Food Exemption

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HEA0088 was passed by the Wyoming Legislature and signed into law by Governor Freudenthal in 2007 exempting food for domestic home consumption. This had the effect of making permanent the temporary exemption passed by the legislature in 2006 of the same nature. The passage of this exemption also required further legislative directive in the creation of definitions to identify food for domestic home consumption from foods designed for immediate consumption such as food sold in restaurants or other similar establishments since the latter was to remain taxable.

Definitions

Food for domestic home consumption means substances whether in liquid, concentrated, solid, frozen, dried or dehydrated form that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. "Food for domestic home consumption" does not include alcoholic beverages, tobacco or prepared foods.

Prepared foods are defined in statute to include: (I) Food sold in a heated state or heated by the seller; (II) Two (2) or more food ingredients mixed or combined by the seller for sale as a single item; or (III) Food sold with eating utensils provided by the seller including plates, knives, forks, spoons, glasses, cups, napkins or straws. A container or package used to transport the food is not an eating utensil. But prepared foods do not include (I) Food that is only cut, repackaged or pasteurized by the seller; (II) Eggs, fish, meat, poultry or foods containing raw animal foods and which are required or recommended to be cooked by the consumer to prevent food borne illness; (III) Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 dealing with bakeries; (IV) Food sold in an unheated state by weight or volume as a single item; or (V) Bakery items including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danishes, cakes, tortes, pies, tarts, muffins, bars, cookies, tortillas and other bakery goods unless the item is sold as prepared food. In the Department's Rules, prepared food also does not include dietary supplements.

These two definitions drive further definitions, as follows:

- Alcoholic beverages are defined as beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.
- Tobacco products means any substance containing tobacco leaf or any product made or derived from tobacco that contains nicotine including, but not limited to, cigarettes, cigars, pip tobacco, snuff, chewing tobacco or dipping tobacco.
- Drugs are defined as compounds, substances or preparations, and any component of a compound, substance or preparation, other than food and food ingredients, dietary

supplements or alcoholic beverages: (A) Recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or a supplement to any of them; (B) Intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease; or (C) Intended to affect the structure or any function of the body.

- And, dietary supplements, defined as any product, other than "tobacco" intended to supplement the diet that contains one or more of the following dietary ingredients: (i) A vitamin; (ii) A mineral; (iii) An herb or other botanical; (iv) An amino acid; (v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or (vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in above; and is intended for ingestion in tablet, capsule, powder, soft gel, gel cap or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box found on the label and as required pursuant to 21 C.F.R. § 101.36.

The passage of the exemption on food for domestic home consumption created many questions relating to the taxability of specific items or sales made by different types of establishments.

FAQ

- *Is food sold in restaurants taxable?*

Yes. Food sold in restaurants is prepared food, typically sold with utensils and is designed for immediate consumption.

- *Is takeout food, food sold in a drive through, or delivery food taxable?*

Yes. Even if it is not consumed on the premises of the seller, the food is still considered prepared food and is taxable.

- *Is food at the movie theatre or sporting events such a UW sporting events taxable?*

Yes. In general terms, food sold by concessionaires is for immediate consumption and is taxable as prepared food.

- *Is food sold in a deli section of the grocery store taxable?*

Generally, no but with the notable exception of heated foods and foods sold with utensils provided by the seller. Deli meats that are sliced and packaged by the seller and sold by weight are exempt as are deli salads sold by weight. Heated deli chicken and other products heated by the seller are taxable. A salad sold in a package with a fork and dressing would also be taxable as prepared food.

- *Are foods sold in a convenience store taxable?*

Food and beverages sold unprepared off the shelf or from the cooler are not subject to Wyoming sales tax. But heated items such as breakfast sandwiches, burritos, hotdogs, etc. and fountain drinks, ices, and similar beverages sold with a cup and straw are

considered prepared food and subject to Wyoming sales tax.

- *Are products which require preparation by the seller but which will require additional preparation by the consumer taxable?*

No. A good example of this would be a fresh pizza offered for sale by a vendor. A notable example of this is Papa Murphy's Pizza. The pizza is prepared by the vendor however is sold without being cooked. The pizza must be cooked by the purchaser.

Specific Products

We have also received questions about specific products:

- *Candy*

Candy is food for domestic home consumption and is generally exempt.

- *Breath mints and chewing gum?*

Breath mints and chewing gum are consumed for taste and/or nutritional content. As such, they are generally exempt.

- *Cough drops/throat lozenges?*

Cough drops and throat lozenges are not consumed for taste or nutrition. They are over-the-counter drugs designed to treat a condition. This answer applies to all over the-counter medications and remedies.

- *Breath strips and sprays?*

Breath strips and sprays are subject to tax as they are commonly used for a hygienic purpose – to kill germs, freshen breath, etc. These items are not consumed merely for taste or nutrition.

- *Homeopathic remedies?*

Products that meet the definition of dietary supplements and which are consumed for taste or nutritional value and which are intended to supplement the diet are exempt as food for domestic home consumption. However, products that otherwise meet the definition but are consumed to treat a condition, ailment, illness, or other malady are considered over-the-counter drugs and are subject to Wyoming sales tax.

- *Ice?*

Crushed or cubed ice is considered food for domestic home consumption and is sales tax exempt. Block or dry ice is used for cooling, not consumption, and remains subject to sales tax.

- *Alcoholic beverages?*

Alcoholic beverages are subject to tax. These products are specifically excluded from the definition of food for domestic home consumption.

- *Non-alcoholic beverages such as non –alcoholic beers and wines?*

If the beverage contains less than ½ of 1% of alcohol by volume, then it is not considered an alcoholic beverage and is considered food for domestic home consumption and thus tax exempt provided it is not sold as prepared food.

- *Cooking sherry, cooking wine or flavored extracts (i.e., almond extract, vanilla extract)?*

Liquids used in cooking that exceed ½ of 1% alcohol by volume, but that are not intended for sale as a beverage (i.e., not for sale as a drinkable liquid) are generally sales tax exempt as food for domestic home consumption.

- *Soft Drinks?*

Soft drinks are generally considered food for domestic home consumption unless they sold as prepared food. Prepared food examples include purchasing a fountain drink with a cup and straw provided by the seller, purchasing a single serving bottled soft drink as part of a prepared meal or from a concessionaire.

- *Bakery products?*

Generally, no, unless the bakery good is sold with utensils or is combined with other food products by the seller. An example of this would be a bagel and cream cheese or a sandwich. These would then become prepared foods and taxable. However, a loaf of bread or a dozen bagels or donuts made in a bakery would be exempt.

- *Wedding cakes?*

Wedding cake purchased from a grocer or bakery is not subject to sales tax unless the vendor also provides utensils such as plates, forks, or serving utensils as part of the price for the wedding cake. Wedding cakes sold and served by a caterer are taxable as prepared foods.

- *Party trays containing cold products like sliced or cubed cheeses, meats, fruits, or vegetables with or without dip?*

Party trays made by an entity who's primary NAICS code is that of a food manufacturer are exempt as food for domestic home consumption. Party trays assembled by the deli, grocery store, or any entities other than NAICS-classified food manufacturers are taxable as prepared food.

- *Grocery store salad bar?*

It is our understanding that some grocers have an open salad bar with various ingredients and containers for transporting the salad. The purchaser fills their container and then pays the grocer based on weight. So long as there are no hot ingredients added to the salad and the seller does not provide a fork or other utensil, then the salad would be considered exempt food for domestic home consumption.

Additional Questions

In addition to specific items, several retailers, food and non-food, have posed questions:

- *I am a lumber store, pet store, automotive retailer, etc. that has a rack of single serve chips, nuts candy bars, etc. Are these items taxable?*

Single serve packages of snacks that are packaged by the manufacturer are generally exempt as food for domestic home consumption even when sold by non-food retailers. These items do transition to taxable products if they are sold through a concessionaire as part of a meal deal or with utensils.

- *I own a bar and most of the food I sell is prepared food. But I may sell a single bag of chips. Would the chips be taxable or exempt?*

For those vendors who sell food that could be considered exempt alongside food that is taxable as prepared food, the Department administers the taxability of these sales as follows. If more than seventy five percent (75%) of the food vendor's sales are comprised of food that is heated by the seller or foods where the seller combined two or more ingredients to make a single item, then all of the vendor's sales of single serve items are subject to tax.

- *I own a coffee shop and most of the food I sell is prepared food. But I may*

sell a pound of coffee beans. Would the beans be taxable or exempt?

Building on the answer from the previous question, if more than seventy five percent (75%) of the food vendor's sales are comprised of prepared food, then all of the vendor's sales of single serve items are subject to tax. But for those sales that are four or more servings per container such as a bag of coffee beans or a 2-liter beverage, those isolated sales would be exempt as food for domestic home consumption.

- *How does this apply to Farmer's Markets?*

The bulk of food sold at a farmer's market is clearly intended to be taken home for later preparation and consumption and is exempt from Wyoming sales tax. But some food concessionaires sell prepared food, i.e., hot food, soft drinks sold in a cup, ice cream, snow cones, etc. for immediate consumption at the same venue. These prepared foods are subject to Wyoming sales tax.

- *How does this apply to vending machine sales?*

If the item meets the conditions to be considered food for domestic home consumption, the fact that it is sold through a vending machine will not transition that product into prepared food. But if the vending machine is designed to dispense prepared food, i.e., hot coffee, hot chocolate, heated sandwiches, fountain drinks, etc., then the food will be taxable as prepared food.

- *How does this apply to novelty gift sets that combine taxable items, such as toys, games, etc. with non-taxable items, such as candy?*

Easter baskets are a key example of such a transaction. If the majority of the purchase or sales price is comprised of exempt food items, then the entire basket takes on the character of the exempt items and the basket is exempt. But if the majority of the purchase or sales price of the basket is comprised of taxable items, then the bundle takes on the character of the taxable items and the sale is subject to tax. For example, if individually the taxable items in the basket cost $4.00 and the non-taxable items cost $2.00 then the entire sales price for the basket would be subject to tax.

Please be advised that this bulletin addresses issues in general terms and cannot be appropriate or applicable in all situations. If your situation is markedly different or you have concerns about this issue, please do not hesitate to contact this department. You can do so by e-mail directed to: **DOR_taxability@wyo.gov**

Supporting Authority -

W.S. 14-3-301(a)(i) states:
"Tobacco products" means any substance containing tobacco leaf or any product made or derived from tobacco that contains nicotine including, but not limited to, cigarettes, cigars, pip tobacco, snuff, chewing tobacco or dipping tobacco.

W.S. 39-15-101(a)(xxviii) states:
"Drug" means a compound, substance or preparation, and any component of a compound, substance or preparation, other than food and food ingredients, dietary supplements or alcoholic beverages:

(A) Recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or a supplement to any of them;

(B) Intended for use in the diagnosis, cure, mitigation, treatment

or prevention of disease; or (C) Intended to affect the structure or any function of the body.

W.S. 39-15-101(a)(xli) states:
"Food for domestic home consumption" means substances whether in liquid, concentrated, solid, frozen, dried or dehydrated form that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. "Food for domestic home consumption" does not include alcoholic beverages, tobacco or prepared foods;

W.S. 39-15-101(xlvi) states: "Prepared food":

(A) Includes:

(I) Food sold in a heated state or heated by the seller; (II) Two (2) or more food ingredients mixed or combined by the seller for sale as a single item; or

(III) Food sold with eating utensils provided by the seller including plates, knives, forks, spoons, glasses, cups, napkins or straws. A container or package used to transport the

(B) Does not include:

(I) Food that is only cut, repackaged or pasteurized by the seller;

(II) Eggs, fish, meat, poultry or foods containing raw animal foods and which are required or recommended to be cooked by the consumer to prevent food borne illness;

(III) Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsector 3118 dealing with bakeries;

(IV) Food sold in an unheated state by weight or volume as a single item; or

(V) Bakery items including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danishes, cakes, tortes, pies, tarts, muffins, bars, cookies, tortillas and other bakery goods unless the item is sold as prepared food under subdivision (xlvi)(A)(III) of this subsection.

W.S. 39-15-103(a)(i)(F) states:
Except as provided by W.S. 39-15-105, there is levied an excise tax upon:

The sales price paid for meals and cover charges, excluding all gratuities regardless of whether offered by the customer or invoiced by the seller, at any place where meals are regularly served to the public;

W.S. 39-15-105(a)(vi)(E) states:
For the purpose of exempting sales of services and tangible personal property which are essential human goods and services, the following are exempt: Sales of food for domestic home consumption.

WY Dept. of Rev Rules, Chap 2, Sec 2(d) states:
"Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half (0.5%) of one percent or more of alcohol by volume.

WY Dept. of Rev Rules, Chap 2, Sec 2(l) states:

"Dietary Supplement" means any product, other than "tobacco" intended to supplement the diet that:

(i) Contains one or more of the following dietary ingredients:
(ii) A vitamin;
(iii) A mineral;
(iv) An herb or other botanical;
(v) An amino acid;
(vi) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or (vii) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in above that is intended for ingestion in tablet, capsule, powder, softgel, gelcap or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and is required to be labeled as a dietary supplement, identifiable by the "Supplemental Facts" box found on the label and as required pursuant to 21 C.F.R. § 101.36.

WY Dept. of Rev Rules, Chap 2, Sec 12(dd) states:

Vending Machines. Vending machine sales of tangible personal property, except postage stamps and food for domestic home consumption, shall be subject to the sales tax. Prepared food sold in a vending machine shall remain taxable.