

TITLE 45 DEPARTMENT OF STATE REVENUE

LSA Document #03-304(E)

DIGEST

Temporarily amends 45 IAC 2.2 to conform to HEA 1815-2003. Authority: HEA 1815, SECTION 42. Effective January 1, 2004.

SECTION 1. (45 IAC 2.2-1-1) (a) Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

(b) Unitary Transaction - Public Utility. For purposes of the state gross retail tax and use tax, all public utility services and commodities subject to said taxes invoiced in a single billing or statement, including a minimum charge, submitted to a consumer for payment shall constitute a unitary transaction.

(c) Retail Transaction. The state gross retail tax is imposed on retail transactions made in Indiana. Three (3) general categories are designated as "retail transactions". The first category is described as transactions of a retail merchant that constitute selling at retail as described in IC 6-2.5-4-1. The second category is described as transactions of a retail merchant that constitute making a wholesale sale as described in IC 6-2.5-4-2. The third category is described as a transaction that is described in any other section of IC 6-2.5-4. **A transaction is made in Indiana if it is sourced to Indiana pursuant to IC 6-2.5-12, IC 6-2.5-13, or IC 6-8.1-15.**

(d) Casual Sales. The Indiana gross retail tax is not imposed on gross receipts from casual sales except for gross receipts from casual sales of motor vehicles and sales of rental property. A casual sale is an isolated or occasional sale by the owner of tangible personal property purchased or otherwise acquired for his use or consumption, where he is not regularly engaged in the business of making such sales.

(e) Retail Unitary Transaction. Regulatory definition of "retail unitary transaction" is used synonymously with the act [IC 6-2.5].

(f) Person. Regulatory definition of "person" is used synonymously with the act [IC 6-2.5].

(g) Department. Regulatory definition of "department" as the Indiana department of state revenue is used synonymously with the act [IC 6-2.5].

(h) Gross Retail Income. Regulatory definition of "gross retail income" is used synonymously with the act [IC 6-2.5].

(i) Gross Retail Income of a Public Utility or Power Subsidiary. Gross retail income includes all gross retail income including minimum charge, flat charge, membership fee, or any other form of charge or billing.

(j) Like Kind Exchange: Additional Consideration. Nontaxability extends only to the amount of value of the property received. Any additional consideration, commonly known as "boot", received either in cash or property of unlike kind, must be reported for taxation at actual value. However, when any property is clearly used as a medium of exchange in lieu of cash, the element of taxable exchange will be present.

(k) Like Kind Exchange: Limited to Two Parties. Nontaxable "exchanges" include only transactions for a swap or barter of property between two (2) parties. Property received in an exchange transaction in which a third party is involved, with or without property, is subject to gross retail tax. This rule is not meant to deny nontaxability of exchanges where one (1) or both of the parties in a two-party exchange employ an agent in carrying out the agreement.

(l) Like Kind Exchange: Property to be Owned by Parties at Time of Exchange. Nontaxable “exchanges” include only transactions in which the property exchanged is owned by the parties thereto at the time the exchange agreement is entered into. Transactions in which the property to be exchanged is acquired by one **(1)** party after the agreement to exchange has been arranged are taxable. The exchange agreement must specify the definite units or quantity of property to be exchanged. However, “retail merchants” are allowed to consider as nontaxable the full value of tangible personal property of like kind received in allowable exchanges, even though ownership of the property received is encumbered by a conditional sales contract, retail installment contract, or a chattel mortgage.

(m) Internal Revenue Code. Regulatory definition of “Internal Revenue Code” as the Internal Revenue Code of 1986, is used synonymously with the act *[IC 6-2.5]*.

(n) Retail Merchant. Regulatory definition of “retail merchant” is used synonymously with the act *[IC 6-2.5]*.

(o) Tax Year or Taxable Year. Regulatory definition of “tax year” or “taxable year” is used synonymously with the act *[IC 6-2.5]*.

(p) Alcoholic beverages. Regulatory definition of “Alcoholic beverages” is used synonymously with the act *[IC 6-2.5]*.

(q) Candy. Regulatory definition of “Candy” is used synonymously with the act *[IC 6-2.5]*.

(r) Computer. Regulatory definition of “Computer” is used synonymously with the act *[IC 6-2.5]*.

(s) Computer software. Regulatory definition of “Computer software” is used synonymously with the act *[IC 6-2.5]*.

(t) Delivered electronically. Regulatory definition of “Delivered electronically” is used synonymously with the act *[IC 6-2.5]*.

(u) Dietary supplement. Regulatory definition of “Dietary supplement” is used synonymously with the act *[IC 6-2.5]*.

(v) Drug. Regulatory definition of “Drug” is used synonymously with the act *[IC 6-2.5]*.

(w) Durable medical equipment. Regulatory definition of “Durable medical equipment” is used synonymously with the act *[IC 6-2.5]*.

(x) Electronic. Regulatory definition of “Electronic” is used synonymously with the act *[IC 6-2.5]*.

(y) Food and food ingredients. Regulatory definition of “Food and food ingredients” is used synonymously with the act *[IC 6-2.5]*.

(z) Lease or Rental. Regulatory definition of “Lease” or “Rental” is used synonymously with the act *[IC 6-2.5]*.

SECTION 2. (a) Mobility enhancing equipment. Regulatory definition of “Mobility enhancing equipment” is used synonymously with the act *[IC 6-2.5]*.

(b) Prescription. Regulatory definition of “Prescription” is used synonymously with the act *[IC 6-2.5]*.

(c) Prewritten computer software. Regulatory definition of “Prewritten computer software” is used synonymously with the act *[IC 6-2.5]*.

(d) Prosthetic device. Regulatory definition of “Prosthetic device” is used synonymously with the act *[IC 6-2.5]*.

(e) Soft drinks. Regulatory definition of “Soft drinks” is used synonymously with the act *[IC 6-2.5]*.

(f) Tangible personal property. Regulatory definition of “Tangible personal property” is used synonymously with the act *[IC 6-2.5]*.

SECTION 3. (45 IAC 2.2-4-1) (a) Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant". **A person is a retail merchant making a retail transaction when he engages in selling at retail.**

(b) All elements of consideration are included in gross retail income subject to tax. Elements of consideration include, but are not limited to: **A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:**

- (1) The price arrived at between purchaser and seller: **acquires tangible personal property for the purpose of resale; and**
- (2) Any additional bona fide charges added to or included in such price for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other services performed in respect to or labor charges for work done with respect to such property prior to transfer: **transfers that property to another person for consideration.**
- (3) No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.

(c) For purposes of determining what constitutes selling at retail, it does not matter whether:

- (1) the property is transferred in the same form as when it was acquired;
- (2) the property is transferred alone or in conjunction with other property or services; or
- (3) the property is transferred conditionally or otherwise.

(d) Notwithstanding subsection (b), a person is not selling at retail if he is making a wholesale sale as described 45 IAC 2.2-4-4.

(e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:

- (1) the price of the property transferred, without the rendition of any service; and
- (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.

For purposes of subdivision (2), charges for delivery are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including, but not limited to, transportation, shipping, postage, handling, crating, and packing.

(f) Notwithstanding subsection (e):

- (1) in the case of retail sales of gasoline (as defined in IC 6-6-1.1-103) and special fuel (as defined in IC 6-6-2.5-22), the gross retail income received from selling at retail is the total sales price of the gasoline or special fuel minus the part of that price attributable to tax imposed under IC 6-6-1.1, IC 6-6-2.5, or Section 4041(a) or Section 4081 of the Internal Revenue Code; and
- (2) in the case of retail sales of cigarettes (as defined in IC 6-7-1-2), the gross retail income received from selling at retail is the total sales price of the cigarettes including the tax imposed under IC 6-7-1.

(g) 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.

SECTION 4. (45 IAC 2.2-4-27) (a) In general, the gross receipts from renting or leasing tangible personal property are taxable **other than receipts from renting or leasing to another for the purpose of subrenting or subleasing.** This regulation [45 IAC 2.2] only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.

(b) Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility, shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.

(c) In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of

tangible personal property constitutes a retail transaction, and every lessor is a retail merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.

(d) The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

(1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental or lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals.

(2) Rental or lease period. For purposes of the imposition of the gross retail tax or use tax on rental or leasing transactions, each period for which a rental is payable shall be considered a complete transaction. In the case of a weekly rate, each week shall be considered a complete transaction. In the case of a continuing lease or contract, with or without a definite expiration date, where rental payments are to be made monthly or on some other periodic basis, each payment period shall be considered a completed transaction.

(3) Renting or leasing property with an operator **shall not be subject to gross retail tax or use tax if:**

~~(A) The renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised. the operator is necessary for the equipment to perform as designed; and~~

~~(B) The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator. the operator does more than maintain, inspect, or set up the tangible personal property.~~

~~(C)~~ (4) When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice rendered by the lessor to the lessee.

~~(D)~~ (5) Notwithstanding any other provision of this regulation [45 IAC 2.2] any lessee leasing or renting a vehicle(s) from any lessor, including an individual lessor, with or without operators, driver(s), or even if the operator (driver) himself is the lessor, regardless of control exercised, shall not be subject to the gross retail tax or use tax, if the leased or rented vehicle(s) are directly used in the rendering of public transportation.

~~(4)~~ (6) Supplies furnished with leased property. A person engaged in the business of renting or leasing tangible personal property is considered the consumer of supplies, fuels, and other consumables which are furnished with the property which is rented or leased.

SECTION 5. (45 IAC 2.2-5-1) (a) Definitions. "Farmers" means only those persons occupationally engaged in producing food or agricultural commodities for sale or for further use in producing food or such commodities for sale. These terms are limited to those persons, partnerships, or corporations regularly engaged in the commercial production for sale of vegetables, fruits, crops, livestock, poultry, and other food or agricultural products. Only those persons, partnerships, or corporations whose intention it is to produce such food or commodities at a profit and not those persons who intend to engage in such production for pleasure or as a hobby qualify within this definition.

"Food", as used in this chapter, includes food ingredients.

"Farming" means engaging in the commercial production of food or agricultural commodities as a farmer.

"To be directly used by the farmer in the direct production of food or agricultural commodities" requires that the property in question must have an immediate effect on the article being produced. Property has an immediate effect on the article being produced if it is an essential and integral part of an integrated process which produces food or an agricultural commodity.

(b) The state gross retail tax shall not apply to:

(1) Sales to farmers of animals and poultry used for breeding purposes are exempt from tax provided the farmer used such animals

and poultry to breed animals and poultry to be used by the farmer in the production of food or agricultural commodities.

(2) Sales to farmers of animals and poultry to be directly used by the farmer in the direct production of food and agricultural commodities are exempt from tax. Domestic animals and birds, pets, game animals and birds, furbearing animals, fish, and other animals or poultry not directly used by the farmer in the direct production of food or agricultural commodities are subject to tax. Baby chicks, ducklings, geese, turkey poults, hatching eggs, pigs, hogs, lambs, sheep, livestock, calves, and cows are exempt from tax, provided that they are directly used by the farmer in the direct production of food or agricultural commodities for sale.

(3) Sales to farmers and to other persons occupationally engaged in the business of producing food and agricultural commodities for human, animal, or poultry consumption (either for sale or for further use in producing such food and agricultural commodities for sale) of animal and poultry life to be directly used by the purchaser in the direct production of food and agricultural commodities.

(4) Sales of animals and poultry to a farmer to be directly used by the farmer in the direct production of food or agricultural commodities (either for sale or for further use in producing such food or commodities for sale) for human, animal, or poultry consumption are exempt from tax.

(c) Energy Equipment.

(1) Equipment used to modify energy purchased from public utilities for the production process is exempt if the equipment is used to modify the utilities for use by exempt equipment.

(2) Equipment used to create energy that could otherwise be purchased exempt from a public utility for use by exempt equipment is exempt.

(3) When any equipment qualifies as essential and integral to the production process and also is used in an alternative nonessential and/or nonintegral manner, the exemption shall only apply to the percentage (%) of use of the equipment used in the exempt manner.

SECTION 6. (45 IAC 2.2-5-27) ~~(a) The term~~ “Person licensed to issue a prescription” ~~shall include~~ **means** only those persons licensed or registered to fit and/or dispense such devices.

~~(b) Definition: The term “prescribed” shall mean the issuance by a person described in paragraph 1 of this regulation [subsection (a) of this section] of a certification in writing that the use of the medical equipment supplies and devices is necessary to the purchaser in order to correct or to alleviate a condition brought about by injury to, malfunction of, or removal of a portion of the purchaser’s body.~~

SECTION 7. (45 IAC 2.2-5-28) (a) Sales of ~~artificial limbs~~ **prosthetic devices** which are prescribed by a person licensed to issue the prescription are exempt from sales and use tax.

(b) The sale to the user of orthopedic devices prescribed by a person licensed to issue the prescription are exempt from sales and use tax.

(c) For purposes of the state gross retail tax, orthopedic devices are designed to correct deformities and/or injuries to the human skeletal system including the spine, joints, bones, cartilages, ligaments, and muscles.

(d) The sale to the user of dental prosthetic devices prescribed by a person licensed to issue the prescription are exempt from sales and use tax.

(e) For the purposes of the state gross retail tax, dental prosthetic devices are devices used for the replacement of missing teeth, as by bridges or artificial dentures.

(f) The sale to the user of eyeglasses or contact lenses prescribed by one licensed to do so is exempted from sales tax. The exemption to the patient applies whether the item is sold by the practitioner or by a dispensing optician.

(g) The sale to the user of **durable** medical equipment, supplies, or devices prescribed by one licensed to issue such a prescription are exempt from sales and use tax.

(h) The term **“durable medical equipment, supplies or devices”**, as used in this ~~paragraph, section,~~ are those items, the use of which is directly required to correct or alleviate injury to malfunction of, or removal of a portion of the purchaser’s body.

SECTION 8. (45 IAC 2.2-5-29) ~~(a)~~ Rentals of **durable** medical equipment, supplies, and devices, described in ~~Regulation 6-2.5-5-18(a)(020)~~ **45 IAC 2.2-5-28** are exempt from the state gross retail tax if the rentals are prescribed by a person licensed to issue the prescription.

(b) The terms “person licensed to issue prescription” and “prescribed” are defined in Regs. ~~6-2.5-5-18(a)(010)(1) and (2)~~ *45 IAC 2.2-5-27*.

SECTION 9. (45 IAC 2.2-5-38) The gross retail tax act exempts food for human consumption. Primarily the exemption is limited to sales by grocery stores, supermarkets, and similar type businesses of items which are commonly known as grocery food.

SECTION 10. (45 IAC 2.2-5-39) (a) ~~The gross retail tax act specifies the items which constitute tax exempt~~ **Sales of food and food ingredients** for human consumption **are exempt from the state gross retail tax.**

(b) A number of items normally sold by grocery stores, supermarkets, and similar type of businesses are classified in this regulation ~~[45 IAC 2.2]~~ under the heading “nontaxable items”. These examples are for illustrative purposes and are not intended to be all-inclusive:

“NONTAXABLE ITEMS”

Baby Foods
Bakery Products
Baking Soda
Bouillon Cubes
Cereal & Cereal Products
Chocolate (for cooking purposes only)
Cocoa
Coconut
Coffee & Coffee Substitutes
Condiments
Cookies
Crackers
Dehydrated Fruit & Vegetables
Diet Foods
Eggs & Egg Products
Extracts, Flavoring as an Ingredient of Food Products
Fish & Fish Products
Flour
Food Coloring
Fruit & Fruit Products, including Fruit Juices
Gelatin
Health Foods
Honey
Ice Cream, Toppings, and Novelties
Jams
Jellies
Ketchup
Lard
Marshmallows
Mayonnaise
Meat & Meat Products
Milk & Milk Products
Mustard
Nuts, including salted, but not chocolate or candy-coated
Oleomargarine
Olive Oil
Olives

Peanut Butter
Pepper
Pickles
Popcorn
Potato Chips
Powdered Drink Mixes (Presweetened or Natural)
Relishes
Salad Dressings and Dressing Mixes
Salt
Sauces
Sherbets
Shortenings
Soups
Spices
Sandwich Spreads
Sugar, Sugar Products, and Sugar Substitutes
Syrups
Tea
Vegetables & Vegetable Products (Excluding Salad Bars)
Vegetable Juices
Vegetable Oils
Yeast

Some items in the above categories will be subject to tax if they are sold in small quantities and, therefore, are prepared for immediate consumption.

The following items are exempt from sales and use tax if sold without eating utensils provided by the seller:

- (1) Food sold by a seller whose proper primary NAAICS 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.**

SECTION 11. (45 IAC 2.2-5-40) The gross retail tax act specifies items which do not constitute “food for human consumption” exempted by the Act ~~HC 6-2.5~~. A number of items normally sold by grocery stores, supermarkets, and similar type businesses are classified in this regulation ~~[45 IAC 2.2]~~ under the heading “taxable items”. These examples are for illustrative purposes and are not to be all-inclusive:

“TAXABLE ITEMS”

Alcoholic Beverages
Candy & Confectionery
Candied Apples
Caramel Coated Popcorn
Chewing Gum
Chocolate Covered Nuts
Cocktail (dry or liquid) Mixes
Dietary Supplements in any form
Household Supplies (Brooms, Mops, Etc.)
Ice
Liver Oils, such as Cod and Halibut
Lozenges
Nonprescription Medicines
Paper Products
Pet Foods and Supplies
Soap & Soap Products
Soft Drinks, Sodas & Similar Beverages
Tobacco Products

Tonics, Vitamins and other Dietary Supplements

Toothpaste

Water, including mineral, bottled carbonated & Soda

The following items are not exempt from sales and use 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 foodborne illnesses); or**
- (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).**

SECTION 12. 45 IAC 2.2-4-3, 45 IAC 2.2-5-42, 45 IAC 2.2-5-43, 45 IAC 2.2-5-44, AND 45 IAC 2.2-6-12 ARE TEMPORARILY REPEALED.

SECTION 13. **SECTIONS 1 through 12 of this document expire July 1, 2005.**

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