a dietary supplement, identifiable by the “Supplemental Facts” box found on the label.

**“Prepared food”** is defined as:

- Food sold in a heated state or is heated by the seller; **or**
- Food where two or more ingredients are mixed or combined by the seller and sold as a single item; **or**
- Food sold with eating utensils, plates, bowls, cups, glasses, napkins or straws provided by the seller.

Prepared food does not include:

- Food that is only cut, repackaged, or pasteurized by the seller; **or**
- Food containing raw animal products which require cooking by the consumer as recommended by the U.S. Food and Drug Administration.

## **Prepared Food: When is food sold in a heated state or is heated by the seller?**

Food is sold in a heated state if it is sold at a temperature higher than the air of the room or place where the item is sold or food that was heated by the seller at any time before the sale.

Prepared food includes food that is served hot even if the food was not otherwise prepared by the seller.

Heating includes, but is not limited to, baking, boiling, smoking, and cooking. The heating of prepared foods may also occur through the use of items such as heat lamps and chaffing dishes. The heating may occur at premises other than the sales location.

## **Prepared Food: When are two or more ingredients mixed or combined and sold as a single item?**

Prepared foods include foods made or combined by the seller. A seller who mixes or combines two (2) or more foods or food ingredients and sells the mixture or combination as a single item, is selling prepared food, e.g., deli trays and popcorn seasoned with salt and butter cooked by the seller.

Foods that contain raw eggs, fish, meat, or poultry products that require cooking after the sale to prevent food borne illnesses are not prepared food, e.g., meats seasoned by the seller.

## **Prepared Food: When is food sold with eating utensils?**

Prepared food includes food sold with eating utensils when provided by the seller. "Utensil" means a plate, bowl, knife, fork, spoon, glass, cup, napkin, or a straw. "Plate" does not include a container or packaging used to transport the food, such as, a paper bag or box. A purchaser's choice not to use a provided utensil does not affect whether an item is prepared food.

Typically, a utensil will be "provided by the seller" if the seller physically hands the utensil to the customer, or provides a utensil that is necessary to receive or consume the item, as part of the sales transaction. Prepared foods sold with eating utensils provided include: salad placed on a plate at a salad bar; a beverage in a cup or glass; and foods purchased to-go with utensils placed in the bag.

In certain circumstances, all food items sold by a seller may be considered prepared food because a utensil is simply made available at a self-service station or central location for the customer to take if they so desire. These special circumstances are described under the section entitled "Prepared Food Sales Percentage" (PFS%) on the following page.

## Prepared Food Sales Percentage (PFS %)

The prepared food sales percentage is used to determine when simply making utensils available to customers constitutes selling food with a utensil “provided by the seller.”

The prepared food sales percentage is important to sellers that primarily sell prepared food, but also sell items that would generally be considered food and food ingredients. These sellers include sandwich shops, cafes, cafeterias, coffee shops, diners, fast food restaurants, mobile food vendors, food courts, hot dog stands, ice cream shops, pizzerias, restaurants, and concession stands.

## How to Calculate the Prepared Food Sales Percentage (PFS %)

1. Calculate total dollar amount of sales of prepared food:  
(Do not include alcoholic beverages)

Food sold heated or heated by the seller \$ \_\_\_\_\_

Food made or decorated by the seller \$ \_\_\_\_\_

Food where plates, bowls, glasses,  
cups are provided or necessary to  
receive the food. \$ \_\_\_\_\_

Total #1 \$ \_\_\_\_\_

2. Calculate total dollar amount of sales of all food items:  
(Do not include alcoholic beverages)

Prepared food (Total # 1) \$ \_\_\_\_\_

Food and food ingredients \$ \_\_\_\_\_

Dietary supplements \$ \_\_\_\_\_

Total # 2 \$ \_\_\_\_\_

**Total # 1 ÷ Total # 2 = PFS %** \_\_\_\_\_ %

## **What does the percentage mean to my business?**

### **If your prepared-food sales percentage is greater than 75%:**

All food items (including items that would otherwise be considered food and food ingredients) are considered prepared food and subject to the full state sales and use tax rate. If your establishment sells items that contain four (4) or more servings, but have not been made or heated by the seller, please refer to Rule 2007-3 for special instructions.

### **If your prepared-food sales percentage is 75% or less:**

All sales of food and food ingredients are subject to the reduced state sales and use tax rate.

All sales of prepared food – food sold in a heated state, food mixed or combined by the seller, or food where the seller physically hands the utensil to the customer or provides a utensil that is necessary to receive or consume the item – are subject to the full state sales and use tax rate.

Sellers must calculate a prepared-food sales percentage each year. Sellers should use data from the prior year to calculate the prepared-food sales percentage for the current year. Sellers will calculate a single prepared-food sales percentage per year for all establishments in the state. (Sellers with multiple locations will only calculate one prepared-food sales percentage.) Sellers must calculate the prepared-food sales percentage within ninety (90) days of the beginning of the year. (Sellers must use either the tax year or business fiscal year for all of the above.)

New businesses must make a good faith estimate of their prepared-food sales percentage for their first year. This estimated prepared-food sales percentage should be adjusted after the first three (3) months of operation if the actual prepared-food sales percentage goes above or below 75%.

## Examples of Rates Applied to Common Food Transactions

### Grocery Store

- At a grocery store, a customer purchases cereal, a gallon of milk, and a bag of flour. All of these items are considered **food and food ingredients**. The seller will collect the reduced state sales and use tax rate.
- At a grocery store, a customer purchases hot fried chicken and a pound of deli meat. The chicken is **prepared food** and will be taxed at the full state sales and use tax rate. The grocer only cuts and repackages the deli meat which qualifies the meat as **food and food ingredients** subject to the reduced state sales and use tax rate.
- At a grocery store, a customer purchases a burrito dinner (made in the deli) that includes a bottled soft drink for one price. The customer also purchases antacid tablets. The burrito dinner with drink is **prepared food** and will be taxed at the full state sales and use tax rate. The antacid is a non-food item and will be taxed at the full state sales and use tax rate.
- At a grocery store, a customer purchases a family pack of raw steaks, a bag of ready to eat salad pre-packaged by a third-party manufacturer, a container of potato salad from the deli (made by the deli), and a 2-liter bottle of soda. The family pack of raw steaks, the bag of ready to eat salad, and the 2-liter bottle of soda are **food and food ingredients** and will be taxed at the reduced state sales and use tax rate. The container of potato salad is **prepared food** and will be taxed at the full state sales and use tax rate.

### Convenience Store

- At a convenience store, a customer purchases a sandwich (not made by the seller) from the cooler, an order of onion rings from the deli, beer and breath mints. The sandwich and breath mints are **food and food ingredients** and will be taxed at the reduced sales and use tax rate. The onion rings are **prepared food** and will be taxed at the full state sales and use tax rate. The beer is an alcoholic beverage and is also taxed at the full state sales and use rate plus any additional excise taxes levied by Arkansas law.

### Concession Stand

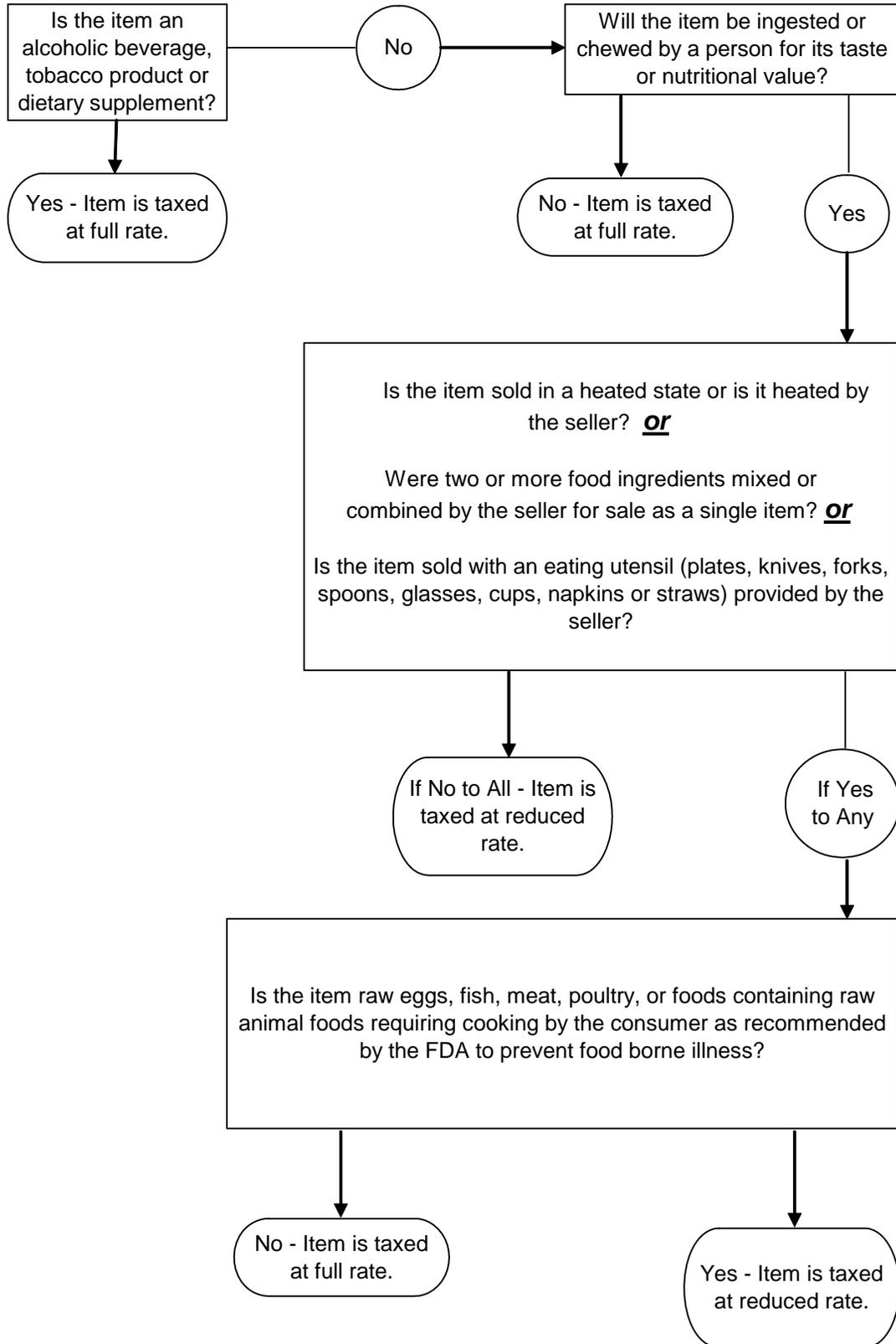
- At a concession stand, a customer purchases a tub of popcorn, a fountain beverage, and a candy bar. The popcorn and fountain beverage are **prepared food** and will be taxed at the full state sales and use tax rate. If the seller's prepared-food sales percentage is greater than 75%, and utensils are made available, the candy bar will also be **prepared food** and will be taxed at the full state sales and use tax rate.

## Examples of Rates Applied to Common Food Transactions (con't.)

### Fast Food Restaurant

- At a fast food restaurant, a customer purchases an 8 oz. container of milk and a 5 oz. container of fruit. Both are pre-packaged by the manufacturer. Since the seller's prepared food sales percentage is over 75% and there is a self-service station with utensils on it in the seller's lobby, utensils are considered provided. Therefore, both items are considered **prepared food** and both items will be taxed at the full state sales and use tax rate.

# Is it “Food” or is it “Prepared Food” ?



**INFORMATION BULLETIN #11****SALES TAX****DECEMBER, 2002****(Replaces Bulletin #11 dated May 1994)**

**DISCLAIMER:** Information bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules and court decisions. Any information, which is not consistent with the law, regulations, or court decisions is not binding on either the Department or the taxpayer. Therefore, the information provided herein should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

**SUBJECT:** Application of Sales Tax to Restaurant Owners Including Fast Food Operations and Caterers

**REFERENCES:** IC 6-2.5-5-20, 45 IAC 2.5-5-4, 45 IAC 2.5-5-43, 45 IAC 2.5-5-44, 45 IAC 2.5-5-45

**I. General Information**

All sales of tangible personal property made by restaurants are subject to the sales tax. The sales tax shall apply to all sales of food and beverages which are packaged, prepared, sold as meals, or in a form which is normally consumed at or near the premises whether or not such food and beverages are actually consumed on the premises.

Sales through a grocery store, salad bar, bakery, or delicatessen and by restaurants, cafeterias, lunch counters, drive-ins, roadside ice cream and refreshment stands, fish and chip places, fried chicken places, pizzerias, food and drink concessions, or similar facilities, of meals, sandwiches, hamburgers, hot dogs, french fries, fried chicken, fish and chips, pizza, potato salad, cole slaw, popcorn, sundaes, cones and cups of ice creams, milk shakes, soft drinks, and similar ready to eat food and beverage items are taxable regardless of whether sold by such establishments for consumption on the premises or on a "take-out" or "to go" basis.

Any food that is cooked to the order of the purchaser, or that is cooked and maintained at or near the cooking temperature prior to sale, or prepared food shall be considered to be sold as a meal or for immediate consumption and shall be subject to the sales tax. In addition the sale of food furnished, prepared, or served for consumption at tables, chairs, or counters, or from trays, glasses, dishes, or other equipment provided by the retail merchant is subject to sales tax.

The sale of food sold through vending machines or by street vendors is also subject to sales tax. The sale of food or meals by caterers is subject to sales tax. The tax does not apply to charges for serving or delivering food or beverages furnished, prepared, or served for consumption at a location or on equipment provided by the retail merchant. However, this exclusion only applies if the charges for serving or delivery are stated separately from the price of the food or beverages when the purchaser pays the charges.

Restaurants and caterers may not accept exemption certificates from any customer or organization in lieu of collecting sales tax except where: (1) the customer or organization purchases food and beverages exclusively for resale; or (2) a not-for-profit organization purchases food and beverage for fund raising.

Sales tax must be collected on any unitary transaction. The amount shown on a single check is considered to be a single sale even though the food or beverage is consumed by more than one person. Payment by one person of items listed on more than one check is also a unitary transaction.

## **II. Purchases by Restaurants:**

### **A. Exempt Purchases**

All purchases by restaurants of tangible personal property to be resold are exempt from sales tax. This exemption shall apply to all types of food, beverages, and other tangible personal property which are to be sold at retail. The purchase of tangible personal property that will act directly on the food during preparation is exempt from sales tax. (For example, a fryer or broiler would be exempt. However, a refrigerator is taxable because it serves merely as an agent in the preservation of food and does not act directly on the food during preparation). Utilities used in the production of food may also be exempt. For more information on this exemption, contact the Indiana Department of Revenue, Compliance Division.

Transactions involving tangible personal property are exempt from sales tax if the property is used, consumed, or removed in the service or consumption of the food, and the property is made unusable for further food service or consumption after the

property's first use for food service or consumption. Items considered exempt include paper napkins, plastic silverware, paper and Styrofoam cups, plates, or bowls. Other items included would be paper place mats, paper tablecloths, and other "to go" containers. Items not exempt from the sale tax would be cloth napkins and tablecloths, reusable plates, glasses, or silverware.

**B. Taxable Purchases**

The purchase of reusable glasses, cups, plates, cleaning materials, fixtures, cash registers, containers, preparation and serving counters, or any other item which is not directly used in direct production of food or is not purchased for resale is subject to sales tax. All materials that have been purchased exempt from sales tax which are later used for a non-exempt purpose are subject to the use tax.

**C. Wrapping Materials:**

The purchase of wrapping materials may or may not be subject to tax depending on their use. Wrapping materials and containers used to preserve food are subject to tax because such materials are not to be resold and are not directly used in direct production of food. Other wrapping materials and containers could be exempt if purchased for the reasons described in subpart A. Exempt Purchases.

**III. Restaurant Records**

All restaurant owners and operators must be registered as retail merchants and must maintain accurate records for three (3) years plus the current year in order to report to the Department the correct amount of gross receipts. If any sales are claimed as exempt sales, the records must clearly reflect such, and the owner must be able to substantiate all exempt sales. Refer to IC 6-2.5-6-8 to determine the calculation of very small transactions and the applicability of a sampling method.



Kenneth L. Miller  
Commissioner

home and modular home factories (when not engaged in real property construction activities), motor vehicle and aircraft factories, oil refineries, paint factories, paper making plants, persons engaged in snowmaking for a ski hill, photofinishers, printers, sawmills, scrap processors, shoe and clothing factories, smelting and steel mills, tanneries, tool and die making plants, tire retreaders, persons engaged in crushing, washing, grading and blending sand, rock, gravel and other minerals, persons engaged in ore dressing, including the mechanical preparation, by crushing and other processes, and the concentration, by flotation and other processes, of ore, and the beneficiation, including but not limited to the preparation of ore for smelting, persons engaged in editing and duplicating video tapes, and persons engaged in heat treating and metal plating semi-finished products furnished by manufacturers.

**B. Nonmanufacturers**

Businesses which are not considered manufacturers include (this list is not all-inclusive):

Contractors (when engaged in real property construction activities and installing or repairing tangible personal property), farmers, fish hatcheries, freezer and locker plants, highway truckers, hotels, laundries and dry cleaners, repair persons, restaurants, television and radio stations, and persons engaged in: corn shelling, experimental and development activities, logging and forestry operations, mining, paper recycling, photography, popping corn, the business of raising and breeding animals, real property construction activities, custom slaughtering of animals and vending machine operations.

**C. Exemption for Manufacturing Machines and Specific Processing Equipment:**

Machines and specific processing equipment and repair parts or replacements thereof and safety attachments for such machines and equipment may be purchased exempt from tax if such items are used *exclusively* and *directly* by a manufacturer in manufacturing tangible personal property; or items or property described in Part X.A.2. and 3.

**D. Exemption for Ingredients, Component Parts, and Consumable Items:**

Effective August 1, 2009, items are exempt from Wisconsin sales and use tax if the items are used exclusively and directly by a manufacturer in manufacturing an article of tangible personal property; or item or property described in Part X.A.2. and 3.; that is destined for sale and that become an ingredient or component part of the article of tangible personal property, or item or property or which are consumed, destroyed, or lose their identity in manufacturing the article of tangible personal property, or item, or property destined for sale, except for fuel and electricity consumed in manufacturing tangible personal property; or item or property described in Part X.A.2. and 3.

**Note:** Prior to August 1, 2009, the exemption was for items which became an ingredient or component part of an article of tangible personal property or which were consumed, destroyed, or lost their identity in the manufacture of tangible personal property in any form destined for sale, except for fuel and electricity consumed in manufacturing tangible personal property.

The exemption does not apply to fuel and electricity (currently as well as prior to August 1, 2009), except that the following are exempt:

1. Tangible personal property, including fuel and electricity, that becomes an ingredient or component part of, or is consumed, destroyed, or loses its identity in the manufacture of shoppers guides, newspapers, or periodicals is exempt, regardless of whether or not the shoppers guides, newspapers, or periodicals are destined for sale.
2. Effective January 1, 2006, fuel and electricity consumed in manufacturing tangible personal property; or items or property described in Part X.A.2. and 3.; in Wisconsin, regardless of whether the tangible personal property, item, or property manufactured is destined for sale.

**Note:** Although most manufacturers could not purchase fuel or electricity exempt from sales and use tax prior or January 1, 2006, they could reduce their

Wisconsin franchise or income taxes by claiming a credit for sales and use tax paid on fuel and electricity consumed in manufacturing tangible personal property in Wisconsin. Unused credits may be carried forward for 20 taxable years. The manufacturer's sales tax credit may not be claimed for taxable years that begin after December 31, 2005. See pages 24-30 of [Wisconsin Tax Bulletin #138](#) (April 2004) for additional information.

**Caution:** Fuel and electricity "consumed in manufacturing" means fuel and electricity used to operate machines and equipment used directly in the step-by-step manufacturing process. Fuel and electricity are not "consumed in manufacturing" if they are used in providing plant heating, cooling, air conditioning, communications, lighting, safety and fire prevention, research and product development, receiving, storage, sales, distribution, warehousing, shipping, advertising or administrative department activities. However, fuel and electricity used directly in manufacturing steam which is used by the manufacturer in further manufacturing or in heating a facility, or both, is "consumed in manufacturing."

Examples of ingredients or component parts qualifying for the exemption are neon or argon gases used as a filler in the production of light bulbs. Welding rods which become a component part of the product manufactured may also be purchased exempt from tax.

Examples of items which are consumed, destroyed or lose their identity are acids, chemicals, cleaning compounds, and solvents for maintaining manufacturing machinery, cutting or lubricating oils, greases, lapping and grinding compounds, sandpaper, and gases and wood used to smoke products.

The exemption does not apply to purchases of employee wearing apparel and gloves worn for the comfort or welfare of the employee. However, wearing apparel consumed during the manufacturing process which prevents contamination of the product produced is exempt from tax.

## E. Manufacturing and Biotechnology Exemptions Effective January 1, 2012

Effective January 1, 2012, exemptions from Wisconsin sales and use taxes were created for purchases of the following:

- Machinery and equipment, including attachments, parts, and accessories, that are sold to persons who are engaged primarily in manufacturing or biotechnology in Wisconsin and are used exclusively and directly in qualified research.
- Tangible personal property; and items, property, and goods described in Part X.A2. to 4.; sold to persons who are engaged primarily in manufacturing or biotechnology in Wisconsin, if the property, item, or good is consumed or destroyed or loses its identity while being used exclusively and directly in qualified research.
- Machines and specific processing equipment, including accessories, attachments, and parts for the machines or equipment, that are used exclusively and directly in raising animals that are sold primarily to a biotechnology business, a public or private institution of higher education, or a governmental unit for exclusive and direct use by any such entity in qualified research or manufacturing.
- The items listed in sec. 77.54(3m)(a) to (m), Wis. Stats., medicines, semen for artificial insemination, fuel, and electricity that are used exclusively and directly in raising animals that are sold primarily to a biotechnology business, a public or private institution of higher education, or a governmental unit for exclusive and direct use by any such entity in qualified research or manufacturing.

The biotechnology exemptions are further explained on pages 37-38 of [Wisconsin Tax Bulletin #162](#).

For more information about how the sales and use tax law applies to manufacturers, obtain [Publication 203](#), *Sales and Use Tax Information for Manufacturers*.

Additionally, rules which may be of interest to manufacturers include secs. [Tax 11.15](#), Wis. Adm.

**Revenue Ruling  
No. 09-002  
Sales Tax  
September 17, 2009**

**State Sales Taxability of Cooking Oils and Shortening Purchased by Restaurants**

**Purpose**

The purpose of this Revenue Ruling is to provide guidance concerning the sales taxability of cooking oils and shortening purchased by restaurants. Specifically, for the purposes of including as food ingredients, deep fat frying, and cooking vessel coating. The Ruling will discuss whether these products purchased by restaurants are for the purposes of resale; thus exempt from the state sales and use tax.

**Issue**

Whether items (i.e. butter and oil) purchased by the restaurants, for the following purposes, are for resale, and therefore excluded from advance sales and use tax:

1. When used as an integral ingredient in the recipe of the finished prepared product (i.e. oils in cake recipes and baked goods).
2. When used as a cooking medium that becomes a component part of the finished product (i.e. frying and grilling).
3. When used to coat pans and skillets to produce a more desirable finished product.

**Legal Analysis/Discussion:**

As of January 1, 2009, the advance sales tax provisions of Louisiana Revised Statute 47:306(B) were repealed. Retail dealers are no longer required to pay advance state sales and use tax on tangible personal property purchased for resale, either in the same form as purchased or used for “further processing” into tangible personal property produced for sale. Dealers are now required to provide their vendors with a Louisiana Resale Certificate, Form R-1042, to certify the items being purchased are for resale and no sales tax should be charged. However, purchases for use or consumption are still taxable and the dealer is required to pay the sales tax, at the time of purchase or report the purchase on line 2 of the sales tax return to be paid with the sales tax return remittance.

To qualify for and use the Louisiana Resale Certificate, Louisiana restaurants must certify that all materials, goods, merchandise, and services purchased from the seller are for resale as tangible personal property, either in the same form as purchased or for “further processing” to be added as a recognizable, identifiable, and beneficial component of a new product. Although Louisiana statute does not define “sale for resale”, R.S. 47:301(10)(a)(i) defines “retail sale”, for the purposes of sales and use tax, as “a sale to a consumer or to any other person for any purpose

A Revenue Ruling is issued under the authority of LAC 61III.101(C). A Revenue Ruling is written to provide guidance to the public and to Department of Revenue employees. It is a written statement issued to apply principles of law to a specific set of facts. A Revenue Ruling does not have the force and effect of law and is not binding on the public. It is a statement of the department's position and is binding on the department until superseded or modified by a subsequent change in statute, regulation, declaratory ruling, or court decision.

other than for resale as tangible personal property,..." In addition all sales of materials that are purchased for further processing into articles of tangible personal property, for sale at retail, are excluded from taxation. R. S.47:301(10)(c)(i) provides, the term "sale at retail" does not include sale of materials for further processing into articles of tangible personal property for sale at retail.

The Louisiana Administrative Code 61:I.4301(C) further clarifies, "the exemption does not cover materials which are used in any process by which tangible personal property is produced, but only those materials which themselves are further processed into tangible personal property. Whether materials are further processed or simply used in the processing activity will depend entirely upon an analysis of the end product. The following "three-pronged test" was developed, to determine the taxability of those materials purchased for further processing: *International Paper, Inc. v. Bridges*, 972 So. 2d 1121 (La 2008) <sup>1</sup>

1. The material must be a recognizable and identifiable component part of the end product;
2. The material must be of benefit to the end product; and
3. The purpose for the purchase of the material must be to process it into the end product.

#### Oils and butter purchased and used as an integral ingredient or as a cooking medium (i.e. frying)

The test for determining whether a material is subject to the exclusion and applicable for the resale certificate, is whether the material was purchased for the purpose of " further processing into" the finished product, such that the material or any of its elements become a "recognizable, integral part" of the finished product. Primarily, what was the intended purpose of the oil or butter purchased?

Integral is defined as "of, relating to, or serving to form the whole: essential to completeness: organically joined or linked."<sup>2</sup> Oil or butter "further processed" into the recipe of cakes, other baked goods, or other products are subject to this exemption, provided it's a recognizable and identifiable component part of the finished product, a benefit to the end product, and purchased for the purpose of processing it into the end product. Pursuant to R.S. 47:301(10)(a)(i), as an integral ingredient, the oil and butter purchased for the necessary further processing of cakes, baked goods, or other finished products, *purposely* becomes incorporated *into* and serves as a *beneficial* component or ingredient of the finished product, and is therefore exempt for the state sales tax.

This exemption also applies to oil or butter purchased for use as a cooking medium or to fry foods. *Al-Tom Investment Inc. v. Director of Revenue*, where the Court held that cooking oil used by Kentucky Fried Chicken franchises became an ingredient of the fried chicken because a portion of the oil remained as an essential or necessary part of the finished product, thus making the entire purchase exempt. Just as flour, salt or spices become a part of the food item during

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<sup>1</sup> *International Paper, Inc. v. Bridges*, 972 So. 2d 1121 (La 2008) Sales and use taxes did not apply to a **paper** manufacturing company's purchases of sodium chlorate, hydrogen peroxide, and elemental oxygen for use in manufacturing white **paper** products. Those chemicals qualified for the tax exclusion under La. Rev. Stat. Ann. § 47:301(10)(c)(i) for materials bought for the further processing of items for resale, also referred to as the reprocessing exclusion. The "three-pronged" test for determining the application of the reprocessing exclusion was met.

<sup>2</sup> Webster's Third New International Dictionary, (2002)

preparation; the cooking oil and shortening become a part of the food during the cooking portion of the preparation. The Court concluded the cooking oil and shortening were ingredients of the food products sold, and thus such purchases were made at wholesale and nontaxable.<sup>3</sup>

Further, rulings of other states such as Alabama, Georgia, and Texas, were found to be compatible with the issue involved.<sup>4</sup> While the cooking oil is primarily used to fry the food, the portion used and that which remains in the product becomes a recognizable and identifiable component, beneficial to its desired result and flavor distinction. The states reasoned that if any part of a material is intended to and does remain as an essential or necessary element of the finished product then the entire purchase is exempt.

**Oil and butter used as a cooking medium or to coat pans and skillets (i.e. frying and grilling)**

The resale certificate is authorized for use in making tax-free purchases of only items for resale, for which R.S. 47:301(10)(a)(i) interprets as materials purchased for further processing into articles of tangible personal property deemed as purchases for resale and exempt for state sales tax. LAC 61:I.4301 further clarifies, although any particular material may be fully used, consumed, absorbed, dissipated or otherwise completely disappear during processing, if it does not become a recognizable and identifiable component which is of some benefit to the end product, it is not exempt under the provision. The fact that a material remained as a recognizable component of an end product by accident because the cost of removal from the end product was prohibitive or for any other reason, if it does not benefit the property by its presence, it was not material for further processing and the sale is not exempt under this provision.

When oil and butter are purchased for use as a cooking medium to coat pans or similar cooking items, the restaurant becomes the end consumer. Oil or butter purchased, is considered sold at retail when purchased by the restaurant to coat pans for a non-stick purpose, not incorporate it into the product. Although the cooking oil is absorbed into the product, it is merely an aid to the processing.

As a cooking medium for the purposes of coating a pan, the oil or butter becomes incidentally incorporated within the final product. Its inclusion results from an unintended (unavoidable) inefficiency of the cooking process. The court in *Al-Tom Investment*, further found where the inclusion of the waste residue of the substance results from an unintended (although unavoidable) inefficiency of the manufacturing process, it is of no benefit to the product sold, and is of the nature of an impurity rather than of an integral part of the finished product.<sup>5</sup> Its purpose is that as stated above, for use as a cooking medium to coat a pan, and not for the purpose of resale or for use as an integral part of the finished product. Therefore, oil or butter purchased for this purpose is still taxable and the restaurants are required to pay the sales tax, at the time of purchase or report the purchase on line 2 of the sales tax return to be paid with the sales tax return remittance.

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<sup>3</sup> *Al-Tom Investment, Inc., d/b/a Kentucky Fried Chicken v. Director of Revenue*, 774 SW2d 131 (1989). Entire cooking oil bought by three restaurants and used in preparing fried foods was entitled to full exemption for ingredients used in producing products for sale. Director of Revenue's policy of considering only 50% of the oil as absorbed into the prepared foods and so allowing only 50% exemption was rejected.

<sup>4</sup> *-Tom Investment, Inc., d/b/a Kentucky Fried Chicken v. Director of Revenue*, 774 SW2d 131 (1989); *State v. Southern Kraft Corporation*, 8 So.2d 886 (1942); *Bullock v. Lone Star Industries, Inc.*, 584 S.W. 2d 386 (Tex. Civ. App. 1979)

<sup>5</sup> *Traigle v. PPG Industries, Inc.*, 332 So. 2d 777 (La 1976)

### **Conclusion**

Restaurants are no longer required to pay advance state sales and use tax on tangible personal property purchased for “further processing” into tangible personal property produced for sale. Instead, they are to use the Louisiana Resale Certificate, providing the certificate to the seller to certify the purchase of such items as oil and butter are for resale, and therefore not charged the state sales tax.

All sales that are not supported by resale certificates properly executed shall be deemed retail sales, and the dealer will be held liable for the tax. Certificates of resale may not be used to obtain tangible personal property or taxable services that would be used by the purchaser, not resold.

Pursuant to the rules and regulations, as mentioned above, oil and butter purchased as an integral ingredient or as a cooking medium to fry food is exempt for the state sale and use tax. However, oil and butter purchased as a cooking medium to coat a pan does not qualify as an item purchased for resale or for the “further processing” of a finished product and therefore is not subject to the exempt or applicable for the Louisiana Resale Certificate.

Cynthia Bridges  
Secretary

By: Leticia Jackson-Mabry, Attorney  
Policy Services Division

SC REVENUE RULING 95-6 (TAX)

**SUBJECT:** Purchases by Restaurants  
Sales and Use Tax)

**EFFECTIVE DATE:** Applies to all periods open under statute.

**SUPERSEDES:** SC Revenue Ruling #92-3

**REFERENCE:** S.C. Code Ann. Section 12-36-110 (Supp. 1993)  
S.C. Code Ann. Section 12-36-120 (Supp. 1993)  
S.C. Code Ann. Section 12-36-910(A) (Supp. 1993)  
S.C. Code Ann. Section 12-36-1310(A) (Supp. 1993)  
S.C. Code Ann. Section 12-36-2120(14) (Supp. 1993)  
Regulation 117-174.79

**AUTHORITY:** S.C. Code Ann. Section 12-4-320 (Supp. 1993)  
SC Revenue Procedure #94-1

**SCOPE:** A Revenue Ruling is the Department of Revenue's official advisory opinion of how laws administered by the Department are to be applied to a specific issue or a specific set of facts, and is provided as guidance for all persons or a particular group. It is valid and remains in effect until superseded or modified by a change in the statute or regulations or a subsequent court decision, Revenue Ruling or Revenue Procedure.

Question:

What guidelines can the Department provide that will assist restaurants in determining their sales and use tax liability on purchases of tangible personal property?

Conclusion:

The Department provides the following guidelines with respect to the sales and use taxes on purchases by restaurants ("NT" - Not Taxable, "T" - Taxable):

Aluminum Foil	*	Bibs	T
Beverage Ingredients	NT	Cleaning Supplies	T
Coasters	T	Paper Buckets or Pails	*
Coffee Stirrers	T	Paper or Plastic Bags	*
Cooking Equipment	T	Place Mats	T
Cooking Oil	+	Plates (disposable or reusable)	NT
Cooking Utensils	T	Serving Utensils	T
Condiments	NT	Shortening	+

Cups & Lids	NT	Skewers	T
Drinking Glasses	NT	Steak Markers	T
Food Containers & Wraps	*	Table Covers	T
Food Products & Ingredients	NT	Tissue Paper	*
Forks, Knives & Spoons	T	Toothpicks	T
Furniture & Fixtures	T	Towels (paper or cloth)	T
Guest Checks	T	Tray Liners	T
Napkins	T	Trays	T
Office Supplies	T	Uniforms	T
		Waxed Paper	*

\* - Materials and containers used incident to the sale and delivery of food and drink products are not taxable; however, materials and containers used for other purposes are taxable (e.g. storage containers).

+ - These items are not taxable only when used as an ingredient in the food products being sold.

NOTE: Other items are to be considered on a case-by-case basis.

Facts:

Advice has been requested by restaurants with regard to their sales and use tax liability on purchases of tangible personal property. In addition to selling food and beverage products, many restaurants provide their customers with napkins, straws, utensils, condiments (salt, pepper, ketchup, etc.) and other ancillary items, which facilitate the consumption of the food or beverage products. Most restaurants make these items readily accessible to their customers for self service (e.g. placing individual serving size packages of condiments or plastic utensils on counters for use with the food products at the customer's discretion) and others attempt to regulate or limit the quantity of such items available to customers by providing them only upon request or including them in the food or beverage package transferred to the customer. Also, restaurants use a variety of containers, packaging materials, and supplies in their business of selling food and beverage products.

Discussion:

Pursuant to Code Section 12-36-910(A):

A sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail. (Emphasis added.)

In accordance with Code Section 12-36-1310(A):

A use tax is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State, at the rate of five percent of the sales price of the property, regardless of whether the retailer is or is not engaged in business in this State. (Emphasis added.)

The terms "sale at retail" and "retail sale" are defined at Code Section 12-36-110, in part, as "all sales of tangible personal property except those defined as wholesale sales". Further, the terms are defined to include (with certain exceptions) the withdrawal, use, or consumption of tangible personal property by anyone who purchases it at wholesale.

Code Section 12-36-120 provides, in pertinent part:

"Wholesale sale" and "sale at wholesale" mean a sale of:

- (1) tangible personal property to licensed retail merchants, jobbers, dealers, or wholesalers for resale, and do not include sales to users or consumers;

\* \* \* \*

- (4) materials, containers, cores, labels, sacks, or bags, used incident to the sale and delivery of tangible personal property.

Code Section 12-36-2120(14) exempts from the sales and use taxes sales or purchases of:

wrapping paper, wrapping twine, paper bags, and containers, used incident to the sale and delivery of tangible personal property.

In summary, in order for either the sales or use tax to apply, there must be a retail sale of tangible personal property. Sales of tangible personal property to users or consumers are retail sales subject to tax. Sales of tangible personal property to licensed retailers for resale and sales of materials, containers, sacks or bags used incident to the sale and delivery of tangible personal property are not taxable.

In considering this issue, it must be determined whether tangible personal property is used or consumed by restaurants, purchased for resale, or used incident to the sale and delivery of the restaurants' food and beverage products.

Regulation 117-174.79, provides guidance and reads:

Licensed retailers purchase free of sales or use taxes wrapping paper, wrapping twine, paper bags and containers for use incident to the delivery of tangible personal property sold by them. They also purchase tax-free materials used in packaging personal property sold by them. They also purchase tax-free materials used in packaging tangible personal property for shipment or sale.

The list below while illustrative of items falling within the Rule announced above is not exhaustive:

Souffle cups, butter chips, paper cups, paper plates, boxes and crates and glazed tissue used to package articles of food.

It will be seen that items such as straws, napkins, wooden or paper spoons and forks do not meet the requirements outlined above and, hence, must bear the tax. Such items are rather in the nature of supplies used or consumed by the retailer in the operation of his or its business.

Hence, purchases of tangible personal property for resale and purchases of materials, containers, cores, labels, sacks, or bags used incident to the sale and delivery of tangible personal property are not subject to the sales or use taxes. Purchases of straws, napkins, and utensils are made at retail and are, therefore, subject to tax.

Commission Decision #95-11 upheld the taxation of utensils, napkins, straws, and tray liners purchased by a restaurant but also addressed the taxation of cooking oil and shortening. In this case the cooking oil and shortening were used for frying food products for sale; however, the shortening was also used as an ingredient to make biscuits. When used for frying, in excess of 70% of the cooking oil and shortening was used or consumed in the process. Thus, the Commission held that the cooking oil and shortening were not subject to tax. The Commission stated that:

The cooking oil and shortening are absorbed by the food. The cooking oil is used as a part of the food being sold. Just as flour, salt or spices become a part of the food item during preparation, the cooking oil and shortening become a part of the food during the cooking portion of the preparation. The Department's established view is that restaurants are making purchases at wholesale when they purchase ingredients of food products sold to customers. We find and conclude the cooking oil and shortening are ingredients of the food products sold, and thus such purchases are made at wholesale and are nontaxable.

For questions concerning the taxation of products purchased by restaurants, contact Steve Hallman at (803) 737-4433 or John McCormack at (803) 737-4438.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/Burnet R. Maybank III  
\_\_\_\_\_  
Burnet R. Maybank, III, Director

Columbia, South Carolina  
June 5 \_\_\_\_\_, 1995

# Rulings of the Tax Commissioner

EXHIBIT 16

**Document Number:** 89-291  
**Tax Type:** Retail Sales and Use Tax  
**Brief Description:** Restaurants; Meals sold to nonprofit organizations; Cooking oil purchases  
**Topics:** Exemptions; Taxability of Persons and Transactions  
**Date Issued:** 10/27/1989

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October 27, 1989

Re: Request for Ruling/ Sales and Use Tax

Dear\*\*\*\*\*

This will reply to your letter of March 13, 1989, concerning the application of sales and use tax to the purchase of cooking oil by fast food restaurants and to the sale of meals by such restaurants to representatives of certain nonprofit organizations. These issues are addressed separately below.

## Cooking Oil

§58.1-603 of the Virginia Code imposes the tax upon every person who engages in the business of selling at retail in this Commonwealth. Virginia Code §58.1-602 defines "sale at retail" to mean a sale to any person for any purpose other than for resale. Inasmuch as the cooking oil in question becomes a component part of the products being sold by the restaurant, such oil may be purchased exempt of the tax by the restaurant under a resale certificate of exemption.

## Meals

§630-10-64 of the Virginia Retail Sales and Use Tax Regulations provides that retail sales of meals by restaurants are taxable. While an exemption from sales and use tax is available to certain nonprofit organizations for their purchases of tangible personal property, the department has traditionally held that the exemption does not generally extend to the purchase of meals or lodging by representatives of such organizations. It should be noted that this rule also applies to state and local government employee purchases of meals and lodging. (See VR 630-10-45, copy enclosed). In such instances, the true consumer of the meal is deemed to be the individual, and not the nonprofit organization or the applicable state or local government. (See Commissioner's Ruling dated May 27, 1988,(Public Document 88-121), and opinion of the Attorney General dated May 14, 1970, copies enclosed). Therefore, restaurants should also apply the tax to the sale of meals to representatives of such organizations.

I trust this answers the questions posed in your letter; however, please contact the department if you have additional questions or if we may be of any further assistance.

Sincerely,

W. H. Forst  
Tax Commissioner

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**Related Policy Documents:** PD 88-121



EXHIBIT 17

# Rulings of the Tax Commissioner

**Document Number:** 97-151

**Tax Type:** Retail Sales and Use Tax

**Brief Description:** Utilities; Fuel for domestic consumption; Exemption from sales and use taxes

**Topics:** Taxability of Persons and Transactions

**Date Issued:** 03/28/1997

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March 28, 1997

Re: § 58.1-1821 Application: Retail Sales and Use Tax

Dear\*\*\*\*\*

This will reply to your letter in which you seek correction of an assessment issued to \*\*\*\*\* (the "Taxpayer") for the period January 1993 through December 1995.

## FACTS

The Taxpayer is a barbecue restaurant that was audited and assessed use tax on its purchases of oak and hickory **firewood** used to cook the barbecue. The Taxpayer maintains that the purchase of the **firewood** is exempt from sales and use tax because the burning wood gives the barbecue a smoky flavor which is essential for the barbecue's unique taste. The Taxpayer also states that the recipe for cooking the barbecue requires the use of hickory and oak **firewood**. The Taxpayer suggests that a cheaper source of fuel would be used to cook the barbecue if the **firewood** was primarily used as fuel for cooking the barbecue.

## DETERMINATION

The department's auditor held the **firewood** purchases taxable based on Title 23 VAC 10-210-630 (copy enclosed). Code of Virginia § 58.1-609.10(1), which is interpreted by VAC 10-210-630, provides an exemption from sales and use tax for "[a]rtificial or propane gas, **firewood**, coal or home heating oil used for domestic consumption." This section defines "domestic consumption" as the use of artificial or propane gas, **firewood**, coal or home heating oil by an individual purchaser for other than business, commercial or industrial purposes." (Emphasis added).

The Taxpayer uses the **firewood** as the fuel source for cooking the barbecue. Because the Taxpayer's use of the **firewood** is not considered "domestic consumption" as defined by law, the sales and use tax would apply to the purchases of **firewood**.

In support of your position that the **firewood** is primarily used to flavor the product, you point out that it would be more cost-effective to use other sources of fuel to cook the barbecue. While I agree that the Taxpayer's use of the **firewood** to cook the barbecue is essential for its flavor, the barbecue's flavor is of no consequence if the barbecue has not been cooked. For this reason, I cannot agree that the primary purpose for using the **firewood** is to flavor the barbecue. Without a statutory exemption in the Code of Virginia for business purchases of **firewood** used to cook and flavor food, there is no basis for removing the **firewood** purchases from the audit.

While I am sympathetic with the Taxpayer's situation, I must conclude that the auditor correctly held the purchases of **firewood** taxable in the audit. The department's records indicate the Taxpayer has an outstanding balance from the audit assessment of\*\*\*\*\* consisting of two bills for \*\*\*\*\* . I will allow you sixty days to submit payment before additional interest accrues on the outstanding balances. You may send your payment to \*\*\*\*\* in the Office of Tax Policy, Post Office Box 1880, Richmond, Virginia 23218-1880. If you have any questions, please contact at \*\*\*\*\* .

Sincerely,

Danny M. Payne  
Tax Commissioner

OTP/11270S

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