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SALES TAX – FOOD FOR HUMAN CONSUMPTION

(Replaces Revenue Administrative Bulletin 2002-20)

Pursuant to MCL 205.6a, a taxpayer may rely on a Revenue Administrative Bulletin issued by the Department of Treasury after September 30, 2006, and shall not be penalized for that reliance until the bulletin is revoked in writing. However, reliance by the taxpayer is limited to issues addressed in the bulletin for tax periods up to the effective date of an amendment to the law upon which the bulletin is based or for tax periods up to the date of a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired that overrules or modifies the law upon which the bulletin is based.

RAB 2009-8. This Revenue Administrative Bulletin (“RAB”) explains the sales and use tax treatment of food and prepared food. This RAB supersedes RAB 2002-20.

Pursuant to statute, generally, food and food ingredients are exempt from sales and use tax. MCL 205.54g and 205.94d; see also 2007 AACCS, R 205.136. However, prepared food (as defined below) is subject to sales and use tax. MCL 205.54g(1)(a),(6) and 205.94d(1)(a),(6).

“Food and food ingredients” are 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 do not include alcoholic beverages or tobacco. MCL 205.54g(3) and 205.94d(3). “Alcoholic beverages” are beverages suitable for human consumption that contain ½ of 1% or more of alcohol by volume. MCL 205.51a(a) and 205.92b(a). “Tobacco” includes cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco. MCL 205.51a(q) and 205.92b(p).

“Prepared food” is:

1. food sold in a heated state or that is heated by the seller;
2. two or more food ingredients mixed or combined by the seller for sale as a single item, or;
3. food sold with eating utensils provided by the seller, including knives, forks, spoons, glasses, cups, napkins, straws, or plates, but not including a container or packaging used to transport the food. MCL 205.54g(4) and 205.94d(4).

[NOTE: Standards for determining when an eating utensil is considered provided by the seller are contained in 2007 AACCS, R 205.136 (Specific Sales and Use Tax Rule 86: Food for Human Consumption); this rule is part of the Michigan Administrative Code, which is accessible online through www.michigan.gov/orr].

“Prepared food” does not include:

1. food that is only cut, repackaged, or pasteurized by the seller;
2. raw eggs, fish, meat, poultry, and foods containing those raw items requiring cooking by the consumer in recommendations contained in section 3-401.11 of part 3-4 of chapter 3 of the 2001 food code published by the food and drug administration of the public health service of the department of health and human services, to prevent foodborne illness;
3. food sold in an unheated state by weight or volume as a single item, without eating utensils, or;
4. bakery items (including bread, rolls, buns, biscuits, bagels, croissants, pastries, doughnuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas) sold without eating utensils. MCL 205.54g(5) and 205.94d(5).

So, regardless if an item might otherwise fall within the definition of “prepared food” outlined above, **if that item is described in one of the exclusions to “prepared food,” it is not “prepared food.”** For example: a seller fries pieces of chicken, then cools them and sells the pieces of cold fried chicken by the pound without eating utensils; even though the chicken was earlier “heated by the seller,” when sold in an unheated state by weight without eating utensils it is not “prepared food.”

Generally, an “eating utensil” is a tool, instrument, or item used or intended to be used to facilitate the eating of food. Statutory examples of “eating utensils” include, but are not limited to, knives, forks, spoons, glasses, cups, napkins, straws and plates. “Eating utensil” does not include a container or packaging used to transport food, such as a plastic carton in which take-out soup or salad is sold. A waxed paper sheet used by a seller to select an item and either to place the selected item in a container (such as a bag or a box) for transport or to hand the item directly to a customer (e.g., for a doughnut or a cookie) is considered as used to transport food rather than used to facilitate the eating of food, and is not considered to be an “eating utensil.”

The following is an analysis of the taxability of various food items.

1. Items Sold at Concessions.

Food sold at concessions at special events and entertainment facilities (including but not limited to theaters, fairs, recreation centers, athletic events, parks and zoos) that is “prepared food” is taxable. This would include, for example, popcorn sold hot, sandwiches made by the seller (not sold by weight or volume as single items), soda pop in a cup, a dish of ice cream with a spoon provided by the seller, a slice of a pizza sold hot, and a hot dog heated by the seller.

Food sold at such concessions that is not “prepared food” is not taxable. This would include, for example, fresh fruit, prepackaged items (e.g., candy bars, chips, nuts, cans or bottles of soda pop) not heated by the seller and sold without eating utensils provided by the seller, and cookies, doughnuts and muffins sold without eating utensils.

2. Bottled Water.

The sale of all bottled water is not subject to sales or use tax. MCL 205.54d(d) and 205.94(1)(q).

3. Ice.

The sale of ice for human consumption is not subject to sales or use tax. Ice sold for other uses (e.g., for cooling the contents of an ice chest, for use in an ice cream maker, for medical purposes) is subject to sales or use tax.

Bagged (e.g., cubed or crushed) ice is presumed for ingestion/chewing by humans and exempt. The seller bears the responsibility for sales tax if this presumption is overcome.

Ice sold in block form is presumed not for ingestion/chewing by humans and taxable. If this presumption is overcome by specific information provided by the purchaser, the seller is not responsible for sales tax.

4. Bakery Items.

Pursuant to statute, bakery items (including bread, rolls, buns, biscuits, bagels, croissants, pastries, doughnuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas) sold without eating utensils are not subject to sales or use tax. Bakery items sold with eating utensils are taxable.

For example, the sale of a doughnut with a napkin (a napkin being statutorily defined as a utensil) is subject to sales and use tax. The sale of a box of a dozen doughnuts (with no eating utensil provided by the seller) is exempt from sales and use tax.

5. Food Bars, such as Soup and Salad Bars.

Food sold at a temperature higher than the surrounding air temperature, is “prepared food” and is taxable. This would include, for example, a chicken that the seller roasts, maintains in a heated state, and sells as hot chicken. This would also include, for example, ready-made soup that the seller obtains in a frozen state, but heats in a large pot and sells hot, by the pint or quart.

A food item consisting of two or more food ingredients mixed or combined by the seller for sale as a single item, even if never heated by the seller and sold by weight or volume as a single item, when sold with an eating utensil is “prepared food” and is taxable. This would include, for example, cold tuna salad made by the seller and sold in a dish with a fork. Food sold in an unheated state by weight or volume as a single item, without eating utensils, is not prepared food. So, if a seller-prepared container of cold macaroni salad is sold by the pound and without an eating utensil, it would not be taxable.

Cold or room-temperature salad items (e.g., lettuce, tomatoes, olives, cheese, onions and cucumbers) sold by weight in a container used to transport the food, without eating utensils,

are not subject to sales or use tax. Such items sold with eating utensils provided by the seller would be taxable.

Standards for determining when an eating utensil is considered provided by the seller are contained in 2007 AACRS, R 205.136 (Specific Sales and Use Tax Rule 86: Food for Human Consumption); this rule is part of the Michigan Administrative Code, which is accessible online through www.michigan.gov/orr).

6. Delicatessens.

Food sold in an unheated state by weight or volume as a single item, without eating utensils, is not “prepared food” and is exempt from sales and use tax. Therefore, deli trays of such foods as cheese and crackers, luncheon meats, seafood, or vegetables and dip, sold in an unheated state by weight or volume as a single item, without eating utensils, are not subject to sales or use tax.

Deli items sold at (or below) room temperature by weight or volume as a single item, without eating utensils, such as potato salad, coleslaw, sliced meats, and vegetables, regardless whether previously heated by the seller, are not “prepared food” and are not taxable.

Deli items sold at a temperature higher than room temperature, whether sold by weight or volume as a single item or sold without eating utensils, are “prepared food” and are subject to sales and use tax. This would include, for example, hot roasted or fried chicken, buffalo wings, ribs, etc.

7. Sandwiches.

A sandwich made by the seller (two or more food ingredients combined by the seller for sale as a single item) is “prepared food” and subject to sales and use tax, unless it is sold in an unheated state by weight or volume as a single item, without eating utensils.

A sandwich that is not made by the seller, that is not sold in a heated state, and that is not sold with an eating utensil provided by the seller, is not “prepared food” and is not taxable.

8. Frozen Foods.

Frozen foods may be taxable “prepared food,” if they consist of two or more food ingredients mixed or combined by the seller for sale as a single item, or are sold with an eating utensil provided by the seller, and do not fall into any of the categories excluded from prepared food.

For example, a frozen pizza sold with napkins or forks provided by the seller is taxable. The sale of a dish of ice cream with a spoon, or an ice cream cone with a napkin, is taxable. An ice cream cone sold by weight (e.g., by the ounce) or volume (e.g., by the scoop), without an eating utensil (e.g., without a napkin) would be exempt.

9. Prepackaged Food Items sold by Carry-out Restaurants.

A prepackaged food item sold as restaurant carry-out may meet the definition of “prepared food” and be subject to sales and use tax: for example, a hot roast chicken packaged in a plastic container with a handle for easy carrying is taxable “prepared food.” Prepackaged cookies, priced per cookie, sold with an eating utensil (a napkin) would be taxable prepared food.

Some prepackaged food items sold as restaurant carry-out will be excluded from the definition of “prepared food” and will not be subject to sales or use tax. Examples include a container of cold macaroni salad, sold by the pound without eating utensils. A prepackaged cookie or bag of chips, sold without a napkin or other eating utensil, would not be “prepared food” and would not be subject to sales or use tax.

10. Food Sold and Heated in Convenience Stores.

Items such as sausages, hot dogs, and taquitos, cooked or heated on roller grills and sold heated, are taxable. Pizza maintained and sold in a heated state is taxable, regardless whether the pizza was made from scratch by the seller, or purchased frozen and heated by the seller.

Items sold at room temperature or below, not consisting of two or more food ingredients mixed or combined by the seller, sold without eating utensils, and after purchase heated by the buyer in a microwave oven made available at the convenience store, are not prepared food and are not taxable. For example, a sausage and biscuit sandwich prepared and packaged by a third party, sold cold and without eating utensils, is not subject to sales or use tax, even though the buyer, after purchasing the sandwich, heats it in a microwave oven provided by the seller.

11. Sealed Containers of Beverages.

Sealed containers of non-alcoholic beverages (e.g., cans of iced tea, bottles of soda pop or juice) are not taxable “prepared food” so long as they are not sold in a heated state or with an eating utensil provided by the seller. However, the sale of fountain soda pop in a cup (food sold with an eating utensil) is the sale of “prepared food” and is taxable.

12. Popcorn and Nuts.

Popped corn sold hot by the seller is taxable. Popped corn sold in an unheated state by weight or volume as a single item is nontaxable, unless sold with an eating utensil provided by the seller.

The sale of nuts when roasted, kept warm, and then placed into a box or bag and sold warm, is taxable. Nuts sold at room temperature (even if previously roasted by the seller) by weight or volume as a single item without eating utensils, are exempt from tax.

13. Food Sold through Vending Machines.

Food that is not “prepared food” (including, for example, bakery items sold without eating utensils) sold at room temperature through vending machines is not subject to sales or use tax. For example, vending machine sales of prepackaged gum, cookies, crackers and chips, at room temperature, are not subject to sales or use tax.

Milk, nonalcoholic beverages in sealed containers, and fresh fruit sold from vending machines are exempt from sales and use tax. See MCL 205.94d(2). Other food or drink which is heated or cooled mechanically, electrically, or by other artificial means to an average temperature above 75 degrees Fahrenheit or below 65 degrees Fahrenheit before sale, and sold from a vending machine, are subject to sales and use tax. See MCL 205.94d(2). For example, the sale of a chilled can of soda pop from a vending machine is not taxable, while the vending machine sale of hot coffee, dispensed into a cup, is subject to sales and use tax.

Sales or use tax due on the sale of food or drink from a vending machine selling both taxable items and exempt items is calculated based on one of the following methods, as determined by the taxpayer:

- (a) actual gross proceeds from sales at retail;
- (b) 45% of proceeds from the sale of items subject to tax under the General Sales Tax Act or the Use Tax Act or exempt from tax under the General Sales Tax Act or the Use Tax Act, other than from the sale of carbonated beverages.

14. Miscellaneous – Federal Food Stamp Program.

The General Sales Tax Act and the Use Tax Act include provisions referencing the federal food stamp program, and exempt the following items from sales tax and from use tax:

- A. food purchased under the federal food stamp program;
- B. meals eligible to be purchased with food stamps and sold by a person not subject to sales tax, or to use tax on their purchases (e.g., Meals-on-Wheels meals);
- C. fruit or vegetable seeds, and fruit or vegetable plants, if purchased at a business authorized to accept food stamps by the food and nutrition service of the U.S. Department of Agriculture, or if purchased at a business that has made a complete and proper application for authorization to accept food stamps but has been denied authorization and provides proof of denial to the Department of Treasury.

For example, the purchase of a raspberry plant at a qualifying business would be exempt from sales and use tax, while the purchase of an ornamental flowering plum tree would be taxable. The purchase of carrot seeds at a qualifying business would be exempt from sales and use tax, while the purchase of zinnia seeds would be taxable.

Other purchases made by the federal government pursuant to federally-authorized programs are exempt from sales tax and from use tax.

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