

Food, Drugs, Medicines, And Medical Appliances

Purpose

This chapter is meant to introduce the auditor to the various rules associated with food, medicines, medical appliances, and grooming and hygiene products.

Disclaimer

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Citations to statutes, regulations, or case law are included to assist the auditors in locating the relevant legal authority as a basis for conducting audits. The manual may be amended at any time without notice by the Department. Nothing in this manual shall contradict the official text of statutes, administrative rules, or case law. In case of any unintended inconsistency, the official text of statutes, administrative rules, and case law controls and must be followed. The Department’s Director, General Counsel, and Legal Services Bureau do not sanction any deviation by the Department staff from the official text of statutes, administrative rules, or case law in the performance of job functions.

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14.1 General Information

14.2 Definitions **

14.3 Food

- 14.3.1 Factors Which Determine How Food Is Taxed
- 14.3.2 Tests To Determine The Proper Taxable Rate On Food
- 14.3.3 Vendors Of Meals
- 14.3.4 Employee Meals
- 14.3.5 Selling Of Food By Exempt Organizations
- 14.3.6 Taxation Of Food Transferred By Serviceman
- 14.3.7 Taxation Of Food Not Transferred By Serviceman
- 14.3.8 Food Distribution Programs – Non-Profit

14.4 Drugs, Medicines, Medical Appliances And Grooming And Hygiene Products

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- 14.4.1 Medicines
- 14.4.2 Grooming And Hygiene Products
- 14.4.3 Breast Pump And Breast Pump Kit Exemption
- 14.4.4 Registered Pharmacists
- 14.4.5 Physicians And Surgeons
- 14.4.6 Dentists
- 14.4.7 Chiropractors, Osteopaths And Chiropractors
- 14.4.8 Optometrists And Opticians
- 14.4.9 Other Medical Professions, Providers, And Disciplines
- 14.4.10 Taxation Of Drugs And Medical Appliances Transferred By Serviceman – Service Occupation Tax
- 14.4.11 Taxation Of Drugs And Medical Appliances Not Transferred By Serviceman – Use Tax
- 14.4.12 Medicaid, Medicare, And Medicare Part D Prescription Plan
- 14.4.13 Hospitals
- 14.4.14 Prescription Drugs For Pets

14.5 Audit Procedures – General

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Through the years the "neighborhood grocer" who sold only food and the "neighborhood pharmacy" which only filled prescriptions and sold medical supplies have given way to giant mega-stores, supermarkets, and convenience stores which sell a variety of products besides food and drugs, such as clothing, toys, food for immediate consumption, etc. Consequently, few grocers today qualify under the strict definition of a retail grocer (marketplace where groceries are sold). These mega-stores may have pharmacies, optical departments, food courts, bakeries, delicatessens, car care centers, etc., in addition to a supermarket. Supermarkets may have a pharmacy, a bakery, and a delicatessen. Pharmacies may sell all sorts of food items and over-the-counter drugs (non-prescription medicines) in addition to prescription medicines and medical appliances. Convenience stores sell food items and over-the-counter drug items. Food items and over-the-counter medicines are sold in many other establishments such as hardware stores, non-grocery retail outlets, gas stations, etc. Food items are also sold from vending machines. Vendors of meals such as hotels, restaurants, caterers, boarding houses, concessionaires, nonprofit service organizations, and schools are other major component of the food industry.

In addition to pharmacies and stores that sell drugs, medicines, medical supplies and medical appliances, the medical services industry is also involved in using and selling these same items in conjunction with their services provided. The medical services industry includes hospitals, physicians, surgeons, chiropractors, dentists, optometrists, etc.

The taxation of food, drugs, and medical appliances depends upon the nature of the transaction. For food, this means how it is prepared, where it is sold, how it is sold, who is purchasing (wholesale vs. end user), how it is packaged, etc. For drugs, medicines, and medical appliances, this means prescription or over the counter, medicinal claims on the label, who is providing it, how the provider transfers it, how the provider uses it, who is paying for it, how it is provided, etc. These will be discussed in detail in later sections of this chapter.

The State of Illinois sales tax laws allow for certain food items, drugs, and medical appliances to be taxed at a significantly lower tax rate (1%) than general merchandise (6.25%). Food for human consumption which is to be consumed off the premises where it is sold (other than alcoholic beverages, food consisting of or infused with adult use cannabis, soft drinks, candy, and food which has been prepared for immediate consumption), and prescription and non-prescription medicines, drugs, medical appliances, products classified as Class III medical devices by the United States Food and Drug Administration that are used for cancer treatment pursuant to a prescription, as well as any accessories and components related to those devices, modifications to a motor vehicle for the purpose of rendering it usable by a person with a disability, and insulin, blood sugar testing materials, syringes, and needles used by human diabetics, are subject to the reduced rate of 1%. (35 ILCS 120/3-10).

For purposes of this Chapter, Illinois Sales Tax has two tax rates:

- "low rate" for qualifying food, drugs, and medical appliances taxed at the rate of 1% plus any applicable local taxes; and
- "high rate" for all other general merchandise taxed at the rate of 6.25% plus any applicable local taxes.

"Qualifying food, drugs, and medical appliances" include:

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- food that has not been prepared for immediate consumption, such as most food sold at grocery stores, excluding hot foods, alcoholic beverages, candy, and soft drinks;
- prescription medicines and nonprescription items claimed to have medicinal value, such as aspirin, cough medicine, and medicated hand lotion, excludes over-the-counter sales of grooming and hygiene products; and
- prescription and nonprescription medical appliances that directly replace a malfunctioning part of the human body, such as corrective eyewear, contact lenses, prostheses, insulin syringes, and dentures.

“Other general merchandise” includes sales of most tangible personal property including sales of:

- soft drinks;
- candy;
- hot foods and hot food products;
- prepared food such as food purchased at a restaurant;
- over-the-counter sale of grooming and hygiene products; and
- non-qualifying food and drugs.

Effective September 1, 2009, Public Act 96-0038 amended the Use Tax Act (35 ILCS 105/3-10), the Service Use Tax Act (35 ILCS 110/3-10), the Service Occupation Tax Act (35 ILCS 115/3-10), and the Retailers' Occupation Tax Act (35 ILCS 120/2-10) by changing the definitions and taxability of soft drinks, candy, and grooming and hygiene products.

** If defined in the rules, the regulation is cited, otherwise the definition is from [Merriam-Webster](#).

Grocer– a dealer in staple foodstuffs, meats, produce, and dairy products and usually household supplies.

Food – 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. 86 Ill. Adm. Code 130.310(c)(1).

Food Prepared for Immediate Consumption – food that is prepared or made ready by a retailer to be eaten without substantial delay after the final stage of preparation by the retailer. 86 Ill. Adm. Code 130.310(c)(2).

Medicine and Drugs– any pill, powder, potion, salve, or other preparation for human use that purports on the label to have medicinal qualities. Medicines prescribed by veterinarians for animals are subject to the high rate of tax. A written claim on the label that a product is intended to cure or treat disease, illness, injury, or pain, or to mitigate the symptoms of such disease, illness, injury, or pain constitutes a medicinal claim. 86 Ill. Adm. Code 130.311(c). Beginning January 1, 2014, "prescription and nonprescription medicines and drugs" includes medical cannabis and medical cannabis infused products sold by a registered dispensing organization under the Compassionate Use of Medical Cannabis Program Act.

Medical Appliance – an item that is used to directly substitute for a malfunctioning part of the body. 86 Ill. Adm. Code 130.311(e).

Pharmacy – the art, practice, or profession of preparing, preserving, compounding, and dispensing medical drugs; a place where medicines are compounded and dispensed.

Pharmacist – a health-care professional licensed to engage in pharmacy with duties including dispensing prescription drugs, monitoring drug interactions, administering vaccines, and counseling patients regarding the effects and proper usage of drugs and dietary supplements.

Soft Drink –

- Until September 1, 2009: the term "soft drinks" meant any complete, finished, ready-to-use, non-alcoholic drink, whether carbonated or not, including but not limited to soda water, cola, fruit juice, vegetable juice, carbonated water, and all other preparations commonly known as soft drinks of whatever kind or description that are contained in any closed or sealed bottle, can, carton, or container, regardless of size; but "soft drinks" did not include coffee, tea, non-carbonated water, infant formula, milk, or milk products as defined in the Grade A Pasteurized Milk and Milk Products Act, or drinks containing 50% or more natural fruit or vegetable juice. 86 Ill. Adm. Code 130.310(d)(6)(A).
- Beginning September 1, 2009, "soft drinks" mean non-alcoholic 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 greater than 50% of vegetable or fruit juice by volume. 86 Ill. Adm. Code 130.310(d)(6)(B).

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Candy – means 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. 86 Ill. Adm. Code 130.310(d)(7)(A).

Grooming and Hygiene Products – includes, but is not limited to, soaps and cleaning solutions, shampoo, toothpaste, mouthwash, antiperspirants, and sun tan lotions and sunscreens, unless those products are available by prescription only. 86 Ill. Adm. Code 130.311(d). Beginning September 1, 2009, "nonprescription medicines and drugs" does not include grooming and hygiene products.

Premises – the area over which the retailer exercises control, whether by lease, contract, license or otherwise, and, in addition, the area in which facilities for eating are provided, including areas designated for, or devoted to, use in conjunction with the business engaged in by the vendor. Vendor premises include eating areas provided by employers for employees and common or shared eating areas in shopping centers or public buildings if customers of food vendors adjacent to such areas are permitted to use them for consumption of food products. 86 Ill. Adm. Code 130.310(c)(3).

Adult Use Cannabis – means cannabis subject to tax under the Cannabis Cultivation Privilege Tax Law and the Cannabis Purchaser Excise Tax Law and does not include cannabis subject to tax under the Compassionate Use of Medical Cannabis Program Act [410 ILCS 130]. 86 Ill. Adm. Code 130.310(c)(4).

14.3.1 Factors Which Determine How Food Is Taxed

The way food is taxed depends upon two distinct factors which must both be considered in determining if food is taxed at the high rate as “food prepared for immediate consumption” or the low rate as “food prepared for consumption off the premises where sold.”

- The first factor is whether the retailer selling the food provides premises for consumption of food. If so, a rebuttable presumption is created that all sales of food by that retailer are considered to be prepared for immediate consumption and subject to tax at the high rate. As a result of this presumption, even bulk food could potentially be taxable at the high rate. However, this presumption is rebutted if a retailer demonstrates that:
 - the area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and
 - the retailer has a separate means of recording and accounting for collection of receipts from sales of both high and low-rate foods. For purposes of this section, the phrase “separate means of recording and accounting for collection of receipts” includes cash registers that separately identify high-rate and low-rate sales, separate cash registers, and any other methods by which the tax on high-rate and low-rate sales are recorded at the time of collection.
- The second factor is the nature of the food item being sold. Some foods, such as hot foods, soft drinks, and candy, are always considered to be “foods prepared for immediate consumption”, and thus subject to the high rate of tax. 86 Ill. Adm. Code 130.310.

Beginning July 1, 2022, and until July 1, 2023, the State tax rate imposed on grocery items is reduced to 0%. This suspension of tax only applies to the 1% State rate of tax. Sales which are subject to Regional Transportation Authority (RTA) tax will still be subject to the RTA tax due under 70 ILCS 3615/4.03. All items other than food for human consumption that is to be consumed off the premises where it is sold (other than alcoholic beverages, food consisting of or infused with adult use cannabis, soft drinks, candy, and food that has been prepared for immediate consumption) remain unaffected by the suspension of the 1% State tax on grocery items.

Additionally, the gross sales related to these items qualifying for the 1% suspension from sales tax are to be included when determining the retailer’s discount of 1.75% that is allowed on taxes reported on the ST-1 return. The amount of tax that would have been due at the 1% rate is to be included on the return to determine the applicable discount, however, this tax amount will be removed prior to determining the total tax due on the return.

High Rate - The following are subject to Use Tax at the high rate of 6.25% (plus any applicable local taxes):

- the low rate (1%) does not extend to alcoholic beverages. An alcoholic beverage is any beverage subject to the tax imposed under Article VIII of the Liquor Control Act of 1934 [235 ILCS 5/8-1];

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- the low rate does not extend to soft drinks. Soft drinks will be taxed at the State sales tax rate of 6.25% (plus any applicable local taxes);
- beginning September 1, 2009, "food for human consumption that is to be consumed off the premises where it is sold" does not include candy. NOTE: Candy that does not require refrigeration is taxable at the high rate even if it is refrigerated. For example, a number of candy bars that are regularly marketed at room temperature in the candy aisle may also be found in the refrigerated section. These products are refrigerated for customer preference rather than as directed on the label and are still taxable at the high rate.;
- beginning August 1, 2009, soft drinks, candy, and food products that are dispensed hot from a vending machine, regardless of the location of the vending machine will be subject to the high rate of tax;
- caterers who make deliveries of prepared meals are selling food for immediate consumption, and their sales are subject to the high rate of tax;
- food prepared for immediate consumption is food that is prepared or made ready by a retailer to be eaten without substantial delay after the final stage of preparation by the retailer and is subject to the high rate. Food prepared for immediate consumption includes, but is not limited to, the following:
 - all hot foods, whether sold in a restaurant, delicatessen, grocery store, discount store, concession stand, bowling alley, vending machine, or any other location. At a grocery store, hot foods subject to the high rate of tax include, but are not limited to, pizza, soup, rotisserie or fried chicken and coffee; other examples of food prepared for immediate consumption include popcorn or nachos sold at a movie concession stand; hot dogs sold by a street vendor; and hot precooked meals sold to customers, such as a Thanksgiving dinner. For purposes of this Section, "hot" means any temperature that is greater than room temperature.
 - sandwiches, either hot or cold, prepared by a retailer to the individual order of a customer;
 - salad, olive, or sushi bars offered by a retailer at which individuals prepare their own salads (hot or cold);
 - all coffee, tea, cappuccino, and other drinks prepared by a retailer for individual consumption, whether hot or cold, are subject to the high rate of tax;
 - all food sold for consumption on the premises where sold (e.g., restaurants, coffee shops, fast food restaurants).

References

[86 Ill. Adm. Code 130.310](#) - Food, Soft Drinks and Candy

[Publication 113](#) - Retailer's Overview of Sales and Use Tax, Prepaid Wireless E911 Surcharge, and Illinois Telecommunications Access Corporation (ITAC) Assessment

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[86 Ill. Adm. Code 130. Illustration C Food Flow Chart](#)

Low Rate - The following are subject to Use Tax at the low rate of 1% (plus any applicable local taxes):

- all food for human consumption which is to be consumed off the premises where it is sold (other than alcoholic beverages, soft drinks, candy, and food which has been prepared for immediate consumption) is subject to the low rate; Food prepared for immediate consumption does not include the following items which are generally taxed at the low rate:
 - doughnuts, cookies, bagels, or other bakery items prepared by a retailer and sold either individually or in another quantity selected by the customer, provided they are for consumption off the premises where sold;
 - whole breads, pies and cakes prepared by a retailer, even when prepared to the individual order of a customer;
 - sandwiches that are prepared by a retailer and placed in a deli case or other storage unit;
 - cold salads, jellos, stuffed vegetables or fruits sold by weight or by quart, pint, or other quantity by a retailer;
 - cheese, fruit, vegetable, or meat trays prepared by a retailer, either to the individual order of a customer or premade and set out for sale;
 - food items sold by a retailer that are not prepared or otherwise manufactured by that retailer, such as pre-packaged snacks or chips unless these items will be consumed on the premises where sold (e.g., in a sandwich shop). For grocers, such items include but are not limited to, fruits, vegetables, meats, milk, canned goods, and yogurt.
- beginning August 1, 2009, all food sold through a vending machine qualify as low rate, except soft drinks, candy, and food products that are dispensed hot from a vending machine. 35 ILCS 120/2-10;
- Bagged ice is always subject to tax at the low rate even when sold in large bags no matter where it is sold because ice is a food item;
- Individual sized bags of potato chips, pretzels, and various other snack type foods (except candy) packaged and prepared by the manufacturer, or another person are subject to the low rate of tax if there are no facilities for consumption of the product in the area. If there are chairs and tables in the area at which these products may be consumed, then the high rate of tax generally applies unless separately partitioned;
- If a food item and non-food item are contained in the same package, the proper tax rate would be determined by the item having the greater value. That rate would then be applied to the total selling price;

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- Items such as cooking oil, used by restaurants to fry food, are taxable at the low rate on the portion of the oil that is not transferred to the customer as a result of the cooking process. The portion of the cooking oil that remains on the food when sold is exempt from tax as a purchase for resale. 86 Ill. Adm. Code 130.215(b).

References:

[86 Ill. Adm. Code 130.310](#) - Food, Soft Drinks and Candy

[Publication 113](#) - Retailer's Overview of Sales and Use Tax, Prepaid Wireless E911 Surcharge, and Illinois Telecommunications Access Corporation (ITAC) Assessment

Examples Of Soft Drinks And Candy Tax Rates

SOFT DRINKS -

LOW RATE	HIGH RATE
Unsweetened tea	Sweetened tea
Unsweetened water regardless of carbonation	Naturally and artificially sweetened water
Fruit or vegetable juices that contain more than 50% juice by volume	Drinks labeled as containing 50% or less fruit or vegetable juice
Beverage powders (Kool-Aid, lemonade, instant sweetened iced tea, powdered Gatorade)	Sports drinks (Gatorade, PowerAde, etc.)
Nutritional drinks that contain soy (Ensure, Boost, etc.)	Sodas (colas, root beer, artificially sweetened diet colas, ginger ales, etc.)
Frappuccino drink found in the Dairy section of a retailer or grocer (not considered as a soft drink because it contains milk)	Frappuccino sold over the counter at a coffee shop
Chocolate or strawberry flavored milk in the Dairy section of a retailer or grocer (not considered as a soft drink because it contains milk)	Chocolate or strawberry flavored milk sold at a restaurant

CANDY -

LOW RATE	HIGH RATE
Fresh apple	Caramel apple
Candy bars containing flour (e.g., KitKats, Twix, some licorice, etc.)	Candy bars not containing flour (e.g., Reese's Peanut butter Cups, 3 Musketeers, Snickers, some licorice, etc.)
Salted or unsalted nuts	Honey roasted nuts, beer nuts, etc.
Buttered popcorn	Caramel covered popcorn
Trail mix which includes fruit and nuts but no candy	Trail mix that includes some type of candy (chocolate or yogurt pieces)
Plain raisins or nuts	Chocolate, yogurt, or carob covered raisins or nuts
Salted or unsalted peanuts	Peanut brittle

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LOW RATE	HIGH RATE
Bags of assorted candy which contain both candy with flour and candy without flour	
Dried fruit	Glazed fruit
Unsweetened coconut	Sweetened coconut
	Breath mints
	Chocolate chips
	Sweet or semi-sweet cooking bars or chips
	Unsweetened or sweetened baking chocolate in bars, pieces, or chips
	Fruit roll-ups and gummies (excluding cannabis infused products)
	Marshmallows
	Gum – any type
	Sugarless candy

Note: The candy examples assume that the high-rate items do not contain flour or require refrigeration.

Since September 1, 2009, if an item contains flour as an ingredient or requires refrigeration, it is not candy. This distinction is important as some brands of candy bars have flour as an ingredient while other versions (like the dark chocolate versions of the same candy bar) might not. The ones with flour are not candy even though an almost identical version without flour would be candy for tax purposes.

In this definition, the ingredient list is the objective criteria that will be used to determine taxability (other than refrigeration). The ingredients label must specifically contain the word “flour” for the item to not be considered as candy.

The allergy warning portion on the label is not part of the ingredient listing. Even though it might warn that wheat flour may be present, it does not mean that it is an ingredient.

Bags of mixed candy and non-candy items will be taxed at the low rate if the ingredient label contains the word “flour.”

EXAMPLE 1: A bag of assorted candy items includes Baby Ruth candy bars, Nestle’s Crunch candy bars, 100 Grand candy bars, and Butterfingers candy bars. Each item has its own ingredient listing on the package. The Baby Ruth and Butterfingers do not contain flour as an ingredient and are considered candy but the Nestle’s Crunch and 100 Grand both contain flour as an ingredient and are not considered as candy. The reason that the low rate applies is that “flour” is shown as an ingredient somewhere within the entire ingredient listing on the package. It does not matter that each item’s ingredients are separately listed on the ingredients portion of the wrapper.

EXAMPLE 2: A bag of Brach’s Bridge Mix contains chocolate covered raisins, nuts, caramels, and malted milk balls. Even though most of the pieces within the package are candy, the presence of the malted milk balls which contain “flour” would cause the entire bag to be classified

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as non-candy. The ingredient listing on the package shows flour as an ingredient but doesn't specify which item within the package it is an ingredient of.

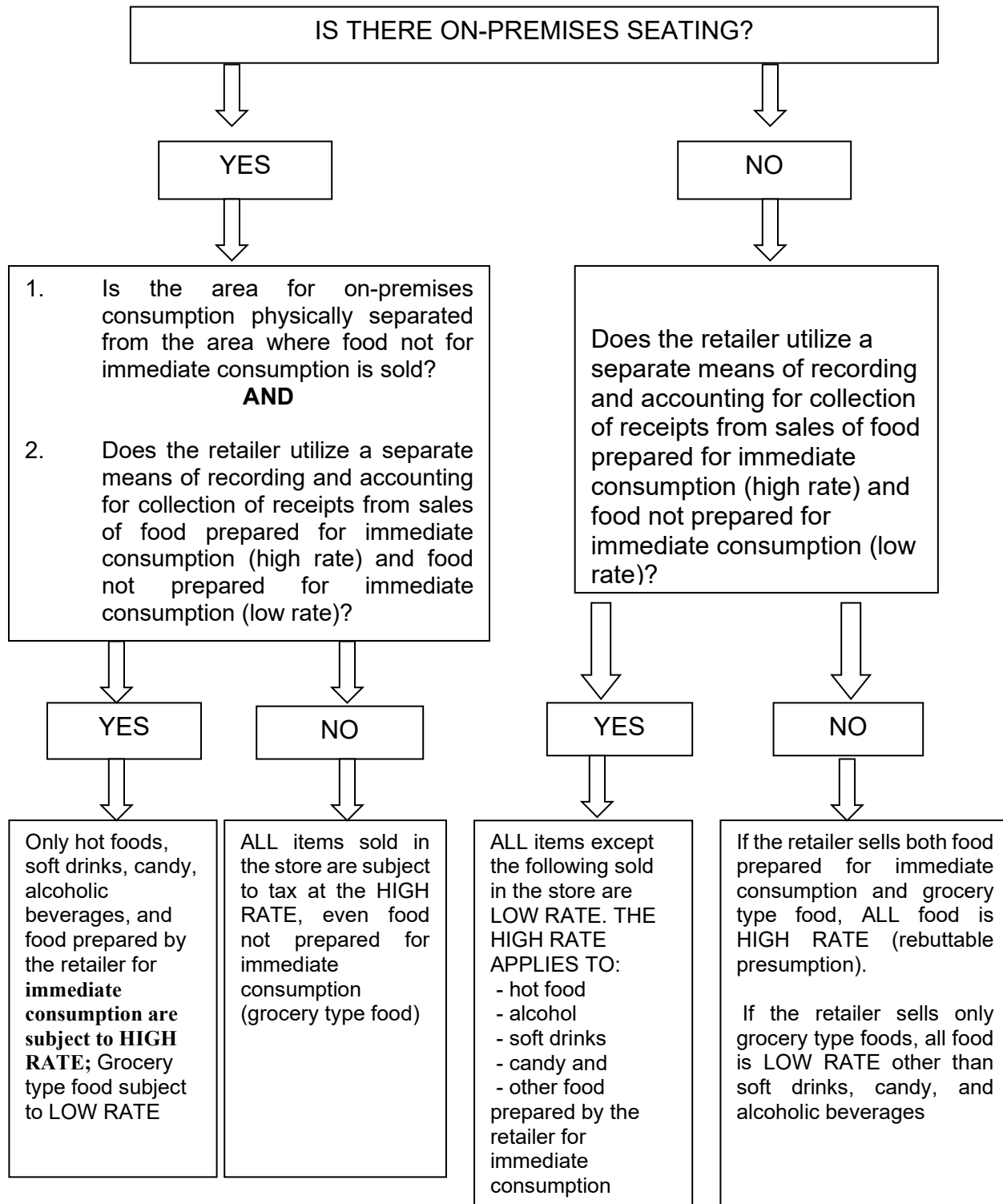
14.3.2 Tests To Determine The Proper Taxable Rate On Food

Although grocers primarily market food for consumption off the premises (low-rate food), they also sell many food products that directly compete with food sold by restaurants, in particular fast-food establishments and delis which are establishments that are taxed at the high rate. The following tests and flow chart have been developed for use in ascertaining either the high or low rate of tax on food prepared for immediate consumption.

The test to determine the rate at which food is taxable is as follows:

1. If retailers (e.g., grocery stores, convenience stores) provide seating or facilities for on-premises consumption of food, all food sales are presumed to be taxable at the high rate as "food prepared for immediate consumption." However, this presumption can be rebutted by evidence that:
 - the area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and
 - the retailer utilizes a means of recording and accounting for collection of receipts from the sales of food prepared for immediate consumption (high rate) and the sales of food that are not prepared for immediate consumption (low rate).
2. If a retailer does not provide seating or facilities for on-premises consumption of food, then the low rate of tax will be applied to all food items except for "food prepared for immediate consumption by the retailer" as provided in the definitions section. However, for the low rate of tax to apply, retailers that sell both food prepared for immediate consumption and food for consumption off the premises where sold must utilize means of recording and accounting for collection of receipts from the sales of food prepared for immediate consumption (high rate) and the sales of food that are not prepared for immediate consumption (low rate). If such receipts are not maintained, all sales will be presumed to be at the high rate of tax. 86 Ill. Adm. Code 130.310(d).

The flow chart on the following page is a decision tree which is designed to assist the auditor in making high/low-rate determinations.

Decision Tree For Test To Determine Tax Rate (Excluding Restaurants And Cafeterias)[86 III. Adm. Code 130.Illustration C Food Flow Chart](#)

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Examples:**1. Grocery Store – On-Premises Facilities for Consumption of Food**

Provided that the requirements of “Test 1” (seating) are met, examples of high-rate items include, but are not limited to, hot foods (soup, pizza, rotisserie or fried chicken, stuffed potatoes, hot dogs); all sandwiches, either hot or cold, that are prepared to the individual order of a customer; salads prepared by customers at a salad/olive/sushi bar; and all food sold for consumption on the premises. Also included are hot precooked meals sold to customers, such as a Thanksgiving dinner; however, if precooked meals are sold in an unheated state of preparation, they are considered to be low rate. Meal packages sold by a grocer (e.g., 2 or more pieces of fried chicken with choice of two sides and dinner rolls sold at one price) that include at least 1 hot food item are taxable at the high rate, even if some foods in the package, sold alone, would be taxable at the low rate. Low-rate items would include but are not limited to, doughnuts (regardless of quantity), bagels, rolls and whole breads or bakery items prepared by the retailer; sandwiches that are premade by the retailer and set out for sale to customers; cold pizzas prepared by the retailer and set out for sale to customers; stuffed olives or peppers prepared by the retailer and set out for sale in individual sized containers; and deli items sold by the retailer to customers by size or weight (prepared salads, e.g., potato, pasta, bean or fruit salads; jello; pudding; stuffed olives).

2. Grocery Store – No on-Premises Facilities for Consumption of Food

Provided that the requirements of “Test 2” (no seating) are met, examples of high-rate items would include, but are not limited to, hot foods (soup, pizza, rotisserie or fried chicken, hot dogs); all sandwiches, either hot or cold, that are prepared to the individual order of a customer; salads that are made by customers at a salad/olive/sushi bar. In addition, effective September 1, 2009, all sales of “candy”, as defined in 4.3.1.3 above, are subject to the high rate of tax. Also included are hot precooked meals sold to customers, such as a Thanksgiving dinner. If precooked meals are sold in an unheated state of preparation, however, they are considered to be low rate. Low-rate items would include but are not limited to, doughnuts (regardless of quantity), bagels, rolls and whole breads or bakery items prepared by the retailer; sandwiches that are premade by the retailer and set out for sale to customers; cold pizzas prepared by the retailer and set out for sale to customers; stuffed olives or peppers prepared by the retailer and set out for sale in individual sized containers; and deli items sold by the retailer to customers by size or weight.

3. Restaurants and Cafeterias

All foods sold by a restaurant, or a cafeteria are considered food prepared for immediate consumption. Such food can either be prepared to the individual order of a customer or premade and set out for selection by the customer. However, if a restaurant or cafeteria also sells whole pies, cakes or individual pastries for sale, these items are taxable at the low rate, if the requirements of “Test 1” are met.

4. Bakery

Provided that the requirements of either “Test 1” or “Test 2” are met, the following items are taxable at the low rate: doughnuts, cookies, or individual pastries, regardless of quantity, sold for consumption

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off the premises where sold; and whole cakes or pies, such as wedding or special occasion cakes. Food sold for consumption on the premises, such as doughnuts and coffee, are subject to the high rate of tax.

5. Delicatessen

Provided that the requirements of either “Test 1” or “Test 2” are met, meat, cheese, and prepared salads sold by weight or volume are taxable at the low rate. Individual sandwiches prepared to the individual order of a customer are high rate, as well as other food sold for consumption on the premises.

6. Ice Cream Store

Ice cream items in individual sizes, either prepared to the individual order of a customer or premade and offered for sale by a retailer, constitute “food prepared for immediate consumption” and are subject to the high rate of tax. Such items include ice cream cones, cups of ice cream, sundaes, shakes, and premade ice cream sandwiches, bars, or cookies. However, provided that the requirements of either “Test 1” or “Test 2” are met, ice cream cakes, rolls or ice cream packaged in premeasured containers, such as a pint, quart, or gallon, are subject to tax at the low rate.

7. Food Sold at Food Courts

All hot food and food prepared to the individual order of a customer by a retailer at a food court is subject to the high rate of tax. In addition, all other food sold for consumption on the premises of a food court is subject to the high rate of tax.

8. Convenience Stores

Provided that the requirements of either “Test 1” or “Test 2” are met, prepackaged food items not prepared by a convenience store retailer (excludes candy) are subject to the low rate of tax. Such items include, but are not limited to chips, snacks, bread products, and cookies. The sale of hot food items, such as hot dogs, nachos, or pretzels, are subject to the high rate of tax, as well as other food sold for consumption on the premises. In addition, effective September 1, 2009, all sales of “candy”, as defined in 14.3.1.3 above, are subject to the high rate of tax.

9. Coffee Shops

Provided that the requirements of either “Test 1” or “Test 2” are met, coffee, latte, cappuccino, and tea (either prepared hot or cold) and food sold for consumption on the premises (e.g., pastries, cookies, snacks) are subject to the high rate of tax. Bulk coffees (beans or grounds, for instance) and teas, or pastries that are not consumed on the premises, are subject to the low rate of tax.

86 Ill. Adm. Code 130.310.

14.3.3 Vendors Of Meals

When Liable For Tax

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Vendors of meals include, but are not limited to, the following:

- hotels;
- restaurants;
- caterers;
- boarding houses;
- concessionaires;
- nonprofit service organizations and institutions to the extent indicated in 86 Ill. Adm. Code 130.2005(a), (b), and (c), and similar enterprises when conducting business with a view to profit to the extent indicated in 86 Ill. Adm. Code 130.2005(o);
- employers who operate dining facilities for the benefit of their employees, except as noted in 86 Ill. Adm. Code 130.2005(b); and
- sellers of food and beverages in Illinois to airlines for use in serving passengers on aircraft without a separate charge for the food or beverages being made by the airline, regardless of whether the airline may serve the food and beverages in Illinois or outside Illinois; sales of meals to airlines for use on their aircraft in serving crews, where the cost is deducted from a food allowance, are nontaxable sales for resale, but if the meals are delivered to the airline in Illinois, the airline incurs retailers' occupation tax liability on its receipts (consideration in the form of compensation for service rendered) from reselling such meals to crews, regardless of whether the aircraft is in Illinois or outside Illinois when it serves such meals to its crew.

These vendors of meals when engaged in the business of selling meals to purchasers for use or consumption incur retailers' occupation tax liability on their receipts from such sales. It is immaterial that no profit is realized from the operation of any such business if the seller is engaged in a commercial enterprise, or if the seller engages in activities which make the retailer taxable under the terms of 86 Ill. Adm. Code 130.2005. It is also immaterial that the class of purchasers may be a limited one, such as the employees of a particular employer who operates a cafeteria or other dining facilities for the benefit of their employees.

Vendors Of Meals To Organizations Or Their Members - When members of an organization meet at a hotel, restaurant, or other place of business where food or drinks are sold and pay for those items, the hotel, or other vendor of meals, is considered to be selling such tangible personal property directly to members as users or consumers, and the sales shall be considered to be taxable. This is true even if the organization collects from the members and makes payment to the vendor, and even if the organization is permitted to retain a portion of what it collects for its own purposes.

In this situation, the organization is deemed to be acting for the accommodation of all concerned and is not deemed to be standing in the role of a purchaser and reseller.

The taxable amount is the amount received by the hotel, etc., for the tangible personal property that it furnishes.

Cover Charges - Cover charges are not included in the taxable receipts under the Retailers' Occupation Tax Act of persons operating restaurants, hotels, and other places of business, where such cover charges are made exclusively for the privilege of occupying space within the eating place, and

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when the payment of a cover charge by a patron does not entitle the patron to use or consume any food or beverage or other tangible personal property.

Minimum Charges - The provisions regarding cover charges do not apply to so-called "minimum charges" charged by night clubs, public eating places, private clubs, or other retailers of food or beverages or both, and that entitle the persons paying such charge to use or consume some tangible personal property, such as food or beverages, without additional payment. The retailer's receipts from these charges are subject to Retailers' Occupation Tax.

When a single charge is made for both entertainment and food and the charge for food is not separately stated on the customer's bill, the entire charge is subject to tax. For example, when a dinner theater charges \$50 for a show and includes food and beverages, the entire \$50 is subject to tax unless a separate charge is made for the food and beverages.

However, minimum charges imposed by country clubs that must be paid regardless of whether the member purchases food or beverages are subject to tax only to the extent they are incurred for actual food or beverage purchases. (See the cases *Aurora Country Club, Inc. v. Department of Revenue*, 50 Ill.App.3d 756, 365 N.E.2d 229 (2d Dist. 1977), *Cohen v. Playboy clubs International, Inc.*, 19 Ill. App. 3d 215 (1st Dist. 1974), and *Fontana D'orr v. Dept. of Revenue*, 44 Ill. App. 3d 1064 (1st Dist. 1976).)

Mandatory Service Charges - Mandatory gratuities are not included in the taxable receipts of persons operating restaurants, hotels, and other places of business that come within the Retailers' Occupation Tax Act, if such mandatory gratuity is added to banquet or dinner checks in the form of a percentage of the total bill, or as a flat rate, to the extent that the proceeds of the service charge are in fact turned over as tips or as a substitute for tips to the employees who participate directly in preparing, serving, hosting, or cleaning up the food or beverage function with respect to which the service charge is imposed. If any portion of the service charges is used to fund or pay wages, labor costs, employee benefits, or employer costs of doing business, that part of the service charge is includable in gross receipts.

Food Served With Rentals Of Banquet, Meeting, And Conference Rooms – True Object Test

The taxation of charges for the rental of a banquet, meeting, conference, or similar room in conjunction with the providing of food or beverages will depend upon the nature of the transaction. The Department uses a "true object" test to characterize the nature of such transactions. 86 Ill. Adm. Code 130.2145(3).

General True-Object Test

- 1) If the true object of the transaction is the rental of the room and if food or beverages are provided incidentally to the rental of the room, no tax is incurred on the charges for the rental of the room. If no separate charge is made under the contract for the incidental amount of food or beverages provided, the renter is considered the user of the food or beverages and incurs Use Tax on its cost price of the food or beverages transferred incidentally to the rental of the room. If a separate charge is made for any food and beverages transferred incidentally to the rental of the room, the renter incurs retailers' occupation tax on the selling price of the food or beverages.

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- 2) If the true object of the transaction is the sale of food or beverages, any room rental charges are part of the seller's costs of doing business and are includable in the seller's taxable gross receipts even if the charges for the room rental are separately stated on the agreement or bill between the seller and its customers. See 86 Ill. Adm. Code 130.410. The rental of the room is considered an inseparable link in the sale of the food and beverages to the customer and is not merely incidental to the seller's business of selling food or beverages.
- 3) If the rental contract requires that alcoholic beverages or food and other beverages be provided or sold by a specific third party or from a choice of providers specified by the rentor, the rentor shall be deemed to be the provider of those alcoholic beverages, food, and other beverages for purposes of determining the taxation of the room rental charge.
- 4) The above sections (1-3) are applicable to rentals of such rooms in situations in which those rentals are not subject to tax under the Hotel Operators' Occupation Tax Act.

True object – rental of room - The Department deems an incidental provision of food or beverages to include the providing of non-alcoholic beverages, such as coffee, tea, and soft drinks, and the providing of snacks, such as cookies, popcorn, candy, doughnuts, fruits, and raw vegetables. 86 Ill. Adm. Code 130.2145(f).

EXAMPLE 1: A person contracts for the rental of a meeting room at a hotel for a business meeting. As part of the contract, the hotel agrees to provide coffee, tea, soft drinks, and cookies at no extra charge to the participants of the meeting. The true object of this transaction is deemed to be the rental of the room and any food and beverages provided are incidental to the renting of the room. The hotel does not incur retailers' occupation tax on the charges for the rental of the room and the incidental providing of food and beverages. The hotel does incur Use Tax on its cost price of the coffee, tea, soft drinks, and cookies provided incidentally to the rental of the room.

EXAMPLE 2: A person contracts for the rental of a meeting room at a hotel for a business meeting. The hotel agrees to provide coffee, tea, soft drinks, and cookies at the meeting for a separately stated charge as part of the contract. The true object of this transaction is deemed to be the rental of the room and any food and beverages provided are incidental to the renting of the room. In this transaction, the hotel incurs retailers' occupation tax on the charge for sale of the coffee, tea, soft drinks, and cookies. The gross receipts subject to retailers' occupation tax do not include the separate charge for the rental of the room.

EXAMPLE 3: A person rents a room for a wedding reception from a hotel, but that person separately contracts for the food and beverages with a caterer instead of the hotel. The contract between the hotel and the customer did not specify any particular caterers.

The true object of the transaction is deemed to be the rental of the room since the caterer and not the hotel provides the food and beverages. No retailers' occupation tax is incurred on the hotel's rental charges in this instance.

True object – sale of food and beverages - The Department deems the providing of any food other than snacks to be the true object of the transaction and not the rental of the room. If alcoholic beverages are either provided or sold by the rentor to the persons attending the event for which the room is rented, the true object of the transaction will always be deemed the sale of food or beverages and not the rental of the room. If the rental contract requires that the alcoholic beverages or the food and other beverages be provided or sold by a specific third party or from a choice of providers specified by the rentor, the rentor shall be deemed to be the provider of those alcoholic beverages, food, and other beverages for purposes of determining the taxation of the room rental charge. 86 Ill. Adm. Code 130.2145(g).

EXAMPLE 1: A person contracts for the rental of a meeting room at a hotel for a business luncheon. As part of the contract, the hotel agrees to provide coffee, tea, soda, soup, sandwiches, and various desserts to the participants of the luncheon meeting for no extra charge. The true object of this transaction is deemed to be the sale of food and beverages and not the rental of the room. The hotel incurs retailers' occupation tax on its gross receipts from the sale of the food and beverages, including the charges for the rental of the room.

EXAMPLE 2: A person contracts for the rental of a meeting room at a hotel for a business after hours gathering with a speaker from a local business group. The hotel provides snacks and non-alcoholic beverages for a separately stated charge as part of the contract. The hotel provides for a bartender and agrees to sell alcoholic beverages to the participants at the gathering. The true object of this transaction is deemed to be the sale of food and beverages and not the rental of the room. The hotel incurs retailers' occupation tax on its gross receipts from the sale of the food and beverages, including the charges for the rental of the room.

EXAMPLE 3: A person contracts with a hotel for the rental of a banquet room for a wedding reception. As part of the contract, the hotel charges that person a specific amount for each individual who attends the reception in exchange for providing beverages and a buffet meal to those individuals. The true object of this transaction is deemed to be the sale of food and beverages and not the rental of the room. The hotel incurs retailers' occupation tax on its gross receipts from the sale of the food and beverages, which includes the specific charge for each individual who attends the reception, along with any charges for the rental of the room.

EXAMPLE 4: A person contracts with a hotel for a room for a cocktail reception. The hotel's rental contract requires that all alcoholic beverages and food be provided by a restaurant located on the hotel premises. The restaurant is a separate legal entity from the hotel. Because the hotel's rental contract requires the restaurant to provide the food and beverages, the hotel is the provider of the food and beverages for purposes of determining taxation of the room charge. The true object of the transaction is the provision of food and beverages since alcoholic beverages and food are provided. As a result, the hotel's charge for the room rental is subject to retailers' occupation tax. The restaurant is subject to retailers' occupation tax on the sale of the alcoholic beverages and food. If the hotel's rental contract had not required a specific third party to provide food and beverages, the charges for the room rental would not be subject to tax.

Other Charges - Charges that are related to the provision of food or beverages are always part of the gross receipts from the sale of such food or beverages. The reason such charges are part of the gross receipts subject to tax is because those charges are part of a seller's costs of doing business and are

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not deductible from a seller's gross receipts. 86 Ill. Adm. Code 130.2145(h). Also see 86 Ill. Adm. Code 130.410.

Examples of charges that are related to the provision of food and beverages include, but are not limited to, the following:

- fees for food serving or carving and corkage; and
- charges for linens, chairs, tables, dishes, glassware, flowers, and centerpieces.

Examples of charges that are not related to the provision of food or beverages include, but are not limited, to charges for:

- security;
- valet;
- coat check;
- entertainment;
- audiovisual and telecommunications services; and
- cancellation fees.

References:

[86 Ill. Adm. Code 130.2005](#) - Persons Engaged in Nonprofit Service Enterprises and in Similar Enterprises Operated as Businesses, and Suppliers of Such Persons

[86 Ill. Adm. Code 130.2145](#) - Vendors of Meals

14.3.4 Employee Meals

A restaurant or other place of business is not liable for Retailers' Occupation Tax liability when it provides meals to employees free of any charge, so long as such employees are entitled to no additional compensation if they fail to eat such meals at the restaurant's place of business. In these instances, the restaurant employer would incur Use Tax liability based upon the cost price of the food. Until December 31, 2021, the base (cost price of the food that is consumed) upon which the use tax is calculated, in the absence of evidence establishing a lower figure, is presumed to be 75 cents per meal, and beginning January 1, 2022, the figure is increased to \$3.50 per meal. See 86 Ill. Adm. Code 130.2050.

Food used in such employee meals is generally subject to the low rate (1% plus any applicable local taxes). The low tax rate applies to this food because it constitutes food used by the employer, rather than food purchased by the employer for resale and sold for immediate consumption, which is taxable at the high rate (6.25% plus any applicable local taxes).

If employers charge for employee meals, the employer incurs Retailers' Occupation Tax on the gross receipts received from such sales, even if the sales are at a discounted price. The high rate of tax (6.25% plus any applicable local taxes) applies to these sales since the employer is selling food for immediate consumption.

14.3.5 Selling Of Food By Exempt Organizations

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Hospital Sales – Nonprofit hospitals, nonprofit sanitariums and nonprofit nursing homes which qualify as exclusively charitable institutions are not taxable when selling food or medicine to their patients in connection with the furnishing of hospital service to them, nor on the operation of restaurant facilities which are conducted primarily for the benefit of the hospital's employees, and which are not open to the public. However, sales made in a cafeteria which is open to the public will be taxable sales.

Retailers' occupation tax liability is incurred when selling candy, chewing gum, tobacco products, razor blades and the like at retail even when such items are sold only to patients because (unlike food and medicine) these items are not necessary to the furnishing of hospital service, and they are competitive. 86 Ill. Adm. Code 130.2005(b)(1).

Charitable Or Religious Organizations – Meals - Charitable or religious organizations incur retailers' occupation tax liability on their receipts from sales of meals to the public unless such selling constitutes an occasional dinner or other similar activity. No more than two such occasional dinners or other similar activities are authorized in any calendar year. Such sales are tax exempt, provided that all the profits from such sales are used for charitable or religious purposes. 86 Ill. Adm. Code 130.2005(b)(3)(A).

If such sales occur more than twice in any calendar year, the organization or institution may select which two events held within that year will be considered exempt. Once the organization or institution has made the selections, the selections cannot be changed. All other events in that year will be considered taxable. 86 Ill. Adm. Code 130.2005 (a)(4)(B).

Also, a church or religious organization does not incur retailers' occupation tax liability on its receipts from sales of meals where the following conditions are met:

- the profits, if any, are used for religious purposes;
- the meals are confined to the members of such church and their guests and are not open to the public; and
- the serving of the meals relates to some religious service or function.

Under the circumstances just described, even if this type of selling of meals is done rather frequently, it is exempt from the retailers' occupation tax because it is in the category of sales to members "primarily for the purposes of" the religious organization (the seller). 86 Ill. Adm. Code 130.2005(b)(3)(B) and (C).

Schools

1) Dining Facilities

A school does not incur retailers' occupation tax liability on its operation of a cafeteria or other dining facility which is conducted on the school's premises, and which confines its selling to the students and employees of the school. In any instance in which the dining facility is opened for the use of other persons, all sales that are made at such facility while that condition continues to prevail are taxable.

2) Food Sales - Miscellaneous Items

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A school or school organization incurs retailers' occupation tax liability when it sells soft drinks, candy, peanuts, popcorn, chewing gum and the like to students or to members of the public for use or consumption, where these items are sold at a school bookstore, through vending machines, or otherwise. These sales may be exempt if the sales are in a restricted school cafeteria and are a part of the selection which the student has in buying meals in such cafeteria. 86 Ill. Adm. Code 130.2005(b)(4)(E).

However, the proceeds from the sale of tangible personal property such as food items by teacher-sponsored student organizations affiliated with an elementary or secondary school located in Illinois are exempt from retailers' occupation tax. (See 35 ILCS 120/2-5(6) and 86 Ill. Adm. Code 130.2006.)

Universities

1) University Provided Food Services

As stated above, a school does not incur retailers' occupation tax liability on its operation of a cafeteria or other dining facility which is conducted on the school's premises, and which confines its selling to the students and employees of the school. In any instance in which the dining facility is opened for the use of other persons, all sales that are made at such facility while that condition continues to prevail are taxable.

In a college campus setting, this has meant that sales of meals by the university to students and employees in a closed dormitory cafeteria were exempt, but all food sales in a student union type setting open to the public, including sales to students and employees, were taxable. The restricted cafeteria exemption has been available to schools for many years and is supported by 86 Ill. Adm. Code 130.2005(b)(4)(A). The school would incur retailers' occupation tax liability if it should engage in selling any of the same items to the public.

The regulatory provisions and the closed cafeteria concept have served two purposes. The first purpose served by the closed cafeteria concept is to solve the practical impossibility that the Department would face when auditing an open facility in verifying that all of the sales claimed to be exempt were, in fact, made to students and employees of the school. The second purpose served by the closed cafeteria concept is the protection of retailers in competition with the school's open facility. That is, student union type (open to the public) selling competes with area food service establishments for student purchases as well as for purchases by the public.

As an accommodation to schools that sell meal plans but have no separate dormitory food facility, the Department has allowed universities to make tax-free sales of meals to students in a central food facility open to the public. Such sales by a university may be made tax free in a campus cafeteria that is open to the public only if there is a mechanism for identifying and documenting, at or before the time of sale, the nontaxable sales of food to students living in university housing and enrolled in a meal plan. The mechanism for identifying and documenting such sales to such students, however, must consist of something more than simply showing an identification card. These mechanisms must consist of systems that provide both an auditable and verifiable record of food sales to each of those students.

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To avoid problems of competition, the Department has limited tax-free sales of food by the school in facilities open to the public to students who live in university housing and have purchased a meal plan. These sales can only be made tax free if the school has a program in place that allows appropriate students to be identified in an auditable and verifiable record system. No sales paid for in “dining dollars” may be made tax exempt unless the dining dollars can identify students living in university housing that have purchased a meal plan. No cash sales may be made tax exempt. Meals sold to employees of the school and others are subject to tax in facilities open to the public.

2) Vendors Of Food With Contracts With Universities

The Department is aware that on campus food services have expanded to include various additional kinds of vending arrangements. Food services in the student union include not only traditional sales of food by the school, but sales by the school operating as a franchisee and sales made by commercial vendors. The Department recognizes that the selling of meals by a university in a food facility open to the public may not be done tax free except to students who live in university housing and have bought a meal plan. For this, there must be an auditable and verifiable record system in place for tracking these sales.

In determining who the seller is, it is imperative to review the contracts or agreements between the university and the restaurant or vendor. For instance, if the university is merely leasing space to a restaurant for that restaurant to make sales of food to students and employees in a dining facility open to the public, then all such sales made by the restaurant are subject to sales tax. It is the Department’s position, as articulated in the regulation and affirmed by *Subway*, that it must be the school itself that makes such sales. *Subway Restaurants v. Topinka*, 322 Ill. App. 3d 376 (4th Dist. 2001).

Conversely, sales made by a university as a franchisee are competitive sales and as such are subject to sales tax with the exception of sales to students who live in university housing and have bought a meal plan. For this, there must be an auditable and verifiable record system in place for tracking these sales. This means, for example, that the system must be able to distinguish tax-free sales of meals to students who live in university housing and have a meal plan from taxable sales of meals to students who do not live in university housing may or may not have a meal plan and are paying with “dining dollars”.

All sales of non-food items on campus, including sales made by the school, are subject to tax regardless of who purchases them. This is ongoing competitive sales.

14.3.6 Taxation Of Food Transferred By Serviceman

Food for human consumption which is sold or transferred by a serviceman as an incident to a sale of service is generally subject to the high rate of tax (6.25%) if it is prepared for immediate consumption or is sold for consumption on the premises of the sale. Food which is not prepared by the serviceman for immediate consumption or not sold for consumption on the premises of the sale and which is transferred as an incident to a sale of service is subject to the lower rate of 1%. 86 Ill. Adm. Code 140.126(a). See also, 86 Ill. Adm. Code 130.310(c)(2) for examples of what is and is not considered a “food prepared for immediate consumption”.

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Effective January 1, 1993, food prepared for immediate consumption and transferred incident to a sale of service by an entity licensed under the Hospital Licensing Act or the Nursing Home Care Act shall be subject to tax at the rate of 1%. Effective August 13, 1999, the 1% rate shall also apply to food prepared for immediate consumption and transferred incident to a sale of service by an entity licensed under the Child Care Act of 1969. 86 Ill. Adm. Code 140.126(a). See also 86 Ill. Adm. Code 140.101(b)(1)(B).

14.3.7 Taxation Of Food Not Transferred By Serviceman

If food items or other tangible personal property are purchased at retail from an unregistered out-of-State supplier and are not transferred to service customers, but instead used or consumed by the serviceman, the serviceman must self-assess use tax on that tangible personal property and remit use tax to the Department. The State rate is 6.25% for general merchandise and 1% for food, drugs, and medical appliances. 86 Ill. Adm. Code 140.126(c).

Similarly, if a de minimis serviceman paying use tax (see 86 Ill. Adm. Code 140.108) makes purchases of tangible personal property that will be transferred to service customers from suppliers who do not charge Illinois tax, the de minimis serviceman must register to self-assess and remit use tax directly to the Department. This would be the case, for example, when purchases were made from out-of-State suppliers not registered to collect Illinois tax. 86 Ill. Adm. Code 140.126(c).

14.3.8 Food Distribution Programs – Non-Profit

Public Act 88-0374 (35 ILCS 120/2-5.5), effective January 1, 1994, exempts from the tax, low-rate food, prescription and non-prescription medicines, medical appliances, insulin, urine testing materials, syringes and needles used to treat human diabetes when sold by a non-profit food distribution program. In order to qualify for the exemption, the food distribution program must sell food at a price below the retail cost of the food, the purchasers must be required to perform community service as a condition of participation in the program and the county or municipality in which the distribution program is located must notify the Department in writing that it does not want the 1% tax to be collected from any such organization located within that county or municipality.

14.4.1 Medicines

General - With respect to prescription and non-prescription medicines, drugs, medical appliances, products classified as Class III medical devices by the United States Food and Drug Administration that are used for cancer treatment pursuant to a prescription, as well as any accessories and components related to those devices, modifications to a motor vehicle for the purpose of rendering it usable by a person with a disability, and insulin, blood sugar testing materials, syringes, and needles used by human diabetics, retailers' occupation tax is imposed at the rate of 1%. Grooming and hygiene products do not qualify for the 1% rate, regardless of whether the products make medicinal claims. Grooming and hygiene products are taxed at the general merchandise rate of 6.25%. 86 Ill. Adm. Code 130.311(a).

Medicines And Drugs - Except for grooming and hygiene products, a medicine or drug is any pill, powder, potion, salve, or other preparation for human use that purports on the label to have medicinal qualities. Medicines prescribed by veterinarians for animals are subject to the high rate of tax. A written claim on the label that a product is intended to cure or treat disease, illness, injury, or pain, or to mitigate the symptoms of such disease, illness, injury, or pain constitutes a medicinal claim.

Examples of medicinal claims that will qualify the product for the low rate of tax include, but are not limited to:

- "medicated";
- "heals (a medical condition)";
- "cures (a medical condition)";
- "for relief (of a medical condition)";
- "fights infection";
- "stops pain";
- "relief from poison ivy or poison oak";
- "relieves itching, cracking, burning";
- "a soaking aid for sprains and bruises";
- "relieves muscular aches and pains";
- "cures athlete's foot";
- "relieves skin irritation, chafing, heat rash and diaper rash";
- "relief from the pain of sunburn"; and
- "soothes pain."

86 Ill. Adm. Code 130.311(c)(1)

The use of the terms "antiseptic," "antibacterial" or "kills germs" may or may not constitute a medicinal claim. The use of these terms in conjunction with a claim that the product kills germs in general does not constitute a medicinal claim. However, a claim that a product is for use as an antiseptic to kill germs to prevent infection in cuts, scrapes, abrasions, and burns does constitute a medicinal claim. 86 Ill. Adm. Code 130.311(c)(2)

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Examples of claims that do not constitute medicinal claims include, but are not limited to:

- “cools”;
- “absorbs wetness that can breed fungus”;
- “deodorant, or “destroys odors”;
- “moisturizes”;
- “freshens breath”;
- “anti-perspirant”;
- “sunscreen”;
- “prevents”; and
- “protects.”

86 Ill. Adm. Code 130.311(c)(3)

14.4.2 Grooming And Hygiene Products

Beginning September 1, 2009, the phrase, "nonprescription medicines and drugs" does not include grooming and hygiene products. "Grooming and hygiene products" includes, but is not limited to, soaps and cleaning solutions, shampoo, toothpaste, mouthwash, antiperspirants, and suntan lotions and sunscreens, unless those products are available by prescription only, regardless of whether the products meet the definition of "over-the-counter-drugs. 86 Ill. Adm. Code 130.311(d)

“Over-the-counter-drug” means a drug for human use that contains a label that identifies the product as a drug as required by 21 C.F.R. § 201.66. The "over-the-counter-drug" label includes a "Drug Facts" panel; or a statement of the "active ingredients" with a list of those ingredients contained in the compound, substance, or preparation. 35 ILCS 120/2-10 and 86 Ill. Adm Code 130.311(d).

On or after September 1, 2009,

- Non-prescription medicines and drugs that are grooming and hygiene products do not qualify for the 1% rate of tax for medicines and drugs under 86 Ill. Adm Code 130.311(c). Grooming and hygiene products do not qualify for the 1% rate, regardless of whether the products make medicinal claims or meet the definition of over-the-counter-drugs. Grooming and hygiene products are taxed at the general merchandise rate of 6.25%.
- Products available only with a prescription are not “grooming and hygiene products.”

Examples of products that are grooming and hygiene products include, but are not limited to:

all shampoos, hair conditioners and hair care products such as gel, mousse, spray, color, permanent wave, volumizing, conditioners, treatments, brushes, and combs	shaving creams or lotions;
deodorants;	moisturizers;
breath spray;	all condoms, with or without spermicide;

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14.4 Drugs, Medicines, Medical Appliances And Grooming And Hygiene Products

Page 3 (05/2023)

baby and adult diapers;	baby powder;
contact lens solutions;	hand sanitizers;
acne products;	skin creams, lotions, ointments, and conditioners;
foot powders;	footwear insoles that are intended to eliminate odor;
feminine hygiene products, such as feminine wipes, washes, powders and douches, but NOT including tampons, menstrual pads, and menstrual cups beginning January 1, 2017, through December 31, 2026.	lip balms
denture cleaners	bath oils, salt, sprays, beads, etc.
colognes and perfumes	cosmetics
suntan lotions and screens	toothpaste and mouthwashes

NOTE: If any of the above are **available by prescription only** then they will be subject to the low rate of 1%. Grooming and hygiene items which meet the definition as over-the-counter drugs are taxed at the high rate.

NOTE: Beginning January 1, 2017, through December 31, 2026, tampons, menstrual pads, and menstrual cups are exempt from the Retailers' Occupation Tax Act. (35 ILCS 120/2-5(42)) Menstrual pads (including pantliners) are exempt even when the label indicates that those products are to be used as both menstrual products and incontinence products. However, incontinence products that do not indicate on the label that they can also be used as menstrual products are not exempt.

The following products are not grooming and hygiene products so they may qualify for the 1% rate if they meet the requirements of a medicine or drug in any pill, powder, potion, salve, or other preparation for human use that purports on the label to have medicinal qualities.

hydrocortisone creams or ointments;	anti-itch creams or ointments;
vaginal creams or ointments;	nasal sprays;
eye drops;	topical pain relievers;
ice/heat creams;	rubbing alcohol;
denture creams or adhesives; and	styptic pencils

Nonprescription medicines and drugs and products that are not grooming and hygiene products do not qualify for the 1% rate of tax unless they meet the requirements that a medicine or drug is any pill, powder, potion, salve, or other preparation for human use that purports on the label to have medicinal qualities.

Products that are taken orally and ingested, such as vitamins, supplements, and weight gain or weight loss products, are not grooming and hygiene products.

Medical Appliances - A medical appliance is an item that is intended by its manufacturer for use in directly substituting for a malfunctioning part of the body. These items may be prescribed by licensed

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14.4 Drugs, Medicines, Medical Appliances And Grooming And Hygiene Products

Page 4 (05/2023)

health care professionals for use by a patient, purchased by health care professionals for the use of patients, or purchased directly by individuals. Purchases of medical appliances by lessors that will be leased to others for human use also qualify for the low rate of tax.

An item that becomes part of the human body by substituting for any part of the body that is lost or diminished because of congenital defects, trauma, infection, tumors, or disease, is considered a medical appliance. Examples of medicinal appliances that will qualify the product for the low rate of tax include, but are not limited to:

- breast implants that restore breasts after loss due to cancer;
- heart pacemakers;
- artificial limbs;
- dental prosthetics;
- crutches and orthopedic braces;
- dialysis machines (including the dialyzer);
- wheelchairs;
- mastectomy forms and bras;
- mobility scooters; and
- sleep apnea devices.

Corrective medical appliances such as hearing aids, eyeglasses, contact lenses, and orthodontic braces qualify as medical appliances subject to the low rate of tax. Sterile band-aids, dressings, bandages, and gauze qualify for the low rate because they serve as a substitute for skin.

Items transferred incident to cosmetic procedures are not considered medical appliances. For purposes of this section, a cosmetic procedure means any procedure performed on an individual that is directed at improving the individual's appearance and that does not prevent or treat illness or disease, promote the proper function of the body, or substitute for any part of the body that is lost or diminished because of congenital defects, trauma, infection, tumors, or disease. Cosmetic procedures include, but are not limited to, elective breast, pectoral, or buttock augmentation. See 86 Ill. Adm. Code 130.311(e).

Effective August 19, 2016, products classified as Class III medical devices by the United States Food and Drug Administration that are used for cancer treatment pursuant to a prescription, as well as any accessories and components related to those devices, qualify for the 1% rate of tax. 35 ILCS 120/2-10 and 86 Ill. Adm. Code 130.311(f).

Diagnostic Equipment - Diagnostic equipment shall not be deemed to be a medical appliance, except as provided in 86 Ill. Adm. Code 130.311(g). Other medical tools, devices, and equipment such as x-ray machines, laboratory equipment, and surgical instruments that may be used in the treatment of patients but that do not directly substitute for a malfunctioning part of the human body do not qualify as

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exempt medical appliances. Sometimes a kit of items is sold so the purchaser can use the kit items to perform self-treatment. The kit will contain paraphernalia and sometimes medicines. An example is a kit sold for the removal of ear wax. Because the paraphernalia hardware is for treatment, it generally does not qualify as a medical appliance. However, the Department will consider the selling price of the entire kit to be taxable at the reduced rate when the value of the medicines in the kit is more than half of the total selling price of the kit. 86 Ill. Adm. Code 130.311(e)(5).

Supplies, such as cotton swabs, disposable diapers, toilet paper, tissues and towelettes, and cosmetics, such as lipsticks, perfume, and hair tonics, do not qualify for the reduced rate.

Insulin, blood sugar testing materials, syringes, and needles used in treating diabetes in human beings qualify for the reduced rate of tax. 86 Ill. Adm. Code 130.311(g).

Modifications Made To A Motor Vehicle - Modifications made to a motor vehicle, as defined in Section 1-146 of the Illinois Vehicle Code [625 ILCS 5/1-146], for the purpose of rendering it usable by a person with a disability, qualify for the reduced rate of tax (35 ILCS 120/2-10.) The low rate applies to modifications that enable a person with a disability to drive a vehicle, or that assist in the transportation of persons with disabilities. Examples of such modifications include, but are not limited to, special steering, braking, shifting, or acceleration equipment, or equipment that modifies the vehicle for accessibility, such as a chair lift. See 86 Ill. Adm. Code 130.311(h)

NOTE: This reduced rate only applies to the parts used to make the vehicle usable by a person with a disability, not on the purchase of the vehicle. If a vehicle is sold that has already been modified to make it usable by a person with a disability, the vehicle is taxed at the high rate.

14.4.3 Breast Pump And Breast Pump Kit Exemption

Beginning July 1, 2022, breast pumps, breast pump collection and storage supplies, and breast pump kits are exempt from tax under the Retailers' Occupation Tax Act (35 ILCS 120/2-5), the Use Tax Act (35 ILCS 105/3-5), the Service Occupation Tax Act (35 ILCS 115/3-5), and the Service Use Tax Act (35 ILCS 110/3-5). This exemption is not subject to the sunset provisions.

"Breast pump" means an electrically controlled or manually controlled pump device designed or marketed to be used to express milk from a human breast during lactation, including the pump device and any battery, AC adapter, or other power supply unit that is used to power the pump device and is packaged and sold with the pump device at the time of sale.

"Breast pump collection and storage supplies" means items of tangible personal property designed or marketed to be used in conjunction with a breast pump to collect milk expressed from a human breast and to store collected milk until it is ready for consumption.

"Breast pump collection and storage supplies" includes but is not limited to: breast shields and breast shield connectors; breast pump tubes and tubing adapters; breast pump valves and membranes; backflow protectors and backflow protector adaptors; bottles and bottle caps specific to the operation of the breast pump; and breast milk storage bags.

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"Breast pump collection and storage supplies" does not include: (1) bottles and bottle caps not specific to the operation of the breast pump; (2) breast pump travel bags and other similar carrying accessories, including ice packs, labels, and other similar products; (3) breast pump cleaning supplies; (4) nursing bras, bra pads, breast shells, and other similar products; and (5) creams, ointments, and other similar products that relieve breastfeeding-related symptoms or conditions of the breasts or nipples, unless sold as part of a breast pump kit that is pre-packaged by the breast pump manufacturer or distributor.

"Breast pump kit" means a kit that: (1) contains no more than a breast pump, breast pump collection and storage supplies, a rechargeable battery for operating the breast pump, a breastmilk cooler, bottle stands, ice packs, and a breast pump carrying case; and (2) is pre-packaged as a breast pump kit by the breast pump manufacturer or distributor. 35 ILCS 120/2-5(46). See Informational Bulletin FY 2022-30 for additional information.

14.4.4 Registered Pharmacists

When Liable For ROT - When registered pharmacists sell drugs or medicines "over-the-counter" to purchasers for use or consumption apart from their filling of the prescription of a licensed physician or other person qualified to issue prescriptions, or when registered pharmacists sell other tangible personal property to purchasers for use or consumption, they incur retailers' occupation tax liability. 86 Ill. Adm. Code 130.2035.

Non-prescription sales of drugs over the counter are subject to the low rate on the selling price. However, some drugs are sold both as a prescription and over the counter. The general guideline is: If the drug is purchased off the shelf, retailers' occupation tax is due at the low rate on the full selling price; if the drug is purchased by prescription, then the taxpayer must follow Service Occupation Tax Act guidelines to determine the proper tax liability.

When Liable For SOT - When registered pharmacists sell medicines or drugs on the prescription of a licensed physician or other person qualified to issue prescriptions, they are engaged primarily in a service occupation or profession and are not required to remit retailers' occupation tax. These transactions are governed by the Service Occupation Tax Act. 86 Ill. Adm. Code 130.2035.

14.4.5 Physicians And Surgeons

When Liable For ROT - When physicians or surgeons sell items of tangible personal property such as medical bracelets, crutches, wheelchairs, first-aid kits, and the like, to purchasers for use or consumption apart from their rendering of service as physicians or surgeons, they incur retailers' occupation tax liability. 86 Ill. Adm. Code 130.2020(a). For information about whether these items qualify for the low rate, see 86 Ill. Adm. Code 130.311.

When Liable For SOT - Physicians and surgeons are engaged in professions and primarily render service. When they engage in such professions and transfer tangible personal property as a part of the services rendered, they incur liability under the Service Occupation Tax Act. 86 Ill. Adm. Code 130.2020(b).

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14.4.6 Dentists

When Liable For ROT - When dentists sell items of tangible personal property, such as mouthwash, toothpaste, dental floss, and the like, to purchasers for use or consumption apart from their rendering of service as dentists, they incur retailers' occupation tax liability. 86 Ill. Adm Code 130.1956(a).

When Liable For SOT - Dentists are engaged primarily in a profession or service occupation. When they engage in such professions or service occupation and transfer tangible personal property as a part of the services rendered, they incur liability under the Service Occupation Tax Act. 86 Ill. Adm. Code 130.1956(b).

When liable for Use Tax - When a dentist gives the consumer a take home package of items such as toothpaste, dental floss and a toothbrush, the dentist owes use tax on the cost of these items. Use tax is also due on disposable items such as mouthwash, cleaning pastes, towels, etc. that are used on the patient but not transferred to the patient.

14.4.7 Chiropodists, Osteopaths And Chiropractors

When Liable for ROT - When chiropodists, osteopaths or chiropractors sell such items as shoes, arch supports, trusses, braces, appliances, or other tangible personal property such as supplements and vitamins to purchasers for use or consumption apart from their rendering of service as chiropodists, osteopaths, or chiropractors, they incur retailers' occupation tax liability. 86 Ill. Adm. Code 130.1930(a). For information about whether these items qualify as medical appliances, see 86 Ill. Adm. Code 130.311.

When Liable for SOT - Chiropodists, osteopaths, and chiropractors are engaged in professions and primarily render service. When they engage in such professions and transfer tangible personal property as a part of the services rendered, they incur liability under the Service Occupation Tax Act. 86 Ill. Adm. Code 130.1930(b).

14.4.8 Optometrists And Opticians

Optometrists -- When Liable For ROT - When optometrists sell tangible personal property to purchasers for use or consumption apart from their rendering of service as optometrists, they incur retailers' occupation tax liability. This is the case, for example, where optometrists sell spectacles, frames, or mountings, without examination or treatment of the eyes, to purchasers for use or consumption, or where optometrists sell such items as sunglasses, cleaning solutions for lenses, barometers, telescopes, field glasses, opera glasses, or other tangible personal property to purchasers for use or consumption without any rendering of service. 86 Ill. Adm Code 130.1980(a). For information about whether these items qualify as medical appliances, see 86 Ill. Adm. Code 130.311.

Optometrists -- When Liable For SOT - Optometrists are engaged in a profession which primarily renders service. When they engage in this profession and transfer tangible personal property as a part of the services rendered, they incur liability under the Service Occupation Tax Act.

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Opticians – When Liable for SOT - Opticians are engaged in a profession which renders service when they sell tangible personal property such as lenses which they produce in accordance with the prescriptions of licensed optometrists. They are engaged primarily in a service occupation and incur Service Occupation Tax. 86 Ill. Adm. Code 130.1980(c).

Opticians – When Liable for ROT - An optician would incur retailers' occupation tax liability if they should engage in selling any tangible personal property at retail apart from engaging in a service occupation (e.g., selling eyeglass cases or lens cleaning solutions over the counter). 86 Ill. Adm Code 130.1980(c).

14.4.9 Other Medical Professions, Providers, And Disciplines

When Liable For ROT - When they sell items of tangible personal property to purchasers for use or consumption apart from their rendering of service as medical service providers, they incur retailers' occupation tax liability.

When Liable For SOT - When they are engaged primarily in a profession or service occupation and transfer tangible personal property as a part of the services rendered, they incur liability under the Service Occupation Tax Act.

When liable for Use Tax - When they give the consumer a take home package of items such as band-aids, gauze, etc., they owe use tax on the cost of these items. Use tax is also due on disposable items such as wound cleaning solutions, towels, cotton swabs, etc. that are used on the patient but not transferred to the patient.

14.4.10 Taxation Of Drugs And Medical Appliances Transferred By Serviceman – Service Occupation Tax

Prescription and non-prescription medicines, drugs, medical appliances, modifications to a motor vehicle for the purpose of rendering it usable by a person with a disability, and insulin, blood sugar testing materials, syringes, and needles used by human diabetics, are subject to the 1% rate of tax when they are sold or transferred incident to service. 86 Ill. Adm. Code 140.126. See the auditing section in chapter 6 on how the serviceman must determine their filing and tax liability payment requirements.

14.4.11 Taxation Of Drugs And Medical Appliances Not Transferred By Serviceman – Use Tax

If a serviceman purchases drugs and medical appliances or other tangible personal property at retail from an unregistered out-of-State supplier and does not transfer these items to service customers, but instead uses or consumes the items, the serviceman must self-assess use tax on that tangible personal property and remit use tax to the Department. The rate is 6.25% for general merchandise and 1% for food, drugs, and medical appliances. Similarly, if a de minimis serviceman paying use tax (see 86 Ill. Adm. Code 140.108) makes purchases of tangible personal property that will be transferred to service customers from suppliers who do not charge Illinois tax, the de minimis serviceman must register to

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14.4 Drugs, Medicines, Medical Appliances And Grooming And Hygiene Products

Page 9 (05/2023)

self-assess and remit use tax directly to the Department. This would be the case, for example, when purchases were made from out-of-State suppliers not registered to collect Illinois tax. 86 Ill. Adm Code 140.126(c).

If the cost ratio between the tangible personal property transferred incident to sales of service and the serviceman's total annual gross receipts from all sales of service is 35% or greater (75% or greater in the case of servicemen transferring prescription drugs or engaged in graphic arts production), the serviceman must register and remit service occupation tax. 86 Ill. Adm Code 140.106(a).

Example: A doctor purchases tongue depressors from an out-of-State supplier who does not collect Illinois tax. Since tongue depressors are not medical appliances, but rather are supplies used by the doctor, they are subject to use tax (6.25% rate), which must be self-assessed and remitted to the Department. The same would be true if the items were purchased from an Illinois retailer who did not charge tax for some reason. 86 Ill. Adm. Code 140.126.

Example: A dentist purchases gold for dental fillings. If the dentist is at or above the 35% threshold, the dentist should purchase the gold with a resale certificate and pay service occupation tax on the selling price at a 1% rate (86 Ill. Adm. Code 140.106). If below the 35% threshold, the dentist may, as appropriate depending on registration status, pay either use tax or service occupation tax at the 1% rate on the cost price as described in 86 Ill. Code 140.108 or 140.109. If the dentist is a de minimis serviceman incurring a use tax liability on the cost price and purchases gold from out-of-State suppliers, the dentist must self-assess and remit the use tax to the Department. If the dentist is a de minimis serviceman incurring service occupation tax liability on the cost price, they should provide suppliers with Certificates of Resale. 86 Ill. Adm. Code 140.126.

Example: An optometrist makes sales of prescription glasses and nonprescription sunglasses. The sales of the non-prescription sunglasses are retail sales of general merchandise subject to retailers' occupation tax at the 6.25% rate on the selling price. The prescription eyeglasses, however, are medical appliances subject to the 1% rate. If the optometrist is at or above the 35% threshold, they should purchase the eyeglass components with a resale certificate and pay service occupation tax on the selling price at a 1% rate (see 86 Ill. Adm. Code 140.106). If below the 35% threshold, the optometrist may pay service occupation tax at the 1% rate on either the cost price as described in 86 Ill. Adm. Code 140.109, or on the selling price as described in 86 Ill. Adm. Code 140.106. If the optometrist is a de minimis serviceman incurring service occupation tax liability on the cost price, they should provide suppliers with Certificates of Resale. If the optometrist purchased the lenses from an optical lab which ground the lenses to fill a special-order prescription, a multi-service situation would exist. See 86 Ill. Adm. Code 140.145 for further information. 86 Ill. Adm. Code 140.126.

14.4.12 Medicaid, Medicare, And Medicare Part D Prescription Plan

Medicaid And Medicare - In general, sales made to Medicare and Medicaid are exempt from tax as sales to a government body so long as the exemption is properly documented through provision of an active exemption identification number ("E" number). See 86 Ill. Adm. Code 130.2080(a). While no tax may be due on payments made directly to vendors by Medicare or Medicaid, tax is due upon any portion of the bill paid by individuals or private insurance companies not covered by Medicare and Medicaid.

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In other words, when Medicare directly pays 80% of the medical bill and the remaining 20% is billed to the patient or the patient's insurance company, the 20% will be subject to sales tax. The 80% payment is a governmental payment and is not subject to the tax.

The purchaser of medical goods from a supplier can purchase those items tax free if those items will eventually be paid for by Medicaid or Medicare. If the purchaser is registered with the Department, that purchaser can present the supplier a resale certificate.

If a purchaser is an unregistered de minimis serviceman who incurs Use Tax on the cost price, they can utilize the pass-through exemption when selling to Medicare or Medicaid. (See 86 Ill. Adm. Code 140.108(a)(2)(A)-(B)). The de minimis serviceman must provide the supplier a letter stating they are a de minimis serviceman and that the items are purchased for use in a service for which they will receive direct reimbursement from Medicare or Medicaid.

Medicare Part D Prescription Plan - The Medicare Part D Prescription Plan is organized differently. The government provides funds on a per capita basis to the Prescription Drug Providers ("PDPs"). The PDPs operate as private insurance companies under contract with the government. They, not the government, are responsible for purchasing drugs for their beneficiaries. The beneficiaries usually pay a co-pay. Since sales are made to the PDPs and not directly to the government, the drug sales do not qualify for the government tax exemption. Therefore, sales of drugs are not exempt from tax under the Medicare D Plan. Please note that according to the U.S. Department of Health and Human Services, sales tax cannot be added to a beneficiary's co-payment under the Plan. As a result, sales tax is due on drugs sold under the Medicare Part D Plan, but it may not be charged to the beneficiary. As between the beneficiary and the PDP, any sales tax due is the responsibility of the PDP. For example, a qualifying senior covered under the Medicare Part D Plan with a \$10 co-pay may not be charged tax on that co-pay.

14.4.13 Hospitals

In the case of hospitals, nonprofit sanatoria and nonprofit nursing homes which qualify as charitable institutions, such hospitals are not taxable when selling drugs to anyone because this is for the relief of the sick (which is the hospital's primary purpose) and so is "primarily for the purpose of" such hospitals, thus qualifying such transactions for tax exemption. 86 Ill. Adm. Code 130.2005(b).

14.4.14 Prescription Drugs For Pets

Prescriptions written by veterinarians for pets and filled by a pharmacy do not qualify for the reduced rate of tax. The transfer of medicine pursuant to a prescription by a veterinarian is subject to tax under the Service Occupation Tax Act so long as the medicine or other pet product cannot be purchased over the counter at retail.

If veterinarians prescribe pet products which are available at retail, the sale of these products are subject to retailers' occupation tax even though they have been prescribed or the item is transferred to the pet pursuant to an examination and treatment. Such items may include, but are not limited to, items

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that are required to be prescribed by a veterinarian; nonprescription medicines; vitamins; herbal remedies; dietary and nutritional supplements; medicated shampoos; topical flea and tick products; and flea and tick collars. 86 Ill. Adm. Code 130.2165(c)(2)(C).

For a transaction to be considered a service transaction for purposes of taxation several requirements must first be met. Specifically:

- A licensed veterinarian must have first established a valid VCPR (Veterinarian-Client-Patient Relationship) with the service client as defined in the Veterinary Medicine and Surgery Practice Act of 2004 ("the Act") (225 ILCS 115/3).;
- A licensed veterinarian must have physically examined the animal;
- A veterinary practice must maintain medical records demonstrating that the animal for whom tangible personal property was transferred was physically examined by a licensed veterinarian in that veterinary practice no more than 1 year prior to the date on which tangible personal property was transferred;
- The above requirements are not intended in any way to affect the requirements of the Act concerning the establishment or maintenance of a valid VCPR but are intended only to establish the type of tax liability that will be incurred by a veterinary practice. 86 Ill. Adm. Code 130.2165(c).

See Chapter 6 for an outline of the basic audit procedures that will apply to the issues described in this chapter. The information above should be referenced as well as the newest statutes and regulations to determine what tax is due on food and medical products during an audit. Also, the newest information should be referenced when determining what exemptions apply. When a business is audited, documents will be requested to ensure that the tax types and rate being applied is correct and that all taxes due are being collected.