Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice.

(1) SCOPE.

(a) The purpose of this rule is to clarify the application of tax on the sale of food products generally sold in or by grocery stores, convenience stores, supermarkets, bakeries, fish markets, produce markets, and other like places of business. This rule is also intended to clarify the application of tax on the sale of bakery products by bakeries, pastry shops, or like establishments and on the sale of drinking water or ice.

(b) Rule 12A-1.0115, F.A.C., is intended to clarify the application of tax on food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, caterers, hotels, taverns, or other like places of business.

(2) TAX-EXEMPT FOOD PRODUCTS.

(a) Food products for human consumption, whether processed, cooked, raw, canned, or in any other form that is generally regarded as food, are exempt. The following is a nonexhaustive list of exempt food products:

1. Baby foods and baby formulas;
2. Baked goods and baking mixes, including ready-to-eat and ready-to-bake products;
3. Baking and cooking items advertised and normally sold for use in cooking or baking, such as chocolate morsels, flavored frostings, glazed or candied fruits, marshmallows, powdered sugar, or food items intended for decorating baked goods;
4. Cereals and cereal products, including ready-to-eat, instant, and regular hot cereals;
5. Cheeses, including cured and whey cheese, cream, natural, grating, processed, spread, dip, and other miscellaneous cheeses;
6. Cocoa;
7. Coffee and coffee substitutes;
8. Condiments and relishes, including seasoning sauces and spreads, such as mayonnaise, ketchup, or mustard;
9. Cookies, including chocolate-coated or cream-filled;
10. Dairy products;
11. Dairy substitutes;
12. Dietary supplements (including herbal supplements) and meal replacements, including liquid food supplements and nutrition bars, including those that are candy-coated or chocolate-coated;
13. Eggs and egg products, including liquid, frozen, or dried eggs;
14. Fish, shellfish, and other seafood products, whether fresh or frozen;
15. Food coloring;
16. Frozen dinners and other frozen food products;
17. Fruit (including fruit sliced, chunked, or otherwise cut by the retailer), fruit snacks, fruit roll-ups, and dried fruit, including those sweetened with sugar or other sweeteners;
18. Gelatins, puddings, and fillings, including flavored gelatin desserts, puddings, custards, parfait, pie fillings, and gelatin base salads;
19. Grain products and pastas, including macaroni and noodle products, and rice and rice dishes;
20. Honey;
21. Ice cream, frozen yogurt, sherbet, and similar frozen dairy or nondairy products sold in units larger than one pint;
22. Jams and jellies;
23. Marshmallows;
24. Meat and meat products;
25. Meat substitutes;
26. Milk, including natural fluid milk, homogenized milk, pasteurized milk, whole milk, chocolate milk, buttermilk, half and half, whipping cream, condensed milk, evaporated milk, powdered milk, or similar milk products, and products intended to be mixed with milk;
27. Natural fruit or vegetable juices or their concentrates or reconstituted natural concentrated fruit juices in any form, whether frozen or unfrozen, aerated, dehydrated, powdered, granulated, sweetened or unsweetened, seasoned with salt or spice, or unseasoned. Only those juices that are permitted by federal law and regulation to be labeled “100 percent juice” or “100 percent juice with added—” “ingredient(s),” “preservative,” or “sweetener” will be considered natural fruit or vegetable juices. [Title 21 (Food and Drug), Chapter 9 (Federal Food, Drug, and Cosmetic Act), Subchapter IV (Food) 21 U.S.C. ss. 341; 343 (January 24,
2002), hereby incorporated by reference]; [21 C.F.R. Ch. 1, ss. 101.30; 102.5; 102.33, 146.114-146.187; 156.3; 156.145 (4-1-06), hereby incorporated by reference].

28. Peanut butter;
29. Poultry and poultry products;
30. Salad dressings and dressing mixes;
31. Salt, salt tablets, pepper, spices, seeds, seasonings, blends, extracts, and flavorings, whether natural or artificial;
32. Sandwich spreads;
33. Sauces and gravies;
34. Snack foods, including chips, corn chips, potato chips, cheese puffs and curls, cereal bars, cracker jacks, granola bars, nuts and edible seeds, pork rinds, and pretzels, whether such products are chocolate-coated, honey-coated, or candy-coated.
35. Soups and soup mixes;
36. Sugar, sugar products, and sugar substitutes;
37. Tea (including herbal tea), unless sold in a liquid form;
38. Vegetables and vegetable products;
39. Vegetable oils, lard, olive oil, shortenings, and oleomargarine.

(b) Food products prepared off the seller’s premises are exempt when:
1. Sold in the original sealed container;
2. Sliced into smaller portions; or
3. The product is sold frozen and then heated on the seller’s premises by the customer.

(c) Taxpayers who have a question regarding the taxable status or exempt status of a food product may submit a written description of the food product and a copy of the food product label to the Department to obtain a determination of the taxability of the product. This request should be addressed to the Florida Department of Revenue, Technical Assistance and Dispute Resolution, P. O. Box 7443, Tallahassee, Florida 32314-7443.

(3) BAKERY PRODUCTS SOLD BY BAKERIES, PASTRY SHOPS, OR LIKE ESTABLISHMENTS.

(a) Bakery products sold by bakeries, pastry shops, or like establishments as hot prepared food products are taxable.
1. Bakery products that are kept warm by a heat source used to maintain them in a heated state, or to reheat them, are hot prepared food products.
2. Bakery products that are sold while still warm from the initial baking are not hot prepared food products.
3. Example: A bakery establishment toasts a bagel for a customer. The sale of the bagel is subject to tax, whether the bakery establishment has eating facilities or does not have eating facilities.

(b) 1. Bakery products, excluding bakery products sold for consumption off the premises, sold by bakeries, pastry shops, or like establishments that have eating facilities are subject to tax.
2. For the purpose of this subsection, “eating facility” is a place that facilitates the consumption of the bakery products on the seller’s premises on items such as benches, chairs, stools, tables, and counters. For example, a pastry shop that has bar stools and a counter where the bakery products and drinks are served to patrons will be considered a pastry shop with eating facilities. A bakery located within the food court of a mall where tables and chairs are located in the common areas of the food court for patrons to consume food products will be considered a bakery with eating facilities.
3. Bakery products that are sold, regardless of the quantity, in packaging that is glued, stapled, wrapped, or sealed are examples of packaging consistent with an intention by the customer to consume products off the premises.
4. Bakeries, pastry shops, or like establishments that have eating facilities and make tax-exempt sales of bakery products that are for consumption off the premises are required to separately account for the tax-exempt sales of bakery products for consumption off the premises.
a. Examples of methods to separately account for tax-exempt sales of bakery products for consumption off the premises are: using sales invoices which contain documentation that the sale of the bakery product is for consumption off the premises; using a separate key on a cash register to record tax-exempt sales of bakery products; or using a separate cash register to record tax-exempt sales of bakery products.

b. Example. A bakery operates an establishment with eating facilities. The bakery sells donuts, toasted bagels, and other pastries, as well as coffee and other drinks. The bakery sells bakery products to patrons who take the products home for consumption in sealed containers. Products sold for consumption on the premises are served to the customers on trays. The bakery uses separate keys on its cash registers to account for the sales of tax-exempt bakery products to patrons who purchase the products for consumption off the premises separately from the accounting for taxable sales of toasted bagels, coffee, other drinks, and bakery products for consumption on the premises. The bakery products sold for consumption off the premises are exempt, because the bakery’s packaging and accounting methods overcome the rebuttable presumption that the products are sold for consumption on the premises.

d) Bakery products, excluding items sold as a hot prepared food products, that are sold by bakeries, pastry shops, or like establishments that do not have eating facilities are exempt.

(4) TAXABLE FOOD PRODUCTS. The exemption for food products for human consumption does not apply to any of the items specified in this subsection.

(a) Candy, chewing gum, bubble gum, breath mints, and any similar product regarded as candy or confection, based on its normal use as indicated on the label or advertising, is subject to tax. The term “candy and similar products” does not include snack foods not regarded as candy or confection, as indicated on the label or advertising of the product.

(b) Food prepared, whether on or off the seller’s premises, and sold for immediate consumption is subject to tax. This does not apply to food prepared off the seller’s premises and sold in the original sealed container, or to the slicing of products into smaller portions.

1. Food prepared for immediate consumption is food prepared to a point generally accepted as ready to be eaten without further preparation and that is sold in a manner that suggests readiness for immediate consumption. In determining whether an item of food is sold for immediate consumption, the customary consumption practices prevailing at the selling facility shall be considered.

2. Examples:

a. Potato salad is prepared and delivered to a dealer in bulk. The dealer repackages the potato salad into smaller containers. Because the potato salad is not sold in the original sealed container, the sale of the repackaged smaller containers of potato salad is subject to tax.

b. A grocery store buys cold cuts in five-pound packages. The grocery store slices cold cuts for the customer according to the thickness and the amount the customer desires. The food is then packaged for sale to the customer. Because the cold cuts are sliced into smaller portions, the sale of the cold cuts is exempt from tax.

c. A supermarket offers freshly popped popcorn for shoppers for sale. The sale of the popcorn is subject to tax.

d. A supermarket prepares seafood products, such as smoked fish or steamed shrimp, for sale. The sale of the smoked fish or steamed shrimp is subject to tax.

e. A supermarket prepares fruit and vegetable products into various fresh salads for sale. When packaged without eating utensils and sold as a grocery item, the sale of the prepared fresh fruit or vegetable salad is exempt. When the prepared fresh salads are packaged with eating utensils, such as with a fork and a napkin, the salad is a food product prepared and sold for immediate consumption and is subject to tax.

(c)1. Hot prepared food products, whether sold separately or in combination with other food items, when the food is heated by the seller rather than by the customer, is subject to tax.

2. Hot prepared food products are those products, items, or components that have been prepared for sale in a heated condition and sold at any temperature that is higher than the air temperature of the room or place where the products are sold. Preparation of a “hot prepared food product” includes cooking, microwaving, warming, toasting, or any other method of heating the food. Food products, including bakery products, are considered “hot prepared food products” when a heat source is used to maintain the food product in a heated state or is used to reheat the food product. Bakery products that are sold while still warm from the initial baking are not “hot prepared food products.” Their temperature is a result of the timing of the customer’s purchase rather than an indication of preparation to be sold in a heated condition.
3. When a single price is charged for a combination of hot prepared food products and cold food items or other components, the single price charged for the combination is subject to tax.

4. Examples:
   a. A supermarket sells barbecued chicken that is kept hot by a rotisserie to be taken home and eaten. The sale of the chicken is subject to tax.
   b. A grocery store bakes bread in an oven. The bread is packaged for sale while it is still warm. A customer purchases a package of the bread while it is still warm. The sale of the warm bread is not subject to tax.
   c. A single price is charged for a combination of a hot meal, hot pizza, hot specialty dish, or hot sandwich, with cold components, such as a salad or fruit or other side items, by a convenience store. The single price charged for the combination is subject to tax.
   d. Sandwiches sold ready for immediate consumption, whether refrigerated or heated by the customer or by the retailer, are subject to tax. An example of a sandwich not sold ready for immediate consumption would be a frozen sandwich or a sandwich with a frozen or partially frozen filling.
   e. Meals sold for consumption on or off the seller’s premises are subject to tax.
   f. Ice cream, frozen yogurt, and similar frozen dairy or nondairy products in cones, small cups, or pints, and popsicles, frozen fruit bars, or other novelty items, whether sold separately or in multiple units, are subject to tax.

5. TAXABLE SOFT DRINKS. The exemption for food products for human consumption does not apply to soft drinks. The following sales of soft drinks are subject to tax:
   a. Nonalcoholic beverages, whether carbonated or noncarbonated.
   b. Any noncarbonated beverage made from milk derivatives, such as ice cream sodas, milkshakes, or malts.
   c. Any beverages and preparations commonly referred to as a “soft drink,” such as sodas, soda water, ginger ale, colas, root beer, tonic, fizzes, or cocktail mixes.
   d. Any beverage containing fruit or vegetable juice labeled with the word(s) “ade,” “beverage,” “cocktail,” “drink,” or “fruit or vegetable flavor, flavored, or flavorings.” Federal law and regulations require that any beverage containing more than 0 percent juice, but less than 100 percent fruit or vegetable juice, which represents or suggests by its physical characteristics, name, labeling, ingredient statement, or advertising that it contains fruit or vegetable juice, be labeled in a manner that is appropriate to advise the consumer that the product is less than 100 percent juice. [Title 21 (Food and Drug), Chapter 9 (Federal Food, Drug, and Cosmetic Act), Subchapter IV (Food) 21 U.S.C. ss. 341; 343 (January 24, 2002)]; [21 C.F.R. Ch. 1, ss. 101.30; 102.5; 102.33, 146.114-146.187; 156.3; 156.145 (4-1-06)]. Examples of taxable beverages include: apple blend, cranberry juice cocktail, grape juice beverage, lemonade, limeade, orangeade, raspberry and cranberry flavored drink, fruit drink, fruit punch, diluted fruit juices, and diluted vegetable juices.
   e. Tea sold in a liquid form.

6. VENDING MACHINES AND MOBILE VENDORS. Food products sold through a vending machine, push cart, motor vehicle, or any other form of vehicle are subject to tax. Drinking water in bottles, cans, or other containers sold through a vending machine, push cart, motor vehicle, or any other form of vehicle is exempt. See Rule 12A-1.044, F.A.C., for sales through vending machines.

7. WATER AND ICE.
   a. Drinking water, including water enhanced by the addition of minerals, sold in bottles, cans, or other containers is exempt, except when carbonation or flavorings have been added to the water in the manufacturing process. When carbonation or flavorings are added to drinking water at a water treatment facility, the sale of the drinking water in bottles, cans, or other containers remains exempt.
   b. The sale of ice, including dry ice, is subject to tax, except when the ice is purchased for use as a packaging material to package food products for sale. See Rule 12A-1.040, F.A.C., for provisions for packaging materials.
   c. Fluoride used in the treatment of drinking water is exempt.
   d. Germicides (such as chlorine), sodium silicate, activated charcoal, and similar purification agents used in the treatment of drinking water are exempt.
   e. The charge for water conditioning (water softening) is not subject to tax. The sale of salt for use in water softeners to regenerate the minerals required for softening water is not the sale of a purification agent used in the treatment of drinking water and
is subject to tax. Dealers must pay tax on items used to provide water conditioning to their customers, such as minerals, tanks, equipment, and other materials.

(8) COMPLIMENTARY AND DONATED FOOD PRODUCTS.

(a) Dealers that primarily sell food products at retail are not subject to sales or use tax on any food or drink provided without charge as a sample or for the convenience of customers, even when cooked or prepared on the dealer’s premises. For example, hot coffee provided in a grocery store for shoppers is not subject to sales or use tax.

2. Dealers that primarily sell food products at retail are not subject to sales or use tax on any item given to a customer as part of a price guarantee plan related to point-of-sale errors.

3. The exemption, as provided in this paragraph, does not apply to businesses whose primary activity is to serve prepared meals or alcoholic beverages for immediate consumption.

(b) Dealers that sell food products at retail are not subject to sales or use tax on any food product donated to a food bank or to an organization determined to be currently exempt from federal income tax pursuant to s. 501(c) of the Internal Revenue Code of 1986, as amended.

(9) FOOD STAMPS AND VOUCHERS.

(a) Food products are exempt when purchased with food stamps issued by the United States Department of Agriculture, or with Special Supplemental Food Program for Women, Infants, and Children (WIC) vouchers issued under authority of federal law.

(b) When a purchase of food products is made partly with food stamps or vouchers and partly with cash or manufacturer’s coupons, the food stamps or vouchers will first be used to defray the cost of the taxable food and drinks, less the value of any manufacturer’s coupons, that can be purchased with the food stamps or vouchers. When the food stamps or vouchers are insufficient to purchase the taxable items, tax is due on the remaining sales price of taxable food and drinks.

Rulemaking Authority 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented 212.02(14)(c), (20), 212.05(1)(a)1.a., 212.06(1)(a), 212.07(2), 212.08(1), (4)(a)1., (7)(oo), (pp) FS. History–Revised 10-7-68, 6-16-72, 9-28-78, 10-29-81, Formerly 12A-1.11, Amended 12-8-87, 1-2-89, 8-10-92, 6-19-01, 4-17-03, 11-3-09.