

## **INFORMATION BULLETIN #11**

### **SALES TAX**

**NOVEMBER 2011**

**(Replaces Bulletin #11 dated December 2002)**

**DISCLAIMER:** Information bulletins are intended to provide nontechnical assistance to the general public. Every attempt is made to provide information that is consistent with the appropriate statutes, rules and court decisions. Any information, which is not consistent with the law, regulations, or court decisions, is not binding on either the Department or the taxpayer. Therefore, the information provided herein should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein.

**SUBJECT:** Application of Sales Tax to Restaurant Owners Including Fast Food Operations and Caterers

**REFERENCES:** IC 6-2.5-5-20; 45 IAC 2.5-5-4; 45 IAC 2.5-5-43; 45 IAC 2.5-5-44; 45 IAC 2.5-5-45

#### **I. General Information**

All sales of tangible personal property made by restaurants are subject to sales tax unless a specific exemption applies to the transactions. Sales tax applies to all sales of food and beverages that are packaged, prepared, sold as meals, or in a form which is normally consumed at or near the premises of the retail merchant whether or not such food and beverages are actually consumed on the premises.

Prepared food that is subject to sales tax includes any food cooked to the order of the purchaser, sold in a heated state, or heated by the seller; two or more food ingredients mixed or combined by the seller for sale as a single item; and all food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, and straws. A plate does not include a container or packaging used to transport the food.

Sales through a grocery store, salad bar, bakery, or delicatessen and by restaurants, cafeterias, lunch counters, drive-ins, roadside ice cream and refreshment stands, fish and chip places, fried chicken places, pizzerias, food and drink concessions, or similar facilities of meals, sandwiches, hamburgers, hot dogs, french fries, fried chicken, fish and chips, pizza, potato salad, cole slaw, popcorn, sundaes, cones and cups of ice creams, milk shakes, soft drinks, and similar food and beverage items are taxable regardless of whether sold by such establishments for consumption on the premises or on a “take-out” or “to-go” basis.

The sale of food sold through vending machines or by street vendors is also subject to sales tax. The sale of food or meals by caterers is subject to sales tax. The tax does not apply to charges for serving or delivering food or beverages furnished, prepared, or served for consumption at a location or on equipment provided by the retail merchant. However, this exclusion applies only if the charges for serving or delivery are stated separately from the price of the food or beverages when the purchaser pays the charges.

Restaurants and caterers may not accept exemption certificates from any customer or organization in lieu of collecting sales tax, except where: (1) the customer purchases food and beverages exclusively for resale; (2) a nonprofit organization purchases food and beverage for fundraising; or (3) a federal, state, or local government entity purchases food and beverage to carry on its official function. To be exempt, purchases made by nonprofit organizations as well as federal, state, and local government entities must be invoiced directly to and paid directly by the exempt nonprofit or government entity.

Gratuities are not taxable when they result from an unsolicited, affirmative action on the part of the customer to reward good service. Charges for serving food or beverages furnished, prepared, or served for consumption at a location or on equipment provided by the retail merchant are not subject to sales tax.

For more information related to the application of sales tax to purchases made by nonprofit organizations, please refer to Sales Tax Information Bulletin #10, available online at <http://www.in.gov/dor/3650.htm>. For more information related to the application of sales tax purchases made by federal, state, and local government entities, please refer to Sales Tax Information Bulletin #4, available online at <http://www.in.gov/dor/3650.htm>. For more information related to the application of sales tax to meals and banquets, please refer to Sales Tax Information Bulletin #7, available online at <http://www.in.gov/dor/3650.htm>.

Sales tax must be collected on any unitary transaction. The amount shown on a single check is considered to be a single sale even though the food or beverage is consumed by more than one person. Payment by one person of items listed on more than one check is also a unitary transaction.

## **II. Purchases by Restaurants**

### **A. Exempt Purchases**

All purchases by restaurants of tangible personal property to be resold are exempt from sales tax. This exemption shall apply to all types of food, beverages, and other tangible personal property that are to be sold at retail. The purchase of tangible personal property that will act directly on the food during preparation is exempt from sales tax.

**Example:** A fryer or broiler used to prepare food is exempt from sales tax. However, a refrigerator is taxable because it serves merely as an agent in the preservation of food and does not act directly on the food during preparation.

Utilities used in the direct production of food may also be exempt.

**Example:** The electricity used to power a fryer or broiler that is used to prepare food is exempt from sales tax. However, the electricity used to power general lighting in the restaurant is taxable because it has no direct effect on the food during preparation. To apply for a utility exemption, retail merchants must complete a Form ST-200, available online at: <http://www.in.gov/dor/3504.htm>. For more information on this exemption, contact the Indiana Department of Revenue, Enforcement Division at (317) 232-2339.

Transactions involving tangible personal property are exempt from sales tax if the property is used, consumed, or removed in the service or consumption of the food and the property is made unusable for further food service or consumption after the property's first use for food service or consumption. Items considered exempt include paper napkins, plastic utensils, paper and Styrofoam cups, plates, and bowls. Other items include paper placemats, paper tablecloths, and other "to-go" containers. Items not exempt from sales tax include cloth napkins and tablecloths, reusable plates, glasses, and silverware.

## **B. Taxable Purchases**

Transactions involving the purchase of reusable glasses, cups, plates, cleaning materials, fixtures, cash registers, containers, preparation and serving counters, or any other item not directly used in direct production of food or purchased for resale are subject to sales tax. All materials that have been purchased exempt from sales tax that are later used for a non-exempt purpose are subject to use tax.

## **C. Wrapping Materials**

Transactions involving the purchase of wrapping materials may or may not be subject to tax depending on their use. Wrapping materials and containers used to preserve food are subject to tax because such materials are not to be resold and are not directly used in direct production of food. Other wrapping materials and containers could be exempt if purchased for the reasons described in subpart A., "Exempt Purchases."

### **III. Restaurant Records**

All restaurant locations must be registered as retail merchants and must maintain accurate records for three years plus the current year to report to the Department the correct amount of gross receipts. If any sales are claimed as exempt sales, the records must clearly reflect such and the owner must be able to substantiate all exempt sales. Refer to IC 6-2.5-6-8 to determine the calculation of very small transactions and the applicability of a sampling method.

A handwritten signature in black ink that reads "John Eckart". The signature is written in a cursive style with a large, looping initial "J".

Commissioner

John Eckart