

This letter provides a brief summary of when the high rate of tax for food and the low rate of tax for food apply. See 86 Ill. Adm. Code 130.310. (This is a GIL.)

October 16, 2009

Dear Xxxxx:

This letter is in response to your letter dated September 16, 2009, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings (“PLRs”) are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department’s regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter (“GIL”) is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

As a service to our vendors who sell our equipment and supplies to our franchised stores for use in the operation of their restaurants, BUSINESS respectfully requests a written determination as to the proper sales tax treatment of the following items sold in BUSINESS restaurants:

<u>Product</u>	<u>Taxable Yes/No</u>	<u>Supporting Comments/ Statute</u>
Crusher		
Dispensers		
Machine		
Boosting Oven		
Bun Toaster		
Cake Decorations		

Cake Processing		
Chain Broilers		
Changing Station		
Condiments Bar		
Display Freezer		
Disposable Items with Meals		
Drive Thru Communication System		
Flash Freezer		
Food Prep Stand		
Food Steamers		
Food Warmers		
Freezer Accessories		
Fryers		
Griddle		
Holding Cabinet		
Ice Machine		
Kid's Meal Premiums		
Misty Freezer		
Mix Pump		
Product Thermometer		
Restaurant Advertisement		
Seating		
Serving Counter		
Shelving Units		
Signage		
Small Menu Boards		
Smallwares Package		
Soft Serve Freezer		
Trash Receptacles		
Uniforms		
Walk in Cooler/Freezer		
Frozen Novelties – Single Serving		
Frozen Novelties – 6 pack		
Ice Cream Cake		
Shipping/Freight		
Shortening absorbed by Frying Food		

Finally, we would be interested in knowing about other possible factors that may be considered in determining the taxability of these items.

If you have any questions, please give me a call.

DEPARTMENT'S RESPONSE:

The Department is unable to respond to your inquiry in the manner you have requested. Insufficient information has been provided to make a determination with regards to each item in your list of tangible personal property purchased or sold by the Company. You may want to review the Department's rules, bulletins and previously-issued letter rulings for guidance regarding many of the types of items you have inquired about.

Food

The Department's regulation regarding the appropriate tax rates for food can be found at 86 Ill. Adm. Code 130.310. Food that is to be consumed off the premises where it is sold (other than alcoholic beverages, candy, soft drinks, and food that has been prepared for immediate consumption) is taxed at the rate of 1% plus applicable local taxes. Food is defined as any solid, liquid, powder or item intended by the seller primarily for human internal consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice. Candy is defined as a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. Candy does not include any preparation that contains flour or requires refrigeration. "Soft drinks" means non-alcoholic beverages that contain natural or artificial sweeteners, but does not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than 50 % vegetables or fruit juice by volume.

The manner in which food is taxed depends upon the nature of the establishment that is selling the food. Retailers who provide seating or facilities for on-premises consumption of food generally incur tax at the high rate (6.25% State rate) on all food sales (including bulk or grocery type items). However, if establishments sell both food that has been prepared for immediate consumption and bulk or grocery type items and also provide facilities for on-premises consumption, the lower rate of tax (1%) may be charged on the bulk or grocery type items (other than alcoholic beverages, candy, soft drinks, and food that has been prepared for immediate consumption) if the dining facilities are physically partitioned from the area where food not for immediate consumption is sold and these facilities utilize a separate means of collection of receipts. See 86 Ill. Adm. Code 130.310(b)(3).

The Department generally relies on the plain meaning of the term "physically partitioned" as in separated or divided by a tangible barrier. An eat-in-area that is partially isolated from the generally sales area of a store by the arrangement of display cases, service counters, or stub walls would qualify as "physically partitioned."

If establishments have no seating or facilities for on-premises consumption of food, the tax rate incurred on food sales is determined by whether the majority (over 50%) are bulk or grocery type sales or are sales for immediate consumption. If more than 50% of all food sales are for immediate consumption, the retailer must charge the high rate on all food sales. If more than 50% of all food sales are bulk or grocery type items, all food sales are taxed at the low rate with the exception of hot foods, food that has been prepared for immediate consumption, alcoholic beverages, candy and soft drinks. See Section 130.310(a). Food for immediate consumption is defined in the regulation as hot food and food made ready by the retailer to be eaten without substantial delay after the final stage of preparation by the retailer. See 86 Ill. Adm. Code 130.310(b)(6). Please note, however, that amendments to Section 130.310 regarding food have been published in the Illinois Register and some additional changes to the regulation are expected as a result of recent legislation on soft drinks and candy.

Non-reusable tangible personal property

Non-reusable tangible personal property sold to food and beverage vendors, including persons engaged in the business of operating restaurants, cafeterias or drive-ins, is a sale for resale when such property is transferred to customers in the ordinary course of business as part of the sale of food or beverages and is used to deliver, package or consume food or beverages, regardless of where consumption of the food or beverage occurs. Receipts from sales for resale are not subject to the Retailers' Occupation Tax. See Section 130.2070(b)(3). The supplier of such items must be presented with a Certificate of Resale by the purchaser in order for the transaction to be nontaxable. By way of example, items sold for resale include, but are not limited to, paper and plastic cups, plates, baskets, boxes, sleeves, buckets or other containers, utensils, straws, placemats, napkins, doggie bags and wrapping or packaging materials that cannot be reused by the food or beverage vendor and which are transferred to customers as part of the sale of food or beverages. Additionally, small toys and prizes provided in children's meals and transferred to the customer as part of the sale of such child's meal are also considered items sold for resale.

It must be noted, however, that food vendors purchasing items used or consumed in conducting their business and which are not transferred to the customer fully incur Use Tax as the end users of the items sold. Such items include, but are not limited to, paper products, serving trays, serving dishes, utensils or condiment bottles. The supplier's receipts from the sale of items for use or consumption are subject to the Retailers' Occupation Tax. See 130.2070(b)(3) and (c)(1).

Items such as shortening, cooking oil, powders or mixes that will actually become part of the food that will be sold can be sold tax-free as sales for resale. See 86 Ill. Adm. Code Sections 130.210 and 130.1405. If these food items will be used to prepare foods, but will not be incorporated into the food to be resold, they are taxable (*i.e.*, oil used for frying as opposed to oil used to make biscuits). If the items will be used in both capacities, customers can give vendors certificates of resale specifying what percentage can be bought tax-free and what percentage is taxable. The percentage that is taxable would be at the low rate, which is 1%. See 86 Ill. Adm. Code 130.310, which describes the manner in which food is taxed.

Manufacturing machinery and equipment exemption

The Retailers' Occupation Tax does not apply to sales of machinery and equipment used primarily (over 50%) in the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease. See 86 Ill. Adm. Code 130.330. When determining whether a piece of equipment qualifies for the manufacturing machinery and equipment exemption, the requirements of 86 Ill. Adm. Code 130.330 must be met.

"Manufacturing", as defined in this regulation, is the production of articles of tangible personal property, whether such articles are finished products or articles for use in the process of manufacturing or assembling different articles of tangible personal property by procedures commonly regarded as manufacturing, processing, fabricating, or refining which changes some existing material or materials into a material with a different form, use or name. These changes must result from the process in question and be substantial and significant. See 86 Ill. Adm. Code 130.330(b)(2).

Tangible personal property that merely "stores/houses" items until they are needed in a manufacturing process does not qualify for the Manufacturing Machinery and Equipment Exemption. Machinery or equipment used in the last step of the retail sale also does not qualify for the exemption. 86 Ill. Adm. Code 130.330(d)(4)(J).

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters
Associate Counsel

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