

USE TAX ACT (EXCERPT)
Act 94 of 1937

205.94d Exemptions; food or drink from vending machines; definitions.

Sec. 4d. (1) The following are exempt from the tax under this act:

(a) Sales of drugs for human use that can only be legally dispensed by prescription, over-the-counter drugs for human use that are legally dispensed by prescription, or food or food ingredients, except prepared food intended for immediate human consumption. As used in this subdivision, "over-the-counter drug" means a drug that is labeled in accordance with the format and content requirements for over-the-counter drug product labeling under 21 CFR 201.66.

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

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

(d) Fruit or vegetable seeds and fruit or vegetable plants if purchased at a place of business authorized to accept food stamps by the Food and Nutrition Service of the United States Department of Agriculture or a place of 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.

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

(2) Food or drink 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, except milk, nonalcoholic beverages in a sealed container, and fresh fruit, is subject to the tax under this act. The tax due under this act on the sale of food or drink from a vending machine selling both taxable items and items exempt 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) As used in this section:

(a) "Bottled water" means water that is placed in a safety sealed container or package for human consumption, including water that is delivered to the buyer in a reusable container that is not sold with the water. Bottled water is calorie-free and does not contain sweeteners or other additives except that it may contain antimicrobial agents, fluoride, carbonation, vitamins, minerals, and electrolytes, oxygen, preservatives, and only those flavors, extracts, or essences derived from a spice or fruit.

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

(c) "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.

(d) "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 and the sales price of which varies based on its weight or volume.

(e) "Food sold with eating utensils provided by the seller" means food sold by a seller who meets the requirements of subparagraph (i) or (ii), but does not include food described in subparagraph (iii):

(i) 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 is bottled water, candy, or soft drinks, the seller gives or hands the eating utensils to purchasers or makes plates, bowls, glasses, or cups that are necessary for the purchaser to receive the food available to purchasers. If a food item has 4 or more servings packaged as 1 food item sold for a single price, the seller must give or hand the eating utensil to the purchaser. Serving sizes must be determined based on a label on an item sold, or if no label is available, then a seller shall determine the reasonable number of servings in an item.

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

(iii) Food is not sold with eating utensils provided by the seller if the food items have a utensil placed in a package with the food items by a person other than the seller, and that other person's NAICS classification

code is that of a manufacturer, subsector 311. If the packager has any other NAICS classification code, the seller is considered to have provided the eating utensil.

(f) "Prepared food", subject to subdivision (g), means the following:

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

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

(iii) 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.

(g) Prepared food does not include the following:

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

(ii) 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.

(iii) Food sold in an unheated state by weight or volume as a single item, without eating utensils.

(iv) 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.

(h) "Prepared food intended for immediate consumption" means prepared food.

(i) "Prepared food sales percentage" means the percentage described in subparagraph (i) and calculated pursuant to subparagraph (ii):

(i) A percentage determined by dividing the numerator described in sub-subparagraph (A) by the denominator described in sub-subparagraph (B):

(A) The numerator must consist of the seller's annual sales of prepared food described in subdivision (f)(i) and (ii) and food sold when plates, bowls, glasses, or cups are necessary to receive the food. The numerator must not include food described in subdivision (g) or alcoholic beverages.

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

(ii) 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 subdivision (e).

(j) "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 greater than 50% of vegetable or fruit juice by volume.

(k) "Volume" means a 3-dimensional measure, expressed in units such as pints, quarts, cubic centimeters, or liters.

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

History: Add. 1974, Act 309, Eff. Jan. 1, 1975;—Am. 1978, Act 276, Imd. Eff. July 3, 1978;—Am. 1987, Act 120, Eff. Oct. 1, 1987;—Am. 1992, Act 267, Imd. Eff. Dec. 14, 1992;—Am. 2000, Act 328, Eff. Oct. 1, 2001;—Am. 2004, Act 172, Eff. Sept. 1, 2004;—Am. 2008, Act 439, Imd. Eff. Jan. 9, 2009;—Am. 2015, Act 172, Imd. Eff. Nov. 3, 2015;—Am. 2023, Act 141, Eff. Feb. 13, 2024.