



**House  
Legislative  
Analysis  
Section**

Olds Plaza Building, 10th Floor  
Lansing, Michigan 48909  
Phone: 517/373-6466

**SALES TAX: BAKERY PRODUCTS**

**House Bill 4222 (Substitute H-1)  
First Analysis (2-28-95)**

**Sponsor: Rep. Kirk A. Profit  
Committee: Tax Policy**

***THE APPARENT PROBLEM:***

Generally speaking, food is exempt from the sales tax unless it is prepared food intended for immediate consumption, in which case it is taxable. (The exemption was created by an amendment to the constitution in 1974.) The General Sales Tax Act contains a definition of "prepared food intended for immediate consumption." Included as an element in the definition are food and drink sold from a vending machine or by a vendor from a mobile facility, except for milk, juices, fresh fruit, candy, nuts, chewing gum, cookies, crackers, and chips. This means those listed products are not subject to the sales tax, but other food products sold from a vending machine or mobile facility (e.g., a lunch wagon) are taxable. The list of tax-exempt items was added by 1978 legislation. A separate provision, which was in the original 1974 food exemption act, states that "prepared food intended for immediate consumption does not include bakery products for off premise consumption, such as doughnuts, pastry, bread, and cakes . . ." This provision exempts bakery products consumed off the premises from the sales tax. The issue arises as to how to treat bakery products sold from vending machines (and mobile facilities).

The vending machine trade association asserts the following. From 1974 through 1980, vending machine operators paid sales tax on bakery products sold from vending machines. In 1980, however, an attorney general's opinion applied the bakery exemption to bakery products in vending machines. The treasury department refunded sales tax payments made on bakery items by vending machine operators between 1974 and 1990 when requested to do so. Then, the audit of one operator in 1991 produced a query by auditors that in turn led to a revenue administrative bulletin from the Department of Treasury (RAB 91-18 of November 26, 1991) advising that bakery items sold from vending machines were taxable, although back taxes would not be assessed for sales prior to January 1, 1992. (The revenue bulletin said, "Bakery items

sold through vending machines or from mobile facilities are taxable unless purchased for off-premises consumption. The burden of establishing off-premise consumption is upon the person claiming the exemption.") A subsequent effort by a vending machine operator in 1992 to claim a sales tax refund on bakery products sold in January of 1992 was not successful. The outcome has been described as tantamount to a tax increase on vending machine operators enacted not by the legislature but by state tax administrators.

A spokesperson for the Department of Treasury told the House Tax Policy Committee that the department had always held the same position on the taxing of bakery products sold from vending machines throughout the long history of the dispute. A January 1993 Court of Claims ruling (Variety Foodservices, Inc. versus the Department of Treasury) upheld the view of the department's 1991 revenue bulletin on the subject, the department said. In the transcript of that decision, delivered orally by an Ingham County Circuit Court judge, the judge said, in reference to the list of exempted food products, "Had the legislature desired to put in bakery products, they could very well have done so and done so very easily." He also said, regarding the relationship between the provision specifically aimed at vending machines and the provision aimed at bakery products in general, "And I do not . . . find there to be the conflict of the two sections as claimed by the plaintiffs [the vending machine operators]." The decision also provided an expansive view of what should constitute "premises" in the case of vending machine locations (beyond the machine itself to the premises that the operators have an exclusive right to serve), suggested that the purpose of vending machines was to satisfy an immediate desire, and said the burden of proof was on vending machine operators to demonstrate which products were consumed on premises and which off premises.

House Bill 4222 (2-28-95)

The issue is now before the legislature in the form of a proposal to specifically exempt bakery products sold from vending machines and from mobile facilities from the state sales tax.

### **THE CONTENT OF THE BILL:**

The bill would amend the General Sales Tax Act to exempt bakery products from the sales tax when sold from a vending machine or by a vendor from a mobile facility.

MCL 205.54g

### **FISCAL IMPLICATIONS:**

A fiscal note from the House Fiscal Agency says that data on sales of this type are very limited. Its preliminary estimate is of a revenue loss of \$500,000. (2-21-95)

### **ARGUMENTS:**

#### **For:**

Is it fair that a product (for example, a Twinkie or doughnut) should be taxable when purchased from a vending machine but not when purchased from a convenience store, grocery store, or bakery? Why should vending machine operators have to collect or pay a tax when their natural competitors do not? This bill would level the playing field as far as bakery products are concerned. It will, industry spokespersons say, restore the sales tax treatment of baked goods bought from vending machines to that which existed throughout the 1980s. It will overturn a tax increase that was levied on vending machine operators essentially by a change in policy by state administrators. Tax law should be written by the legislature and not by administrative fiat. (Some critics say new interpretations of old laws are a major source of tax increases.) One provision of the sales tax act says bakery products should not be taxed if they are consumed off the premises. How could a bakery product from a vending machine be consumed on the premises? By sitting on the machine? Food from a vending machine should be treated in the same manner as food purchased in a convenience store and not the same as food from a restaurant. The bill would clear up an unnecessarily confusing application of sales tax law. It also has the potential of saving taxpayers hundreds of thousands of dollars each year.

#### **Against:**

The bill would overturn not only the judgment of state tax administrators as to how the sales tax law should be interpreted but also a decision by the court of claims. The bill would substantively change the sales tax act and not merely correct a misinterpretation. And, it will begin the process of further eroding this section of the sales tax law. Proposals will undoubtedly be made to add to the list of exempted products on the false grounds of equal treatment, when the act originally intended for all food and drink from vending machines (and mobile facilities) to be subject to the sales tax without exception. At first, sales from vending machines were treated like food and drink ordinarily sold on a takeout basis, which is taxable whether consumed on or off the premises. As the list of exempted products grows, it becomes ever more difficult to refuse to add others. In the process, the tax becomes more arbitrary and less defensible. Eventually, the tax on food and drink from vending machines will simply disappear.

#### **Against:**

If part of the problem is the confusion over how products are treated (taxable if from one place, exempt if from another) and over which products qualify for exemptions (cookies but maybe not brownies, chips but maybe not pretzels?), perhaps the best approach would be to eliminate all exemptions and tax all products in vending machines. Adding specific products to the exemption is likely to cause more confusion, not less.

#### **Response:**

The basic disparity would then still remain between snack products bought in convenience stores and those purchased from vending machines and between bakery products purchased from a bakery or doughnut shop for off-premises consumption and those purchased for off-premises consumption from a vending machine.

### **POSITIONS:**

The Michigan Distributors and Vendors Association supports the bill. (2-23-95)

The Department of Treasury is opposed to the bill. (2-23-95)