

DEPARTMENT OF STATE REVENUE
Revenue Ruling #2009-08 ST
September 4, 2009

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ISSUES

Sales Tax – Retail Sales of Food and Catered Events

A company ("Taxpayer") is seeking a Revenue Ruling ("Ruling") regarding Indiana sales tax treatment of various retail food items and related services sold as a part of Taxpayer's business operations.

Authority: [IC 6-2.5-2-1](#); [IC 6-2.5-4-1\(g\)](#); [IC 6-2.5-5-20\(b\)](#); [IC 6-2.5-5-20\(c\)](#); [IC 6-2.5-1-26](#); [IC 6-2.5-5-35](#); [45 IAC 2.2-4-1\(b\)](#); [45 IAC 2.2-5-45\(a\)](#); [45 IAC 2.2-5-45\(b\)](#).

STATEMENT OF FACTS

Taxpayer, a company located in Indiana, provides the following facts regarding its request for a Ruling. Taxpayer operates retail stores that primarily sell two types of candy and food: (1) that which is "designed for immediate consumption" and (2) that which is "designed for later consumption" by its customers. Taxpayer also provides catering services. Taxpayer, in pertinent part, provides the following specific information regarding its food products and services that comprise the relevant components of its business operations at issue in this Ruling:

1. Pre-packaged quarts and pints of ice cream – we make all of our own ice cream in our kitchen and prepare ready-to-go quarts and pints both with and without candy "mix-ins". The ice cream is placed in colorful paper containers with our logo anthem and is packaged specifically to take home and sold without eating utensils. The packages are typically placed in a display freezer in our customer area, similar to the ice cream section of a local grocery store, where customers select from many choices. In some instances, these packages are delivered as part of a catering event, again, without utensils...;
2. Pre-packaged ice cream cupcakes – we produce ice cream cupcakes – made with cake, ice cream, mix-ins, and icing – and package them in sealed 4-pack and 6-pack plastic containers with our logo label. They are sold without utensils in the same ways as quarts and pints above...;
3. Pre-packaged ice cream sandwiches – we produce our... ice cream sandwiches – made with two cookies, ice cream and mix-ins – and package them in 6-pack plastic containers sealed with our logo label. They are sold without utensils in the same ways as the two items listed above...;
4. Pre-packaged ice cream cakes – we produce a wide variety of ice cream cakes – made with cake, ice cream, mix-ins and icing – and package them in cake boxes specially designed and made for our brands. They are sold without utensils and in the same ways as the three previous listed items...;
5. Custom cakes – we produce a wide variety of cakes designed specifically to meet customer desires – made with ice cream and/or made with cookie dough... and package them in cake boxes specially designed and made for our brands. They are sold in identical manners to the prior four items...;
6. Bulk cookies – 5 or more cookies – including our half-dozen and baker's dozen items – are typically meant for later consumption at a location other than our store, and are packaged in logo boxes and/or logo bags. They are never served in a "heated state", rather, they are baked fresh in the morning then cooled before being made available for sale...;
7. Catering services – we offer certain services relating to catering events such as delivery fees, setup fees and appearances by our mascot...;
8. Ice cream treats – we provide our ice cream in a variety of different ways designed for immediate consumption and typically served with utensils and/or napkins. These include hand-scooped ice cream combined with candy mix-ins served in either a bowl with a spoon, or in a waffle cone, waffle bowl, sugar cone or cake cone. These also include milk shakes, smoothies, banana splits, sundaes and more...;
9. Individual ice cream cupcakes and ice cream sandwiches – in addition to packaging our ice cream cupcakes and sandwiches into proprietary take home containers, we also make them available individually...;
10. Individual cookies – less than 5 cookies purchased at once are typically consumed right away and not taken home...;
11. Soda and bottled water – we serve coke products from a fountain and bottled water from a refrigerator...; and
12. Catered ice cream and cookies – we perform catering events including parties, fundraising events, festivals and more. Sometimes we are providing ice cream treats and cookies in an almost identical fashion to our retail location. However, other times we are providing a turn-key delivery that does not include utensils

or anything other than the ice cream itself, and, in these instances, we charge a flat fee for what might be considered a "service"....

DISCUSSION

In general, and pursuant to [IC 6-2.5-2-1](#), sales tax is imposed on retail transactions made in Indiana. However, an exemption from sales tax is available for "food and food ingredients for human consumption." Pursuant to [IC 6-2.5-5-20\(b\)](#), the following categories qualify as non-taxable food, provided that the items are sold without eating utensils provided by the seller:

- (1) Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries).
- (2) Food sold in an unheated state by weight or volume as a single item.
- (3) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.

Pursuant to [IC 6-2.5-5-20\(c\)](#), the following categories do not qualify as food exempted from sales tax:

- (1) candy;
- (2) alcoholic beverages;
- (3) soft drinks;
- (4) food sold through a vending machine;
- (5) food sold in a heated state or heated by the seller;
- (6) two (2) or more food ingredients mixed or combined by the seller for sale as a single item (other than 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 federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses);
- (7) food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food); or
- (8) tobacco.

Food sold by caterers is subject to tax. [45 IAC 2.2-5-45\(a\)](#) provides:

- (a) The law provides that the sale of meals shall be taxable whether such meals are served on or off the premises of the retailer. Accordingly the sale of food or meals by caterers is subject to sales tax.

The nature of the agreement between the buyer and seller is determinative as to whether delivery and service charges related to catered meals are taxable. As a general rule, [45 IAC 2.2-4-1\(b\)](#) states that all elements of consideration are included in gross retail income subject to tax. Elements of consideration include, any additional bona fide charges added to or included in the price for preparation, fabrication, alteration, modification, finishing, completion, or delivery. [45 IAC 2.2-5-45\(b\)](#) provides the general rule related to catered events:

The tax applies to the entire charge made by caterers for serving meals, food and drink, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for labor of serving meals.

However, [IC 6-2.5-5-25\(B\)](#) provides an exemption from sales tax for "property [that] is: (i) used, consumed, or removed in the service or consumption of the food and food ingredients; and (ii) made unusable for further service or consumption of food and food ingredients after the property's first use for service or consumption of food and food ingredients[.]"

Additionally, [IC 6-2.5-4-1\(g\)](#) provides the following exclusion from sales tax for separately stated delivery and service charges related to catered events:

Gross retail income does not include income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. However, the exclusion under this subsection only applies if the charges for the serving or delivery are stated separately from the price of the food and food ingredients when the purchaser pays the charges.

RULING

Based on the foregoing authority, unless Taxpayer's sales of food described above are made to an entity with an applicable tax-exempt status, the Department rules as follows.

Taxpayer's sales of food described in items #1 through #6 of this Ruling are not subject to Indiana sales tax, provided the items are not sold as part of a catered event.

Taxpayer's charges for services described in item #7 of this Ruling are not subject to Indiana sales tax, provided that the charges are separately stated. Typically, services are not subject to sales tax in Indiana. More specifically, [IC 6-2.5-4-1](#)(g) provides an explicit statutory exemption from sales tax when catering charges related to serving or delivery of food "are stated separately from the price of the food and food ingredients when the purchaser pays the charges." If the charges are not separately stated, then the entire charge for the catered event, including delivery and service fees, are subject to sales tax.

Taxpayer's sales of food described in items #8 through #10 of this Ruling are subject to Indiana sales tax.

Taxpayer's sales of soda described in item #11 of this Ruling are subject to Indiana sales tax. Fruit or vegetable juices that may be included in Taxpayer's use of the term "soft drink" are not taxable as soft drinks, as defined in [IC 6-2.5-1-26](#). Water is exempt unless utensils are provided.

Taxpayer's sales of food described in item #12 of this Ruling are subject to Indiana sales tax pursuant to [45 IAC 2.2-5-45](#). However, pursuant to [IC 6-2.5-5-35](#), any eating utensils provided by Taxpayer, including plates, knives, forks, spoons, glasses, cups, napkins, or straws used as part of Taxpayer's services and made subsequently unusable for further services are exempt from sales tax.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

Department of State Revenue

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