

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In this Box

**FILED**

2005 DEC 22 P 3:51

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE  
AND  
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: State Tax Department TITLE NUMBER: 110

CITE AUTHORITY W. Va. Code §§ 11-10-5 and 11-15-3a

AMENDMENT TO AN EXISTING RULE: YES \_\_\_\_\_ NO X

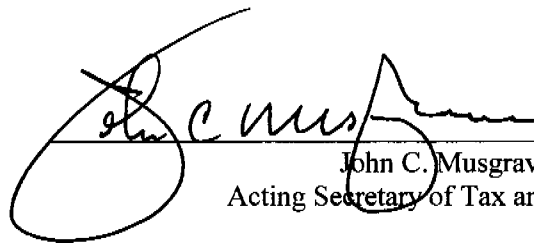
IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 15H

TITLE OF RULE BEING PROPOSED: Consumers Sales and Service Tax and Use Tax - Reduced Sales Tax on Food.

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



John C. Musgrave  
Acting Secretary of Tax and Revenue

#6.20

**FISCAL NOTE FOR AGENCY APPROVED RULES**Rule Title: Consumers Sales and Service Tax and Use Tax - Reduced Sales Tax on FoodType of Rule:  Legislative  Interpretive  ProceduralAgency: State Tax DepartmentAddress: Legal Division  
P.O. Box 1005  
Charleston, WV 25324-1005Phone Number: 558-5330 Email: JMontgomery@tax.state.wv.us**Fiscal Note Summary**

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

Effective January 1, 2006, the Consumers Sales and Service Tax and Use Tax on the sales, purchases and uses of food and food ingredients intended for human consumption is reduced to 5%. Since the tax rate will be lowered, State revenue will be reduced. The State Tax Department will incur additional costs to notify taxpayers and the public of the change in the tax rate.

**Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	\$14,851		
Personal Services			
Current Expenses	\$14,851		
Repairs & Alterations			
Assets			
Other			
2. Estimated Total Revenues	-\$10,200,000	-\$25,000,000	-\$25,000,000

Rule Title: Consumers Sales and Service Tax and Use Tax - Reduced Sales Tax on Food

**3. Explanation of above estimates (including long-range effect):**

Please include any increase or decrease in fees in your estimated total revenues.

According to our interpretation, enactment of the reduced tax rate on food will result in a loss to the General Revenue Fund of roughly \$10.2 million in the current fiscal year (i.e., FY2006) and about \$25 million each year thereafter. Since the tax rate reduction is effective January 1, 2006, the revenue impact on FY2006 is limited.

Since the reduced tax rate does not apply to "prepared food," the State Tax Department incurred additional administrative costs to print and mail a Special Notice concerning the definitions, with examples, of "food" and "prepared food" to 8,141 taxpayers likely to make food sales. Additionally, the State Tax Department held eight seminars throughout the State to explain the tax reduction and the items to which it applies. Costs related to the seminars included advertising to inform the public of the date, time and place of the meeting, seminar room rental and travel expenses of State Tax Department personnel making the presentations.

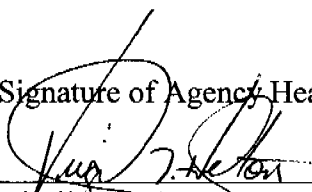
**MEMORANDUM**

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Not applicable.

Date: December 22, 2005

Signature of Agency Head or Authorized Representative

  
\_\_\_\_\_  
Virgil T. Helton  
Acting State Tax Commissioner

**QUESTIONNAIRE**

*(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)*

DATE: December 23, 2005

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) State Tax Department

P. O. Box 1005

Charleston, WV 25324-1005, (304)558-5330

EMERGENCY RULE TITLE: Consumers Sales and Service Tax and Use Tax - Reduced Sales on Food

1. Authorizing statute(s) citation W. Va. Code §§ 11-10-5 and 11-15-3a

2. a. Date filed in state Register with Notice of Hearing or Public Comment Period:  
November 18, 2005

b. What other notice, including advertising, did you give of the hearing:  
Held seminars throughout the State, prepared and filed Publication TSD-419, issued a press release.

c. Date of Public Hearing(s) or Public Comment Period ended:  
December 19, 2005

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.  
Attached \_\_\_\_\_ No comments received X

e. Date you filed in state Register the agency approved proposed Legislative Rule following public hearing: (be exact)  
December 23, 2005

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

John Montgomery, Managing Attorney, Legal Division, P. O. Box 1005,

Charleston, WV 25324-1005

State Capital, Telephone: (304) 558-5330

FAX (304) 558-8728

Jmontgomery@tax.state.wv.us

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taxing of evidence and a general description of the issues to be decided.

N/A

\_\_\_\_\_

\_\_\_\_\_

- b. Date of hearing or comment period:

N/A

\_\_\_\_\_

- c. On what date did you file in the State Register the findings and determinations required together with the reasons therefore?

N/A

\_\_\_\_\_

d. Attach findings and determinations and reasons:

Attached           N/A

**AGENCY APPROVED  
WEST VIRGINIA LEGISLATIVE RULE  
110 C.S.R. 15H  
CONSUMERS SALES AND SERVICE TAX AND USE TAX –  
REDUCED SALES TAX ON FOOD  
STATEMENT OF CIRCUMSTANCE**

The Legislature, on September 13, 2005, enacted H.B. 401 which reduced from 6% to 5% the Consumers Sales and Service Tax and Use Tax imposed on the sale of food and food ingredients intended for human consumption; however, this reduction does not apply to the sale of prepared food. As a result of the complexity involved in determining the application of the reduced Sales Tax, this legislative rule is needed.

**AGENCY APPROVED  
WEST VIRGINIA LEGISLATIVE RULE  
110 C.S.R.15H  
CONSUMERS SALES AND SERVICE TAX AND USE TAX –  
REDUCED SALE TAX ON FOOD  
RULE SUMMARY**

§ 110-15H-1. General.

§ 110-15H-2. Interpretive Note.

§ 110-15H-3. Definitions.

§ 110-15H-4. Reduction of Sales Tax on food and food ingredients.

§ 110-15H-5. Prepared food.

§ 110-15H-6. Bundled transactions.

Appendix A, Food Items

Appendix B, Prepared Food Items.

Appendix C, Other Items.

**PROPOSED  
WEST VIRGINIA LEGISLATIVE RULE  
STATE TAX DEPARTMENT  
TITLE 110  
SERIES 15H  
CONSUMERS SALES AND SERVICE TAX AND USE TAX –  
REDUCED SALES TAX ON FOOD**

**FILED**

2005 DEC 22 P 3:51

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**§ 110-15H-1. General.**

1.1. Scope. - This legislative rule explains and clarifies application of reduced Sales Tax imposed on the sale of food and food ingredients.

1.2. Authority. – West Virginia Code §§ 11-10-5 and 11-15-3a.

1.3. Filing date.

1.4. Effective date.

**§ 110-15H-2. Interpretive Note.**

2.1. This legislative rule incorporates by reference legislative rule 110 C.S.R. 15, Consumers Sales and Service Tax and Use Tax and shall be read in pari materia with that rule. The definitions, policies, and procedures provided in 110 C.S.R. 15 are equally applicable to purchases made under this emergency rule. To the extent that this legislative rule differs from 110 C.S.R. 15, then for the purposes of sales of food and food ingredients, this legislative rule governs. However, for all other purposes, 110 C.S.R. 15 governs the application of the Consumers Sales and Service Tax and Use Tax.

**§ 110-15H-3. Definitions.**

3.1. "Alcoholic beverages" means beverages that are suitable for human consumption and contain one half of one percent or more of alcohol by volume.

3.2. "Bundled transaction" means the retail sale of two or more products, except real property and services to real property, where the products are otherwise distinct and identifiable and the products are sold for one nonitemized price. A "bundled transaction" does not include the sale of any products in which the "sales price" varies, or is negotiable, based on the selection by the purchaser of the products included in the transaction.

3.2.1. "Distinct and identifiable products" does not include:

3.2.1.a. Packaging – such as containers, boxes, sacks, bags, and bottles – or other materials – such as wrapping, labels, tags, and instruction guides –

that accompany the "retail sale" of the products and are incidental or immaterial to the "retail sale" thereof. Examples of packaging that are incidental or immaterial include grocery sacks, shoeboxes, dry cleaning garment bags and express delivery envelopes and boxes;

3.2.1.b. A product provided free of charge with the required purchase of another product. A product is "provided free of charge" if the "sales price" of the product purchased does not vary depending on the inclusion of the product "provided free of charge"; or

3.2.1.c. Items included in the member state's definition of "sales price," as defined in this section.

3.2.2. The term "one nonitemized price" does not include a price that is separately identified by product on binding sales or other supporting sales-related documentation made available to the customer in paper or electronic form including, but not limited to, an invoice, bill of sale, receipt, contract, service agreement, lease agreement, periodic notice of rates and services, rate card, or price list.

3.2.3. A transaction that otherwise meets the definition of a "bundled transaction" is not a "bundled transaction" if it is:

3.2.3.a. The "retail sale" of tangible personal property and a service where the tangible personal property is essential to the use of the service, and is provided exclusively in connection with the service, and the true object of the transaction is the service; or

3.2.3.b. The "retail sale" of services where one service is provided that is essential to the use or receipt of a second service and the first service is provided exclusively in connection with the second service and the true object of the transaction is the second service; or

3.2.3.c. A transaction that includes taxable products and nontaxable products and the "purchase price" or "sales price" of the taxable products is de minimis.

3.2.3.c.1. "De minimis" means the seller's "purchase price" or "sales price" of the taxable products is ten percent or less of the total "purchase price" or "sales price" of the bundled products.

3.2.3.c.2. Sellers shall use either the "purchase price" or the "sales price" of the products to determine if the taxable products are de minimis. Sellers may not use a combination of the "purchase price" and "sales price" of the products to determine if the taxable products are de minimis.

3.2.3.d. Sellers shall use the full term of a service contract to determine if the taxable products are de minimis; or

3.2.3.e. A transaction that includes products taxable at the general rate of tax and food or food ingredients taxable at a lower rate of tax and the "purchase price" or "sales price" of the products taxable at the general sales tax rate is de minimis.

3.2.3.e.1. "De minimis" means the seller's "purchase price" or "sales price" if the products taxable at the general sales tax rate is ten percent or less of the total "purchase price" or "sales price" of the bundled products.

3.2.3.e.2. Sellers shall use either the "purchase price" or the "sales price" of the products to determine if the products taxable at the general rate of tax are de minimis. Sellers may not use a combination of the "purchase price" and "sales price" of the products to determine if the products taxable at the general rate of tax are de minimis.

3.2.3.e.3. Sellers shall use the full term of a service contract to determine if the products taxable at the general rate of tax are de minimis; or

3.2.3.f. The "retail sale" of exempt tangible personal property, or food and food ingredients taxable at a lower rate of tax, and tangible personal property taxable at the general rate of tax where:

3.2.3.f.1. The transaction includes "food and food ingredients", "drugs", "durable medical equipment", "mobility enhancing equipment", and "prosthetic devices" all as defined in West Virginia Code § 11-15B-1 et seq.; and

3.2.3.f.2. Where the seller's "purchase price" or "sales price" of the taxable tangible personal property, taxable at the general rate of tax, is fifty percent or less of the total "purchase price" or "sales price" of the bundled tangible personal property. Sellers may not use a combination of the "purchase price" and "sales price" of the tangible personal property when making the fifty percent determination for a transaction.

3.4. "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.

3.5. "Dietary supplement" means any product, other than "tobacco", intended to supplement the diet that:

3.5.1. Contains one or more of the following dietary ingredients:

3.5.1.a. A vitamin;

3.5.1.b. A mineral;  
3.5.1.c. A herb or other botanical;

3.5.1.d. An amino acid;

3.5.1.e. A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or

3.5.1.f. A concentrate, metabolite, constituent, extract or combination of any ingredient described in the foregoing paragraphs of this subdivision;

3.5.2. Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and

3.5.3. Is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box found on the label as required pursuant to 21 CFR §101.36, or in any successor section of the Code of Federal Regulations.

3.6. "Drug" means a compound, substance or preparation, and any component of a compound, substance or preparation, other than food and food ingredients, dietary supplements or alcoholic beverages:

3.6.1. Recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, and supplement to any of them;

3.6.2. Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans; or

3.6.3. Intended to affect the structure or any function of the human body.

3.7. "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" does not include alcoholic beverages, prepared food, or tobacco.

3.8. "Food sold through vending machines" means food dispensed from a machine or other mechanical device that accepts payment.

3.9. "Includes" and "including" when used in a definition contained in this article is not considered to exclude other things otherwise within the meaning of the term being defined.

3.10. "Person" means an individual, trust, estate, fiduciary, partnership, limited liability company, limited liability partnership, corporation or any other legal entity.

3.11. "Prepared food" means:

3.11.1. Food sold in a heated state or heated by the seller;

3.11.2. Two or more food ingredients mixed or combined by the seller for sale as a single item; or

3.11.3. Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food.

3.11.4. "Prepared food" does not include

3.11.4.a. Food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration in chapter 3, part 401.11 of its Food Code of 2001 so as to prevent food borne illnesses;

3.11.4.b. Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsection 3118 (bakeries);

3.11.4.c. Food sold in an unheated state by weight or volume as a single item; or

3.11.4.d. Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, tortillas.

3.12. "Product-based exemption" means an exemption based on the description of the product or service and not based on who purchases the product or service or how the purchaser intends to use the product or service.

3.13. "Purchase price" means the measure subject to the tax imposed by West Virginia Code §§ 11-15-1 et seq., or 11-15A-1 et seq., and has the same meaning as sales price.

3.14. "Purchaser" means a person to whom a sale of personal property is made or to whom a service is furnished.

3.15. "Retail sale" or "sale at retail" means:

3.15.1. Any sale or lease for any purpose other than for resale as tangible personal property, sublease or subrent; and

3.15.2. Any sale of a service other than a service purchased for resale.

3.16. "Sales price" means the measure subject to the Sales Tax and includes the total amount of consideration, including cash, credit, property and services, for which personal property or services are sold, leased or rented, valued in money, whether received in money or otherwise, without any deduction for the following:

3.16.1. The seller's cost of the property sold;

3.16.2. The cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;

3.16.3. Charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;

3.16.4. Delivery charges;

3.16.5. Installation charges;

3.16.6. The value of exempt personal property given to the purchaser where taxable and exempt personal property have been bundled together and sold by the seller as a single product or piece of merchandise; and

3.16.7. Credit for the fair market value of any trade-in.

3.16.7.a. "Sales price" does not include:

3.16.7.a.1. Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a seller and taken by a purchaser on a sale;

3.16.7.a.2. Interest, financing and carrying charges from credit extended on the sale of personal property, goods or services, if the amount is separately stated on the invoice, bill of sale or similar document given to the purchaser; and

3.16.7.a.3. Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale or similar document given to the purchaser.

3.17. "Sales tax" means the tax levied under West Virginia Code § 11-15-1 et seq.

3.18. "Seller" means any person making sales, leases or rentals of personal property or services.

3.19. "Service" or "selected service" includes all nonprofessional activities engaged in for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible personal property, but does not include contracting, personal services, services rendered by an employee to his or her employer, any service rendered for resale, or any service furnished by a business that is subject to the control of the Public Service Commission when the service or the manner in which it is delivered is subject to regulation by the Public Service Commission of this State. The term "service" or "selected service" does not include payments received by a vendor of tangible personal property as an incentive to sell a greater volume of such tangible personal property under a manufacturer's, distributor's or other third-party's marketing support program, sales incentive program, cooperative advertising agreement or similar type of program or agreement, and these payments are not considered to be payments for a "service" or "selected service" rendered, even though the vendor may engage in attendant or ancillary activities associated with the sales of tangible personal property as required under the programs or agreements.

3.20. "Soft drink" means nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" do not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of vegetable or fruit juice by volume.

3.21. "Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any manner perceptible to the senses. "Tangible personal property" includes, but is not limited to, electricity, steam, water, gas and prewritten computer software.

3.22. "Tax" includes all taxes levied under West Virginia Code §§ 11-15-1 et seq., or 11-15A-1 et seq., and additions to tax, interest and penalties levied under article ten of this chapter.

3.23. "Tax Commissioner" means the State Tax Commissioner or his or her delegate. The term "delegate" in the phrase "or his or her delegate", when used in reference to the Tax Commissioner, means any officer or employee of the State Tax Division duly authorized by the Tax Commissioner directly, or indirectly by one or more redelegations of authority, to perform the functions mentioned or described in West Virginia Code § 11-15A-1 et seq., or rules promulgated for West Virginia Code § 11-15A-1 et seq.

3.24. "Taxpayer" means any person liable for the taxes levied by West Virginia Code §§ 11-15-1 et seq., or 11-15A-1 et seq. or any additions to tax, penalties imposed by West Virginia Code §§ 11-10-1 et seq.

3.25. "Tobacco" means cigarettes, cigars, chewing or pipe tobacco or any other item that contains tobacco.

3.26. "Use tax" means the tax levied under West Virginia Code §11-15A-1 et seq.

3.27. "Use-based exemption" means an exemption based on the purchaser's use of the product or service.

3.28. "Vendor" means any person furnishing services taxed by West Virginia Code §§ 11-15-1 et seq., or 11-15A-1 et seq., or making sales of tangible personal property or custom software. "Vendor" and "seller" are used interchangeably in West Virginia Code §§ 11-15-1 et seq., and 11-15A-1 et seq.

#### **§ 110-15H-4. Reduction of Sales Tax on food and food ingredients.**

4.1. Effective January 1, 2006, the rate of Sales Tax and Use Tax is reduced to 5% on the sales, purchases and uses of food and food ingredients, as defined in Section 3 of this rule, intended for human consumption. However, the reduced rate of tax does not apply to sales, purchases and uses by consumers of prepared food.

4.2. A number of items sold by grocery stores, supermarkets, and similar type businesses are classified in this rule under the headings "Food Items" and "Prepared Food Items." Food Items fall within the definition of "food and food ingredients" and are subject to the Sales Tax at the reduced rate of 5%; a representative listing of Food Items is found in Appendix A of this rule.

4.2.1. Food items include food sold unheated by weight or volume as a single item.

4.2.2. Food items include food that is only cut, repackaged or pasteurized by the seller and eggs, fish, meat, poultry and foods containing these raw animal foods requiring cooking by the consumer such as meat from a deli counter, sliced and wrapped for a customer.

4.2.3. Food items include all food sold through a vending machine that is not prepared food.

4.2.4. Food items include all bakery items unless sold re-heated or with an eating utensil.

4.2.5. Food items include food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311.

4.3. The seller may elect to compute the Sales Tax due on a transaction on a per item basis or on an invoice basis provided the method used is consistently used during the reporting period.

4.4. The reduction in the amount of Sales Tax imposed on the sale of food and food ingredients may not affect the application of the exemption from Sales Tax provided in West Virginia Code § 11-15-9 for food purchased by an eligible person using food stamps, electronic benefits transfer cards or vouchers issued to individuals participating in the Federal Food Stamp Program, by whatever name it is called, or the Women, Infants and Children Program, or the application of any other exemption authorized in West Virginia Code §§ 11-15-1 et seq., or 11-15A-1 et seq.

#### **§ 110-15H-5. Prepared food.**

5.1. Prepared food, as defined in Section 2 of this rule, is food that is prepared by the seller for sale to the consumer. Generally, this does not include food prepared by the manufacturer and sold to the retailer or vendor. Prepared Food Items are subject to the Sales Tax at the regular rate of 6%; a representative listing of Prepared Food Items is found in Appendix B of this rule.

5.2. All food sold with eating utensils provided by the seller including plates, knives, forks, spoons, glasses, cups, napkins or straws falls within the classification of Prepared Food Items. Food is considered to be sold with eating utensils provided by the seller when the food is intended for consumption with the utensils provided.

5.2.1. Prepared Food Items therefore includes all food sold by an eating establishment that sells meals, sandwiches, or other food for consumption on or off the premises.

5.2.2. Prepared Food Items also includes self-service food such as salad bars or drink islands.

5.2.3. The presence of self-service utensils in a facility does not change Food Items (taxable at 5%) into Prepared Food Items (taxable at 6%) unless it is intended that the food be consumed with those utensils. Further, items provided solely pursuant to sanitary statutes or regulations and not for purposes of consumption do not qualify as utensils.

5.3. Prepared Food Items remain taxable at 6% if previously heated by the seller and are ready to eat without further cooking by the purchaser.

5.4. Two or more food ingredients that are mixed or combined by the seller and then sold as a single food item is included in Prepared Food Items.

5.5. Heated food sold in combination with unheated food is included in Prepared Food Items and taxable at 6%. For example, hot chicken prepared by the seller with a pint of potato salad that was not prepared by the seller is sold for a single price.

5.6. Prepared Food Items includes food sold by a seller whose proper primary NAICS classification is 311, food manufacturing (except subsector 3118, bakeries), if:

5.6.1. The food is sold with eating utensils provided by the seller; or

5.6.2. The food is sold in a heated state

5.6.3. If the manufacturer, rather than the seller, provides an eating utensil with the food, such food is not considered to be provided with eating utensils. For example, a box of crackers and cheese that includes a spreader is subject to the 5% rate because the spreader is not provided by the seller.

#### **§ 110-15H-6. Bundled transactions.**

6.1. When an item subject to the Sales Tax rate or the Use Tax rate of 6% is sold with an item subject to Sales Tax rate or the Use Tax rate of 5%, for a single non-itemized price, the purchase amount is subject to the Sales Tax rate or the Use Tax rate of 6%.

6.1.1. Example: Selling a pizza, breadsticks and a 2-liter bottle of soda all for the purchase price of \$14.99 (the pizza and breadsticks are Prepared Food and subject to the rate of 6%, and the bottle of soda is a Food Item and subject to the rate of 5%), the transaction is taxable at the rate of 6% of the purchase price, unless the price of the bottle of soda is separate from the price of the pizza and breadsticks. If separately itemized the soda would be taxable at the rate of 5% and the pizza and breadsticks at 6%.

6.1.2. Example: Popcorn prepared by the seller and sold with a drink and candy for one price is a bundled transaction subject to the 6% rate. However, if the popcorn, drink (if sold in a cup) and candy are sold individually, the popcorn and drink (in a cup) are subject to the 6% rate while the candy is subject to the 5% rate.

#### **APPENDIX A, FOOD ITEMS**

The Sales Tax rate and the Use Tax rate of 5% applies to the sale of food and food ingredients listed below if sold unheated, without eating utensils provided by the seller and the seller is not the manufacturer.

All food sold through a vending machine that is not a prepared food.

Baby food

Bakery items (including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas).

Baking chocolate (whether liquid, powder, or solid)  
Baking soda or other forms of leavening agents  
Beverages containing greater than 50% fruit or vegetable juice or containing milk, milk products or milk substitutes  
Broths and bouillons (whether liquid, instant, freeze dried, or cubes)  
Butter  
Candy and confections including breath mints  
Cereal and cereal products  
Cheese  
Chewing Gum  
Chip dip  
Chocolate covered nuts  
Cocoa  
Coconut (whether whole, shredded, sweetened, processed or raw)  
Coffee and coffee substitutes (coffee beans, ground coffee, freeze dried coffee, coffee in brewing bags and instant coffee)  
Condiments  
Cooking oil  
Cooking wine (that exceeds alcohol content of .5%, that is intended for use in cooking and that is not an alcoholic beverage)  
Dairy products  
Deli items when sold unheated by weight or volume as a single item  
Dietary supplements  
Dried fruit  
Eggs and egg products or substitutes  
Extracts and flavorings intended as a cooking ingredient  
Fish and fish products (including all other forms of seafood)  
Flour (including wheat, whole wheat, rye, corn, rice, barley, buckwheat, soy or other forms of milled grains or nuts)  
Food coloring  
Food sold by a seller whose primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries)  
Food sold unheated by weight or volume as a single item  
Food only sliced, repackaged, or pasteurized by the seller such as meat from a deli counter, sliced and wrapped for a customer  
Frozen meals such as pizza or french fries  
Fruit and fruit products (whether fresh, frozen, canned or dehydrated, but excludes fruit on salad bars)  
Fruit juices (including juices with 50% or less fruit juices)  
Gelatins (whether powdered or prepared)  
Gravies  
Herbs (seasonings)  
Honey  
Ice except block or dry ice (which remain taxable at 6%)  
Ice cream (including prepackaged novelties)  
Jams and jellies (including marmalades and preserves)

Ketchup  
Lard  
Margarine  
Marshmallows (including marshmallow crème)  
Meat and meat products (whether fresh, frozen, cured, canned, or dehydrated)  
Meatloaf - uncooked  
Milk and milk products  
Mustard  
Nuts (including salted nuts)  
Olive oil  
Packaged popcorn  
Pasteurized eggs  
Peanut butter  
Pepper  
Pickles  
Popsicles  
Powdered drink mixes (including sweetened mixes)  
Pumpkins except pumpkins decorated at the time of sale (which remain taxable at 6%)  
Relishes  
Salad dressings and mixes  
Salad purchased for resale and repackaged in smaller containers by the seller unless heated and/or sold with eating utensils  
Salads or other deli dishes unless heated and/or sold with eating utensils  
Salt except rock salt (which remains taxable at 6%)  
Sauces  
Seasonings  
Sherbets and sorbets  
Shortenings  
Soups  
Snack chips and pieces (includes potato chip or crisp type chips, corn chips, pork rinds, pretzels and trail mixes)  
Spices  
Sandwich spreads  
Soft drinks in bottles and cans  
Sugar, sugar products and sugar substitutes  
Sunflower seeds  
Syrups (including molasses and dietetic syrups and similar products)  
Tea (bags, leaves, or instant only)  
Vegetables and vegetable products (whether fresh, frozen, canned or dehydrated, but excludes food on salad bars)  
Vegetable oils  
Water

## **APPENDIX B, PREPARED FOOD ITEMS**

The Sales Tax rate and the Use Tax rate of 6% applies to the sale of prepared food items listed below if prepared by the seller:

- All food sold in a heated state or heated by the seller
- Bakery items if sold with eating utensils provided by the seller
- Bakery items sold in a heated state
- Cold soups, casseroles, beans, potatoes, etc.
- Combined raw meats - that do not require cooking
- Drinks prepared by the seller (coffee, tea, etc.)
- Fried chicken
- Frozen yogurt dispensed as cones, sundaes, etc.
- Fruits cut and combined by the seller (fruit tray)
- Ice cream novelties, cakes or pies
- Ice cream or ice milk dispensed as cones, sundaes, etc.
- Marinated raw meats - that do not require cooking
- Marinated raw seafood - that do not require cooking
- Party trays
- Rotisserie chicken
- Salad greens mixed by the seller
- Salads and deli items if heated and/or sold with eating utensils
- Sandwiches
- Soups, casseroles or meals sold warm
- Warmed nuts
- Vending machine sales of hot coffee, hot chocolate or other hot foods

## **APPENDIX C. OTHER ITEMS**

The Sales Tax rate and the Use Tax rate of 6% applies to the sale of the items listed below:

- Alcoholic beverages and nonintoxicating beer
- Cocktail mixes (dry or liquid)
- Cooking utensils
- Liver Oils
- Lozenges
- Over the counter medicines
- Paper products
- Pet food and supplies
- Soap and soap products
- Tobacco and tobacco products
- Tonics
- Toothpaste and mouthwash