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Taxation

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ST 2004-01 – Food Definition, Issued May, 2004; Revised June, 2007 and May, 2015

The purpose of this information release is to provide additional information regarding the definition of “food” in Ohio Revised Code (“R.C.”) 5739.01(EEE). This revision addresses the proper tax treatment of powdered drink mixes and drink concentrates. The definition of food is important because food consumed off the premises is not subject to Ohio sales tax.

R.C. 5739.01 (EEE)(1) defines “food” as follows:

“Food” 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” does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.

Generally, if a substance, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form is consumed by humans for nutritional value or taste, it is “food.”

Alcoholic beverages, dietary supplements, soft drinks, and tobacco are specifically excluded from the definition of “food.” These exceptions are discussed below.

Alcoholic Beverages

R.C. 5739.01(EEE)(2)(a) provides:

“Alcoholic beverages” means beverages that are suitable for human consumption and contain one-half of one per cent or more of alcohol by volume.

Beer, wine, and liquor are not food and are subject to sales tax.

The term “alcoholic beverages” does not include non-alcoholic beers that contain less than one-half (0.5%) of one per cent of alcohol by volume. Also, “alcoholic beverages” do not include nonalcoholic mixers, whether in liquid, powdered or frozen form. However, some of these items may be “soft drinks” as discussed below.

Cocktail mixes that do not contain alcohol but are artificially or naturally sweetened meet the definition of “soft drink” and are taxable. Also, cocktail mixes that contain alcohol are an alcoholic beverage and are taxable whether in liquid or frozen form. However, items that contain alcohol but are not used as beverages, such as vanilla extract and cooking wines, are not alcoholic beverages.

Dietary Supplements

R.C. 5739.01(EEE)(2)(b) provides:

“Dietary supplements” means any product, other than tobacco, that is intended to

supplement the diet and 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 for use as a sole item of a meal or of the diet; that is required to be labeled as a dietary supplement, identifiable by the “supplement facts” box found on the label, as required by 21 C.F.R. 101.36; and 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;
- vi. A concentrate, metabolite, constituent, extract, or combination of any ingredient described in divisions (EEE)(2)(b)(i) to (v) of this section.

The simplest method to determine whether a particular product is a dietary supplement, as that term is defined above, is to look for the “Supplement Facts” label on the product. If that box appears on the label, the product is a dietary supplement and not a food. All sales of dietary supplements are taxable.

Nutritional and diet products such as Ensure® or Slimfast® that contain a “Nutrition Facts” box on the label are food products, not dietary supplements.

Soft Drinks

R.C. 5739.01(EEE)(2)(c) provides:

“Soft drinks” means nonalcoholic beverages that contain natural or artificial sweeteners. “Soft drinks” does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contains greater than fifty per cent vegetable or fruit juice by volume.

It is important to note that carbonation alone does not determine if a beverage is a “soft drink.” Any naturally or artificially sweetened nonalcoholic beverage, is a soft drink unless it contains milk products or a milk substitute or greater than fifty percent (50%) fruit or vegetable juice by volume. All sales of soft drinks are taxable.

Soft drinks include traditional soda pop beverages, but also include many fruit drinks or fruit punches that contain fifty percent (50%) or less juice by volume. Bottled tea and coffee drinks that contain sweeteners are taxable soft drinks unless they contain milk or milk substitutes.

Tobacco

R.C. 5739.01(EEE)(3)(d) provides:

“Tobacco” means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

This represents no change in Ohio sales tax law as tobacco and tobacco products have never been considered “food.” All sales of tobacco and tobacco products are taxable.

Food Sold for Consumption Off-Premises

The sale of food and food ingredients for human consumption off the premises where sold is exempt from sales tax under R.C. 5739.02 (B)(2). Food consumed on the premises where sold is taxable.

Frequently Asked Questions

Following are some frequently asked questions regarding the definition of food. The response of “nontaxable” assumes the food is consumed off-premises.

A. When is food taxable?

Food consumed on the premises is always taxable. Only food that is consumed off the premises where sold is non-taxable. For example, food consumed in restaurants is always taxable.

B. Is bottled water, flavored water, carbonated water, or flavored carbonated water defined as “food”?

Since water is a liquid substance ingested by humans for taste or nutritional value, these products are generally considered “food”. Food, if purchased for consumption off the premises where sold, is not subject to Ohio sales tax. However, if the water product contains natural or artificial sweeteners, it is a “soft drink” under R.C. 5739.01(EEE)(2)(c) and is taxable.

C. Are beverages that contain “natural flavor,” “essence,” or “spice” but no specifically listed sweeteners included in the definition of “soft drink”?

No. Natural flavors and spices are not sweeteners and therefore these beverages are not “soft drinks.” See Interpretative Opinion 2013-1, issued by the Compliance Review and Interpretation Committee, Streamlined Sales Tax Governing Project.

D. Are prepackaged (canned or bottled) tea and coffee beverages “food”?

Prepackaged beverages that are artificially or naturally sweetened are “soft drinks” and taxable under R.C. 5739.01(EEE)(2)(c). Prepackaged teas and coffees that are sweetened are not food and are taxable as “soft drinks” unless they also contain milk, milk products or a similar substitute for milk such as soy or rice.

As used in this response, “prepackaged” refers to a beverage that is sold to the ultimate consumer in the same container (e.g., bottle or can) in which it is received by the vendor from its supplier.

E. I make and sell coffee, tea, hot chocolate and other beverages to customers in my restaurant. In some cases, I will add a flavored syrup to coffee or tea. Other times I will add steamed milk or whipped cream. Are these products “food”?

A cup of plain coffee or tea is “food”. If the vendor sells plain coffee or tea and provides consumers with sugar or other sweeteners or flavorings that the consumer can add to the beverage at no charge, the coffee or tea is food. In such a case, the beverage is not taxable if it is sold for off-premises consumption.

If the vendor, for a charge, adds a sweetened flavoring, the beverage is a taxable “soft drink” regardless of where it is consumed. If the vendor adds milk or a milk product, such as whipped cream, or a milk substitute, the beverage is “food” and not taxable if it is sold for off-premises consumption. If the vendor adds both a sweetened flavoring and a milk product or milk substitute, the beverage is still “food”.

Hot chocolate that contains milk, a milk product or a milk substitute is a nontaxable “food” if sold for

off-premises consumption.

F. I operate a restaurant that also has a drive-through window. When a customer at the drive-through window orders coffee or tea and requests a sweetener, as a convenience and at no charge, I will add the sweetener to the beverage rather than provide a packet of sweetener to the customer. Is the sweetened coffee or tea sold in this manner “food” or a “soft drink”?

As noted in the prior answer, a cup of plain coffee or tea is “food” and not taxable if sold for off-premises consumption. If the vendor, as a convenience to the consumer, adds sweetener at no additional charge, the transaction is a sale of food. Since it is being consumed off the premises where sold, it is not subject to sales tax. If the vendor charges for the sweetener, the sweetened beverage is a taxable “soft drink” unless a milk product or milk substitute was also added.

G. Are powdered drinks or frozen fruit drink concentrates taxable?

No. A product is a taxable “soft drink” only if it is sold in liquid form because, by definition, a beverage must be a liquid. However, powdered drink mixes or drink concentrates that contain a “Supplement Facts” box on the label are taxable because supplements are not food.

H. Are liquid drink concentrates or liquid water enhancers taxable?

If the drink concentrate or water enhancer is sold in liquid form and contains natural or artificial sweetener, it is a taxable “soft drink”. However, drink concentrates that contain a “Supplement Facts” box on the label are taxable because supplements are not food.

I. Are sports drinks, energy drinks and energy shots “soft drinks”, “food” or “nutritional supplements”?

If the sports or energy drink is naturally or artificially sweetened, it is a “soft drink” and is always taxable. If the sports or energy drink is unsweetened and contains a “Supplement Facts” box on the label then the product is not food and is taxable. If the product is unsweetened and contains a “Nutrition Facts” box on its label, it is “food” and not taxable if consumed off the premises where sold.

J. Is non-alcoholic beer “food”?

If it contains less than one-half (0.5%) of one percent alcohol per volume then it is “food” and is not taxable. But, if the nonalcoholic beer contains one-half percent or more of alcohol per volume it is a taxable alcoholic beverage. However, non-alcoholic beer, like other foods, is taxable if consumed on the premises.

K. Are protein drinks considered to be “food” or a dietary supplement?

The taxability of protein drinks is determined by how they are labeled. If the label has a “Supplement Facts” box, the product is not “food” but a taxable dietary supplement. If the label contains a “Nutrition Facts” box then the product is nontaxable “food”, if consumed off the premises.

L. Are diet products “food” or nutritional supplements?

If the diet product is a capsule, tablet, or any other item that contains a “Supplement Facts” box on its label, then the product is not “food”. A beverage or nutrition bar that contains a “Nutrition Facts” box on its label is food.

M. Are over-the-counter drugs taxable?

Yes. Over-the-counter drugs such as nicotine gum, other tobacco cessation products, pain relievers, cough medicine, cough drops, and antacids are taxable. Products with a “Drug Facts” box on the label

are taxable as an over-the-counter drug.

N. Are candy, chewing gum and breath mints “food”?

Yes. These substances are ingested or chewed for their taste and are food within the meaning of R.C. 5739.01(EEE)(1).

O. Are ingredients used in baking taxable?

Ingredients used in baked goods that are consumed by humans for taste or nutritional value are nontaxable food. Ingredients such as vanilla extract, food coloring, sugar, sweetener, flour, gelatin, pectin, chocolate, peanut butter, cake mixes, marshmallows, nuts, spices, and similar items are not taxable.

P. Is baking soda taxable?

If baking soda is sold for use in baking or cooking then it is food and not taxable. However, baking soda that is sold for any other purpose, such as a deodorizer, is taxable since it is not being purchased to be ingested by humans for taste or nutritional value. Since vendors may not know how the consumer will use the product, the taxability will be determined based on the marketing materials on the packaging. For example, if the packaging primarily markets the product for washing clothes or as a deodorizer, the product is taxable.

Q. Are cooking wines and extracts taxable?

No. Although cooking wines and extracts contain alcohol, they are not meant for drinking. They are used in food preparation and are an ingredient that is within the definition of food.

R. Are condiments such as ketchup and mustard “food”?

Yes. Since condiments are substances ingested by humans for taste or nutritional value, these items are nontaxable food. Ketchup, mustard, mayonnaise, salad dressing, barbecue sauce, cocktail sauce, and hot sauce are a few examples of condiments.

S. Are vegetable and herb plants taxable?

Yes. If it is sold in potted form (e.g. in potting soil) then it is taxable as a plant. But, if an herb is cut and packaged for consumption then it is a nontaxable food.

T. Fruit, vegetable, and flower seeds are sometimes eaten. How do we differentiate between these types of seeds and seeds sold for gardening?

If the seeds are sold for eating, they are food and not taxable. Seeds sold for gardening are not food and taxable.

U. Is ice “food”?

Generally, ice is food and not taxable. However, ice that is sold for cooling purposes is not food and is taxable. For administrative purposes, ice sold by grocery, convenience, and similar stores is presumed to be food and no tax should be charged. A single purchase of ice used for dual purposes, such as to cool beverages before dispensing and also placed in a container for consumption, is nontaxable food.

V. Are fruit and vegetable juices “food”?

Sweetened beverages with fifty percent (50%) or less fruit or vegetable juice are taxable soft drinks. If the fruit or vegetable juice content is more than fifty percent (50%) by volume then the beverage is food. In the case of a liquid beverage concentrate, the fifty percent (50%) test by volume is based upon the reconstituted beverage.

W. Are carbonated beverages excluded from the definition of food as “soft drinks”?

Carbonation is not determinative of whether a beverage is a soft drink. In general, any beverage that is sweetened is a soft drink. If beverages are sweetened naturally or artificially, then they are taxable soft drinks unless they also contain milk, milk products, or similar substitute for milk such as soy or rice. Also, a beverage that contains more than fifty percent fruit or vegetable juice, is food regardless of whether it is carbonated.

X. Some items, such as salt, have multiple uses. How are they taxed?

Since vendors may not know how the consumer will use the product, the taxability is determined based on the marketing materials on the packaging. For example, table salt, including such things as Kosher salt, canning salt, and sea salt, are food products. Salt marketed to be used primarily for ice cream freezers or to melt snow is not food and is taxable.

Y. Is dog and cat food taxable?

Yes. Only food consumed by humans is not taxable.

Z. Does the definition of food affect the items that can be purchased with food stamps?

No. The definition of food does not determine if an item is eligible for purchase with food stamps. Federal law governs the items that may be purchased with food stamps and that determination is independent of Ohio’s definition of “food.” If you have any further questions regarding food stamps, please contact the Food and Nutrition Service (United States Department of Agriculture regional office (Columbus: 614-469-6864; Cleveland: 216-522-4990; or Cincinnati: 513-684-3568) or visit their website at www.fns.usda.gov.

Note that under R.C. 5739.02(B)(16), any purchase of “food” as defined by the Food Stamp Act of 1977, 91 Stat. 958, 7 U.S.C. 2012, that is made using food stamps is exempt from Ohio sales tax regardless of whether the item meets the Ohio definition of “food.”

Reference Chart

Below is a list of items that have been categorized as food or non-food under R.C. 5739.01(EEE). This list is not all-inclusive but is intended as a guide.

Food:

- Baked goods (e.g., cake, cookies, pastry, etc.)
- Baking ingredients
- Bottled water (including carbonated, distilled, and mineral)
- Candy, chewing gum, breath mints
- Cereals and cereal products
- Chips and other snacks
- Cocoa, tea bags, coffee beans
- Coffee (with milk or milk product)
- Coffee-Unsweetened
- Condiments (ketchup, mustard, etc)
- Cooking oils (vegetable, canola, olive, etc.)
- Extracts (vanilla, peppermint, almond, etc.)
- Fruit juice (more than 50% juice content)
- Ice (sold at a grocery, convenience, or similar stores)
- Milk and milk products (including ice cream)

- Non-alcoholic beer (less than 0.5% alcohol content per volume)
- Nuts (all types)
- Popcorn
- Popsicles/sno-cones
- Powdered drink mixes(if sweetened and not more than fifty percent fruit or vegetable juice when prepared (Tang®, Kool-Aid®))
- Pudding/gelatin
- Soy products
- Sugar and sugar substitutes
- Tea-Unsweetened
- Vegetable juice (more than 50% juice content)

Non-Food:

- Alcoholic beverages (with 0.5% or more alcohol per volume)
- Antacids
- Bottled tea or coffee-Sweetened (including artificially)and without milk or milk substitute
- Cod liver oil
- Coffee-Sweetened (including artificially)
- Cough drops
- Diet drugs and supplements
- Fruit juice (50% or less juice content)
- Gelatin capsules
- Ice (used as a refrigerant and not sold at a grocery, convenience, or similar stores)
- Lemonade
- Mineral oil
- Nicotine gum
- Over-the-counter drugs
- Pet food
- Protein drinks (with “Supplemental Facts” on the label)
- Soda pop
- Sweetened beverages without milk or milk substitutes
- Sweetened liquid drink concentrates
- Sweetened Sports/energy drinks (e.g., Gatorade®, Powerade®)
- Toothpaste and mouthwash
- Vegetable juice (50% or less juice content)
- Vitamins
- Water-Sweetened (including artificially)

This information release was reformatted to comply with the Americans with Disabilities Act.

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