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Kentucky Technical Advice Memorandum
KY-TAM-20-01

SUBJECT: Application of Sales Tax to the Sale of Prepared Food

EFFECTIVE DATE: Applies to all periods open under the statute.

SUPERSEDES: N/A

REFERENCE: [KRS 139.485](#)

AUTHORITY: [KRS Chapter 13A](#)
[KRS 131.130\(8\)](#)

SCOPE: The purpose of a Technical Advice Memorandum ("TAM") is to provide direction to the public and to Department personnel. It is issued to apply principles of law to a set of facts or general category of taxpayers. The Kentucky Department of Revenue ("KDOR"), in its discretion, may retroactively withdraw, revoke, or modify any TAM including, but not limited to, if there was a change in the applicable statute(s), regulation(s), case law or other KDOR guidance; or if the TAM was issued in error. A TAM does not constitute a final ruling, order or determination of the KDOR and cannot be appealed.

I. Issue(s)

A. Does the sale of salads prepared in bulk and packaged in individual servings by the retailer constitute the sale of taxable prepared food?

B. Does the availability of eating utensils in a self-serve setting affect the taxability of ordinarily exempt food and food ingredients sold elsewhere in the store?

II. Law

"Food and food ingredient" is defined in KRS 139.485(2) to mean:

substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.

"Food and food ingredients" shall not include:

- (a) Alcoholic beverages;*
- (b) Tobacco;*
- (c) Candy;*
- (d) Dietary supplements;*
- (e) Soft drinks; and*
- (f) Prepared food.*

KRS 139.485(3)(g) and (h) further specifies that, *"Prepared food,"* means:

- 1. Food sold in a heated state or heated by the retailer;*
- 2. Two (2) or more food ingredients mixed or combined by the retailer for sale as a single item except food that is only cut, repackaged, or pasteurized by the retailer, eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration in Chapter 3, Part 401.11 of the FDA Food Code so as to prevent food-borne illnesses; or*
- 3. Food sold with eating utensils provided by the retailer, including plates, knives, forks, spoons, glasses, cups, napkins, or straws;*

(h) Notwithstanding paragraph (g) of this subsection, "prepared food" shall not include the following items if sold without eating utensils provided by the seller:

- 1. Food sold by a seller whose proper primary North American Industry Classification System classification is manufacturing in sector 311, except subsector 3118; or*
- 2. Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danishes, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas.*

III. Facts/Discussion

Grocery stores, convenience stores, delicatessens, and other similar establishments regularly have a lunch counter or café area where customers may purchase prepared food that is subject to sales tax with eating utensils that are provided with the sale of the food or made available for use in consumption of the food. It is also common for these types of stores to sell salads, whether leaf-based, pasta, potato, or chicken, prepared in bulk in the store and packaged in smaller serving sizes in a bag or plastic container. These store-made salads are typically refrigerated and may be sold in refrigerated cases or shelves alongside other similar products not prepared in the store. These store-made salads do not normally include eating utensils in the packaging.

The "food and food ingredients" exemption does not include "prepared food." According to KRS 139.485(3)(g)2, "prepared food" includes:

two (2) or more food ingredients mixed or combined by the retailer for sale as a single item except food that is only cut, repackaged, or pasteurized by

the retailer, eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the Food and Drug Administration in Chapter 3, Part 401.11 of the FDA Food Code so as to prevent food-borne illnesses.

The salads at issue are the product of mixing two or more food ingredients that are packaged for sale as a single item. The production of the salads involves more than cutting and repackaging. The phrase “for sale as a single item” does not equate with a specific serving size of the single item produced. For example, if a food store produces a salad by using a recipe with potatoes that mixes or combines two or more food ingredients, the single item produced is potato salad. Regardless of what quantities that potato salad is later sold in, the item sold is still potato salad. There are also no raw animal food ingredients in the product for sale requiring further cooking under recommendations of the FDA.

Food is taxable prepared food sold with eating utensils (e.g., knives, forks, spoons, napkins, etc.) provided by the retailer when, as part of the purchase, the retailer gives the eating utensils to the customer for the intended consumption of the item. This is true whether the utensils are handed to the customer during the sales transaction or are simply made available by the retailer in a self-serve setting for the customers to take without having to pay any additional charge for the utensils. The provision of eating utensils in one part of the store for prepared food purposes does not make items sold in other areas of the store that are not otherwise defined as “prepared food” subject to sales and use tax. Those items remain exempt as food and food ingredients.

IV. Conclusion

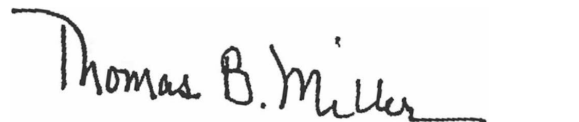
A. Gross receipts from the sales of salads prepared in bulk by a retailer, such as a grocery or food store, are subject to sales and use tax when the salad is produced by combining two or more food ingredients by the retailer for sale as a single item, according to the definition for “prepared food” in KRS 139.485(3)(g)(2). This treatment applies regardless of the how many serving sizes the retailer subsequently repackages the prepared salads into.

B. The presence or absence of eating utensils is irrelevant to the tax treatment of these salads prepared by the retailer. The fact that the retailer prepares these salads as described in Paragraph A makes the products taxable “prepared food,” regardless of the availability of eating utensils.

In the grocery, specialty food store, convenience store, or bakery setting, otherwise exempt food or food ingredients remain exempt where utensils are made available by the retailer in a self-serve setting but are not provided directly to the customer as part of the sale. However, in a restaurant setting, the availability of eating utensils in a self-serve setting does not change the treatment of items sold by the restaurant as prepared food because the seller’s customary practice is to provide eating utensils to the customer. For the restaurant to counter this presumption, the seller must provide information on invoices, cash receipts, or sales tickets showing that the food items are sold without eating utensils. For example, the restaurant selling a piece of pie with eating utensils must distinguish that sale from the sale of a whole pie without eating utensils.

For questions concerning this TAM, contact Policy at DORtaxpolicy@ky.gov.

KENTUCKY DEPARTMENT OF REVENUE

A handwritten signature in black ink that reads "Thomas B. Miller". The signature is written in a cursive style and is positioned above a horizontal line.

Thomas B. Miller, Commissioner

Date: 8/14/20