

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND**

ADMINISTRATIVE LAW DIVISION

Form #4

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

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

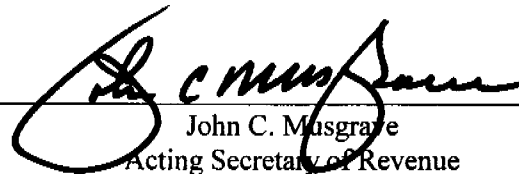
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

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, FOLLOWING REVIEW BY THE LEGISLATIVE
RULE MAKING REVIEW COMMITTEE IS HEREBY MODIFIED AS A RESULT OF REVIEW AND
COMMENT BY THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE. THE ATTACHED
MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.


John C. Musgrave
Acting Secretary of Revenue

#4.80

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

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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" of those products. 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;

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;

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;

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.

3.3. "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" does not include any preparation containing flour and requires no refrigeration.

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

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

3.4.1.a. A vitamin;

3.4.1.b. A mineral;

3.4.1.c. A herb or other botanical;

3.4.1.d. An amino acid;

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

3.4.1.f. A concentrate, metabolite, constituent, extract or combination of any ingredient described in paragraphs a through e of this subdivision;

3.4.2. 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

3.4.3. 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.

3.5. "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:

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

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

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

3.6. "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.

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

3.8. "NAICS" means North American Industry Classification Code.

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

3.10. "Prepared food" means:

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

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

3.10.3. 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.

3.10.4. "Prepared food" does not include

3.10.4.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;

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

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

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

3.11. "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.

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

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

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

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

3.14. "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:

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

3.14.2. 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;

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

3.14.4. Delivery charges;

3.14.5. Installation charges;

3.14.6. 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

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

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

3.14.7.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;

3.14.7.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

3.14.7.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.

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

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

3.17. "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.

3.18. "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.

3.19. "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.

3.20. "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.

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

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

3.23. "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 they are 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 are 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, the 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