

**MICHIGAN DEPARTMENT OF TREASURY
REVENUE ADMINISTRATIVE BULLETIN 2022-4**

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SALES AND USE TAX – FOOD FOR HUMAN CONSUMPTION

(Replaces Revenue Administrative Bulletin 2009-8)

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 2022-4. This Revenue Administrative Bulletin (“RAB”) explains the sales and use tax treatment of food and prepared food. This RAB updates and replaces RAB 2009-8. This RAB includes additional examples and updates this guidance based on the Michigan Court of Appeals’ published decision in *Emagine Entertainment, Inc., et. al. v Dep’t of Treasury*.¹

The General Sales Tax Act and Use Tax Act (collectively “Acts”) generally impose tax, respectively, on the sale and the use, storage, or consumption of tangible personal property, and certain enumerated services.² The Michigan Constitution and the Acts expressly exempt food and food ingredients from these taxes.³ However, prepared food is excepted from this exemption and is subject to sales and use tax.⁴

“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.⁵ “Alcoholic beverages” are beverages suitable for human consumption that contain 0.5% or more of alcohol by volume.⁶ “Tobacco” includes cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.⁷

¹ 334 Mich App 658 (2020). Specifically, *Emagine* invalidated the portion of Rule 86, Mich Admin Code, R 205.136, that deemed eating utensils to be provided by the seller if merely made available to the purchaser if the seller’s percentage of prepared food sales exceeded 75%. As a result of that decision, eating utensils are now only provided by the seller as described in this RAB.

² MCL 205.52(1) and MCL 205.93(1).

³ Const of 1963, Art IX, Sec 8; MCL 205.54g(1) and MCL 205.94d(1).

⁴ MCL 205.54g(1) and MCL 205.94d(1). “Prepared food intended for immediate consumption” means prepared food under the Acts. MCL 205.54g(6) and MCL 205.94d(6).

⁵ MCL 205.54g(3) and MCL 205.94d(3).

⁶ MCL 205.51a(a) and MCL 205.92b(a).

⁷ MCL 205.51a(s) and MCL 205.92b(r).

“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.⁸

Generally, an “eating utensil” is a tool, instrument, or item used or intended to be used to facilitate the eating of food including, but 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 used to transport food rather than used to facilitate the eating of food and is not considered to be an “eating utensil.”⁹

Prior to the Court of Appeals’ decision in *Emagine*, the Department’s Rule 86(5)(b) governed when eating utensils were considered provided by the seller. Rule 86(5)(b) required sellers to calculate a prepared food sales percentage (a ratio of prepared food sales to total food sales) to determine when eating utensils were considered to be provided to its customers. If a seller’s prepared food sales percentage was greater than 75% and it made eating utensils available to its customers, it was considered to have provided eating utensils to its customers and all its food sales would be subject to tax. If a seller’s prepared food sales percentage was 75% or less, the seller needed to physically give the utensil to the customer for it to be considered to have provided eating utensils to its customer.

The decision in *Emagine* invalidated Rule 86(5)(b)’s 75% test and used dictionary definitions to determine when eating utensils are “provided by the seller.”¹⁰ Under *Emagine*, food is considered sold with eating utensils provided by the seller only if the utensils “specifically accompany the food or [are] added to it.”¹¹ This generally means that the seller’s practice must be to physically hand eating utensils to its customers, provide utensils necessary to receive the food (such as a bowl at a salad bar or a cup for a fountain soft drink), or include utensils within the packaging that contains the food.¹² However, if the only eating utensil provided with the food is placed in the package with the food by a person¹³ with a North American Industry Classification System (NAICS) classification code of manufacturer (311), the seller is not considered to have provided eating utensils with the food. For a packager with any other NAICS classification, including caterers, the placement of an eating utensil in the package with the food does constitute the seller

⁸ MCL 205.54g(4) and 205.94d(4).

⁹ Mich Admin Code, R 205.136(5)(a).

¹⁰ The court did not invalidate any other part of Rule 86.

¹¹ *Emagine Entertainment, Inc., supra*, at 725.

¹² Mich Admin Code, R 205.136(5)(d).

¹³ “Person” means an individual, firm, partnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether organized for profit or not, company, estate, trust, receiver, trustee, syndicate, the United States, this state, county, or any other group or combination acting as a unit, and includes the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. MCL 205.51(1)(a) and MCL 205.92(a).

providing eating utensils.¹⁴

“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.¹⁵

“Weight” is “a measure of heaviness, expressed in units such as pounds or grams;” “volume” is “a 3-dimensional measure, expressed in units such as pints, quarts, cubic centimeters, or liters.”¹⁶ An item is sold by weight or volume as a single item when the sales price is determined by multiplying its per unit price by the item’s weight or volume.¹⁷ An item is not sold by weight or volume as a single item merely because it states a weight or volume on the packaging; rather, the sales price of the item must vary based on its weight or volume.

If an item otherwise falls within the definition of “prepared food” outlined above, and **that item is described in one of the exclusions to “prepared food” enumerated above, 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. Even though the chicken was earlier “heated by the seller,” when sold in an unheated state by weight the cold fried chicken is not “prepared food.” However, if eating utensils are provided by the seller as described above with food that is sold in an unheated state by weight or volume as a single item or bakery items, the sale is subject to tax as prepared food. Sales of raw eggs, fish, meat, poultry, and foods containing those raw items requiring cooking by the consumer and food that is only cut, repackaged, or pasteurized by the seller are not taxable even if the seller provides eating utensils as described above.

Example 1: ABC operates a movie theater and sells prepackaged candy bars at its concessions. ABC makes eating utensils available to its customers at a kiosk. ABC’s sales of candy bars are not taxable prepared food.

Example 2: Assume the same facts as Example 1, however, instead of making utensils available at a kiosk, ABC’s practice is to physically hand a napkin to each customer that purchases food, including sales of prepackaged candy bars. The sale is taxable prepared food because it is sold with an eating utensil.

¹⁴ Mich Admin Code, R 205.136(5)(d).

¹⁵ MCL 205.54g(5) and 205.94d(5).

¹⁶ Mich Admin Code, R 205.136(4)(b)(iii)(A) and (B).

¹⁷ Mich Admin Code, R 205.136(4)(b)(iii)(C).

Example 3: ABC operates a movie theater and sells sealed soda bottles and fountain soft drinks. ABC makes eating utensils available to its customers at a kiosk. The sales of the sealed soda bottles are exempt; however, the fountain soft drinks are taxable because the utensil (a cup containing the fountain soft drink) is required to provide the beverage.

Example 4: XYZ is a doughnut shop. When XYZ sells a box of doughnuts it places napkins in the box. The sale of the doughnuts is taxable as prepared food because it is sold with eating utensils provided by the seller.

Example 5: ABC purchases prepackaged salads from a vendor that is not classified with a NAICS code of “manufacturer” for sale at its convenience store. The prepackaged salads contain a disposable fork and napkin packet in the container. The sale of the salad by ABC is taxable as prepared food because eating utensils are in the packaging and the vendor’s NAICS code is not that of a manufacturer.

Example 6: ABC purchases frozen ice cream cups from a dairy products manufacturer for sale at its convenience store. Each of the ice cream cups, as manufactured, contains a wooden spoon to consume the ice cream directly from the cup. Because the utensil is included in the packaging by the manufacturer (NAICS classification code 311), the seller is not considered to have provided the eating utensil with the food; thus, the food is not taxable prepared food.

Example 7: Grocery Store makes dill dip by combining multiple ingredients and sells it without eating utensils. Grocery Store sells the dill dip based on the per pound weight of the dip at a price of \$5/pound. If a customer purchased 1.5 pounds of dip, the price is \$7.50 (\$5/pound x 1.5 pounds), whereas a pound of dip is sold for \$5 (\$5/pound x 1 pound). Even though Grocery Store combined two or more ingredients into a single item (ordinarily making it prepared food), the dill dip is not taxable prepared food because it is sold by weight in which the sales price varies by weight.

Example 8: Assume the same facts as Example 7, but Grocery Store sells containers of dill dip for \$3.99. Each container is 16 ounces, but the price is not established, and does not vary, by weight (product of price/ounce and number of ounces). The dill dip is subject to tax as prepared food because the seller combined two or more ingredients and it was not sold by weight or volume.

Example 9: Grocery Store purchases meats and cheeses, cuts and repackages them into deli trays, and sells them with eating utensils. Because Grocery Store only cut and repackaged the food it is not subject to tax as prepared food even though it provided eating utensils.

The following is an analysis of the taxability of various food items. *Any food items described below as not taxable are taxable if the seller provides an eating utensil with the food as described above except raw eggs, fish, meat, poultry, and foods containing those raw items requiring cooking by the consumer and food that is only cut, repackaged, and pasteurized by the seller.*

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.¹⁸ “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 1 or more of the following:

- Antimicrobial agents.
- Fluoride.
- Carbonation.
- Vitamins, minerals, and electrolytes.
- Oxygen.
- Preservatives.
- Only those flavors, extracts, or essences derived from a spice or fruit.¹⁹

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 thus not taxable. The seller is liable for sales tax if this presumption is overcome, and the seller cannot establish that the ice was sold for human ingestion.

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

4. Bakery Items.

Bakery items (including, but not limited to, bread, rolls, buns, biscuits, bagels, croissants, pastries, doughnuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas) sold

¹⁸ MCL 205.54d(d) and 205.94(1)(q).

¹⁹ Mich Admin Code, R 205.127(3).

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 an eating 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 it is not 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. For example, if a seller-prepared container of cold macaroni salad is sold by the pound, which sales prices varies 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.

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 with foods such 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, even if 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 without eating utensils and in an unheated state by weight or volume as a single item the sales price of which varies by such weight or volume.

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 if they 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) is not “prepared food” and thus 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 (e.g., a napkin) is 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 the price of which varies by the weight and without eating utensils; and a prepackaged cookie or bag of chips, sold without a napkin or other eating utensil.

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 of 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 heated after purchase 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 and 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. 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, the price of which varies by the weight or volume, is nontaxable, unless sold with an eating utensil.

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, the price of which varies by the weight or volume, and without eating utensils are nontaxable.

13. Food Sold through Vending Machines.

Food that is not “prepared food” (including, for example, bakery items sold without eating utensils) and that is 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. Food or drink other than milk, nonalcoholic beverages in sealed containers, and fresh fruit 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.²⁰ For example, the sale of a chilled can of soda pop from a vending machine is not taxable, while a 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; or,
- (b) 45% of proceeds from the sale of items subject to tax or exempt from tax under the Acts, other than from the sale of carbonated beverages.²¹

14. Miscellaneous – Federal Food Stamp Program.

The Acts exempt the following items from sales tax and use tax:

- a. Food purchased under the federal Supplemental Nutrition Assistance Program (SNAP) (previously known as food stamps).

²⁰ MCL 205.54g(2) and MCL 205.94d(2)

²¹ MCL 205.54g(2)(a) and (b) and MCL 205.94d(2)(a) and (b).

- b. Meals eligible to be purchased with an Electronic Benefit Transfer (EBT) card/food stamps and sold by a person not subject to sales tax or use tax on their purchases (e.g., Meals-on-Wheels meals).²²
- 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 Treasury.²³

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, instrumentalities of the federal government, the red cross, the State of Michigan, or political subdivisions of Michigan (e.g., local governments) are also exempt from sales tax and from use tax.²⁴

²² MCL 205.54g(1)(c) and MCL 205.94d(1)(c).

²³ MCL 205.54g(1)(d) and MCL 205.94d(1)(d).

²⁴ MCL 205.54h and MCL 205.94(1)(g).