

DEPARTMENT OF STATE REVENUE

Information Bulletin #11
Sales Tax
June 2019
(Replaces Bulletin #11 dated November 2011)
Effective Date: July 1, 2019

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

REFERENCES: [IC 6-2.5-1-5](#); [IC 6-2.5-4-18](#); [IC 6-2.5-5-20](#); [IC 6-9](#); [45 IAC 2.5-5-4](#); [45 IAC 2.5-5-45](#)

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SUMMARY OF CHANGES

Aside from nonsubstantive, technical changes, this bulletin is updated to add guidance concerning the passage of HEA 1001 (2019), which created a framework for the collection of sales tax by a "marketplace facilitator" on behalf of sellers, including restaurants. The bill also clarified the law with respect to the gross retail income upon which the tax is required to be collected by a marketplace facilitator. The bulletin now contains information also found in Sales Tax Information Bulletin #29 in order to provide consistent guidance regarding the differences between a restaurant and a "combination business," as well as information on food and beverage taxes.

I. INTRODUCTION

Generally, all sales of tangible personal property made by restaurants are subject to sales tax unless a specific exemption applies to the transactions. The purpose of this bulletin is to provide guidance concerning how Indiana sales and use tax applies to sales and purchases made by restaurants.

II. GENERAL INFORMATION FOR RESTAURANTS

A restaurant is a retail merchant that sells prepared food such as meals, sandwiches, or other food for consumption on or off the premises and which provides utensils. A business is considered a restaurant if seventy-five percent (75%) or more of the business's sales are of prepared food, as determined by the formula in "Appendix A." Street vendors and food trucks are considered restaurants. 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. Because utensils are provided by a restaurant, this subjects all food items ready for immediate consumption on or off the premises sold by the restaurant to tax, regardless of the portion size. Sales tax also applies to self-service food such as salad bars or drink islands, bakery items, and other items normally considered non-taxable, including bottled water, fruit, and potato chips. However, food sold by restaurants without eating utensils provided by the restaurant that ordinarily requires cooking (as opposed to just reheating) by the consumer prior to consumption is excluded from prepared food (e.g., prepackaged baking mixes), and they are therefore exempt.

Additionally, the sale of "bulk serving" items (i.e., items that contain four (4) or more servings packaged as one item sold for a single price) are not subject to sales tax when sold by a restaurant. This includes both prepackaged servings and servings individually selected by the purchaser. However, if the restaurant physically gives utensils to the customer, such as placing utensils in a bag or other container with the packaged item that is then handed to the customer, then the item is considered prepared food and is taxable. Furthermore, if the food item is considered prepared food for another reason (it is sold in a heated state or is a combination of two or more food ingredients mixed or combined by the seller and then sold as a single food item), the item remains taxable. Whenever available, serving sizes will be determined based on a label on an item sold. If no label is available, a seller will reasonably determine the number of servings in an item. For examples of how this "bulk serving" item exclusion would apply, please refer Sales Tax Information Bulletin #29.

Sales by a combination business are treated differently. A combination business is a business that has both an area that is considered a restaurant and an area that is considered a store, and the business's sales of prepared

food are less than seventy-five percent (75%) of the business's overall sales (i.e., grocery stores with a deli or cafeteria; convenience stores; farmer's markets; restaurants with a gift store or grocery), as determined by the formula in "Appendix A." Sales of prepared food by a combination business are taxable. However, otherwise exempt food sold by a combination business, including bakery items and items ready for consumption at the time of sale, are only taxable if utensils are handed to the customer. This includes utensils that are placed by the seller in a bag or other container that is handed to the customer.

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.

While all sales of tangible personal property by restaurants are subject to sales tax, restaurants and caterers may accept exemption certificates from any customer or organization in lieu of collecting sales tax 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. Restaurants and caterers may not accept exemption certificates for any other purpose. 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. Separately stated, mandatory charges, including gratuities, 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 of food and food ingredients, the following information bulletins can be found at www.in.gov/dor/6051.htm:

- For general information concerning the exemption for food and food ingredients, please refer Sales Tax Information Bulletin #29.
- For more information related to the application of sales tax to purchases made by nonprofit organizations, please refer to Sales Tax Information Bulletin #10.
- 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.
- For more information related to the application of sales tax to meals and banquets, please refer to Sales Tax Information Bulletin #7.

III. GROSS RETAIL INCOME AND SOURCING

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.

Sales tax is imposed on the gross retail income received by the retail merchant. Separately stated service charges are generally not included within the gross retail income and are not subject to sales tax unless they are services necessary to complete the sale. For instance, a fee charged for curbside pick-up of prepared food is not subject to sales tax if separately stated. An exception is delivery charges, which are subject to sales tax whether they are separately stated or not. In the context of the delivery of food by a restaurant or third-party food delivery service, the term delivery charges includes charges for anything related to the transportation of the food, regardless of what the charge or fee is called.

Please note that if the underlying transaction is exempt from sales tax, then the delivery charges related to that item also are not subject to sales tax. Therefore, when separately stated, sales tax does not apply to charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location or on equipment provided by a retail merchant. However, charges for delivery of prepared food **beyond the seller's location and not served on the seller's equipment** are subject to sales tax. The following examples are found in Commissioner's Directive #23 (available online at www.in.gov/dor/3617.htm), which provides the department's guidance on delivery charges:

Example #1 - A pizza parlor imposes a \$3 charge to deliver pizzas to a customer's residence. The \$3 delivery charge is subject to sales tax.

Example #2- A merchant caters an event at a location leased by the caterer. As a separate charge on the customer's invoice, the caterer charges the customer \$100 for delivering and serving the food. The \$100 is not subject to sales tax.

Example #3 - A merchant caters an event at a location provided by the customer. As a separate charge on the customer's invoice, the caterer charges the customer \$100 for delivering and serving the food. The \$100 is subject to sales tax.

When collected by a marketplace facilitator, the gross retail income from each transaction is the total amount of consideration paid by the purchaser, including the payment of any fee, commission or other charge by the marketplace facilitator, whether separately stated or not, except it does not include any taxes required to be collected on such transaction. Marketplace facilitators are businesses that connect sellers to purchasers by use of the business's marketplace and facilitate the sales of the seller's products in Indiana through the marketplace. In the context of restaurants, a marketplace facilitator might connect sellers with restaurants for the purpose of purchasing meals. For more information on marketplace facilitators, please refer to Sales Tax Information Bulletin #89 (available online at www.in.gov/dor/6051.htm).

IV. 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 #4: A fryer or broiler used to prepare food is exempt from sales tax. However, a refrigerator is taxable if it serves merely as an agent in the preservation of raw or prepared food and does not act directly on the food during preparation.

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

Example #5: 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 Form ST-200, available online at: 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 the 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 the direct production of food. Other wrapping materials and containers could be exempt if purchased for the reasons described in subpart A., "Exempt Purchases."

V. FOOD AND BEVERAGE TAXES

In Indiana, counties or municipalities that have been granted the necessary statutory authority may adopt a local food and beverage tax ("FAB" or "FAB tax"). With the exception of Marion County and the Historic Hotels (French Lick/West Baden Springs) FAB, the rate is 1% of the gross retail income received from taxable food and beverage transactions in which food or beverage is furnished, prepared, or served by a retail merchant for consumption at a location or on equipment provided by the retail merchant in a county or municipality that adopted the tax.

NOTE: In some instances where both a county and a municipality within the county have adopted a FAB, the total FAB tax rate for a taxable transaction inside the municipality is 2%.

FAB taxes and the sales tax operate in a similar manner with regard to how they are imposed on transactions involving food items. For instance, if a transaction is exempt from sales tax, then the transaction is also exempt from any FAB taxes. However, it is not the case that every transaction that is subject to sales tax will also be subject to a FAB. It is important to reiterate that FAB taxes are only imposed on transactions on food and beverages that are **sold for consumption at a location or on equipment provided by the retail merchant** (including where the food is sold with utensils, sold in a heated state, or is a combination of two or more ingredients). For most restaurants and other eating establishments, it is assumed that a FAB tax would apply to any transaction involving a food item subject to sales tax because everything they sell is considered a prepared food item. This is true even if the customer was not dining-in because the food is still prepared on equipment provided by the retail merchant.

For examples of how FAB taxes and sales tax would apply in various scenarios, please refer to Appendix E of Sales Tax Information Bulletin #29. For further guidance on local FAB taxes, please refer to Commissioner's Directive #30 (available online at www.in.gov/dor/3617.htm).

VI. RESTAURANT RECORDS

All restaurant locations must be registered as retail merchants and must maintain accurate records for at least 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.

Adam J. Krupp
Commissioner

Appendix A - Formula for 75% Calculation

The below calculation is used to determine if the seller is considered a restaurant (75% or more of the business's sales are of prepared food) or a combination business (less than 75%). An example of a combination business is a grocery store that includes an eating establishment.

A single prepared food sales percentage will be determined annually, for all of the seller's establishments in a state. Seller may choose to base the below calculations on either the most recent tax year or business fiscal year. Calculations should be performed as soon as possible after accounting records are available and implemented not later than 90 days after the beginning of the tax or business fiscal year.

A new business will make a good faith estimate of their prepared food sales percentage for their first year. A new business should adjust its good faith estimate prospectively after the first three months of operation if actual prepared food sales percentages materially affect the 75% threshold test.

Numerator Calculations

a. Sales of food sold, other than bakery items¹:

- 1. In a heated state or heated by the seller, or;
- 2. Containing two (2) or more food ingredients mixed or combined by the seller for sale as a single item, or;
- 3. Where plates², bowls, glasses or cups are necessary to receive the

Sales in Dollars

food (e.g., dispensed milk, salad bar).

b. Sales of bakery items in which plates or bowls are necessary to receive the food.

+	
-	
=	0

c. Sales of alcoholic beverages, if included in (a) or (b) above.

Numerator Total

Denominator Calculations

a. Sales of all food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks.

-	
=	0

b. Sales of alcoholic beverages, if included in (a) above.

Denominator Total

Percentage of Prepared Food Sales to Total Food Sales (Numerator / Denominator)

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¹ Bakery items include bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danishes, cakes, tortes, pies, tarts, muffins, bars cookies, and tortillas.

² A plate does not include a container or packaging used to transport the food.

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