

# HOUSE BILL NO. 4635

April 14, 2021, Introduced by Rep. Thanedar and referred to the Committee on Tax Policy.

A bill to amend 1937 PA 94, entitled  
"Use tax act,"  
by amending section 4d (MCL 205.94d), as amended by 2015 PA 172.

## **THE PEOPLE OF THE STATE OF MICHIGAN ENACT:**

1       Sec. 4d. (1) The following are exempt from the tax under this  
2 act:  
3       (a) Sales of drugs for human use that can only be legally  
4 dispensed by prescription, over-the-counter drugs for human use  
5 that are legally dispensed by prescription, or food or food

1 ingredients, except prepared food intended for immediate human  
2 consumption. As used in this subdivision, "over-the-counter drug"  
3 means a drug that is labeled in accordance with the format and  
4 content requirements required for labeling over-the-counter drugs  
5 under 21 CFR 201.66.

6 (b) The deposit on a returnable container for a beverage or  
7 the deposit on a carton or case that is used for returnable  
8 containers.

9 (c) Food or tangible personal property purchased under the  
10 federal food stamp program or meals sold by a person exempt from  
11 the tax under this act eligible to be purchased under the federal  
12 food stamp program.

13 (d) Fruit or vegetable seeds and fruit or vegetable plants if  
14 purchased at a place of business authorized to accept food stamps  
15 by the Food and Nutrition Service of the United States Department  
16 of Agriculture or a place of business that has made a complete and  
17 proper application for authorization to accept food stamps but has  
18 been denied authorization and provides proof of denial to the  
19 department. ~~of treasury.~~

20 (e) Live animals purchased with the intent to be slaughtered  
21 for human consumption.

22 (2) Food or drink heated or cooled mechanically, electrically,  
23 or by other artificial means to an average temperature above 75  
24 degrees Fahrenheit or below 65 degrees Fahrenheit before sale and  
25 sold from a vending machine, except milk, nonalcoholic beverages in  
26 a sealed container, and fresh fruit, is subject to the tax under  
27 this act. The tax due under this act on the sale of food or drink  
28 from a vending machine selling both taxable items and items exempt  
29 under this subsection shall be calculated under this act after

December 31, 1994 based on 1 of the following as determined by the taxpayer:

(a) Actual gross proceeds from sales at retail.

(b) Forty-five percent of proceeds from the sale of items subject to tax under this act or exempt from the tax levied under this act, other than from the sale of carbonated beverages.

(3) "Food and food ingredients" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. Food and food ingredients do not include alcoholic beverages and tobacco.

(4) "Prepared food" means the following:

(a) Food sold in a heated state or that is heated by the seller.

(b) Two or more food ingredients mixed or combined by the seller for sale as a single item.

(c) Food sold with eating utensils provided by the seller, including, **but not limited to**, knives, forks, spoons, glasses, cups, napkins, straws, or plates, but not including a container or packaging used to transport the food. **As used in this subdivision:**

(i) **"Food sold with eating utensils provided by the seller" means food sold by a seller who meets the requirements of sub-subparagraph (A) or (B), but does not include food described in sub-subparagraph (C):**

**(A) For a seller with a prepared food sales percentage of greater than 75%, the seller makes eating utensils available to purchasers or, if a food item has 4 or more servings packaged as 1 food item sold for a single price, the seller gives or hands the eating utensils to purchasers. Serving sizes must be determined**

1 based on a label on an item sold or, if no label is available, then  
2 a seller shall determine the reasonable number of servings in an  
3 item.

4 (B) For a seller with a prepared food sales percentage of 75%  
5 or less, the seller's business practice is to give or hand eating  
6 utensils to purchasers. Eating utensils necessary for the purchaser  
7 to receive the food, such as bowls and cups, need only be made  
8 available to purchasers.

9 (C) Except as provided in sub-subparagraph (A) or (B), food is  
10 not sold with eating utensils provided by the seller if the food  
11 items have a utensil placed in a package with the food items by a  
12 person other than the seller, and that other person's NAICS  
13 classification code is that of a manufacturer, subsector 311. If  
14 the packager has any other NAICS classification code, the seller is  
15 considered to have provided the eating utensil.

16 (ii) "Prepared food sales percentage" means the percentage  
17 described in sub-subparagraph (A) and calculated pursuant to sub-  
18 subparagraph (B):

19 (A) A percentage determined by dividing the numerator  
20 described in sub-sub-subparagraph (I) by the denominator described  
21 in sub-sub-subparagraph (II):

22 (I) The numerator must consist of the seller's annual sales of  
23 prepared food described in subdivisions (a) and (b) and food sold  
24 when plates, bowls, glasses, or cups are necessary to receive the  
25 food. The numerator must not include food described in subsection  
26 (5) or alcoholic beverages.

27 (II) The denominator must consist of the seller's total annual  
28 sales of all food and food ingredients and prepared food, excluding  
29 alcoholic beverages.

(B) A seller shall calculate the prepared food sales percentage for each tax year or business fiscal year, based on the seller's sales data from the prior tax year or business fiscal year, respectively, as soon as possible after accounting records are available, but not later than 90 days after the beginning of the seller's tax year or business fiscal year. A single prepared food sales percentage must be determined annually for all of the seller's establishments in this state. A seller shall make a good-faith estimate of its prepared food sales percentage for its first year in business. A seller shall adjust its good-faith estimate prospectively after the first 3 months of its business operation if actual prepared food sales percentages materially affect the 75% threshold described in subparagraph (i).

(5) Prepared food does not include the following:

(a) Food that is only cut, repackaged, or pasteurized by the seller.

(b) 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.

(c) Food sold in an unheated state by weight or volume as a single item, without eating utensils. **As used in this subdivision:**

(i) "Food sold in an unheated state by weight or volume as a single item" means food sold in an unheated state and the sales price of which is determined by multiplying its per unit price by its weight or volume.

(ii) "Volume" means a 3-dimensional measure, expressed in units

1    such as pints, quarts, cubic centimeters, or liters.

2           (iii) "Weight" means a measure of heaviness, expressed in units  
3    such as pounds or grams.

4           (d) Bakery items, including bread, rolls, buns, biscuits,  
5    bagels, croissants, pastries, doughnuts, danish, cakes, tortes,  
6    pies, tarts, muffins, bars, cookies, and tortillas, sold without  
7    eating utensils.

8           (6) "Prepared food intended for immediate consumption" means  
9    prepared food.