

280-RICR-20-70-4

## TITLE 280 – DEPARTMENT OF REVENUE

### CHAPTER 20 – DIVISION OF TAXATION

#### SUBCHAPTER 70 – SALES AND USE TAX

##### PART 4 – Local Meals and Beverage Tax/Food Stamp Purchases/Meal Services

#### 4.1 Purpose

These rules and regulations implement R.I. Gen. Laws § 44-18-18.1. This section imposes a Local Meals and Beverage Tax that is to be administered and collected in conjunction with the State Sales and Use Tax. These rules also govern the regulation provides for the regulation of meal services as well as food stamp purchases.

#### 4.2 Authority

These rules and regulations are promulgated pursuant to R.I. Gen. Laws §§ 44-1-4 and 44-19-33. The rules and regulations have been prepared in accordance with the requirements of R.I. Gen. Laws § 42-35-1 *et. seq.*, the Rhode Island Administrative Procedures Act. This regulation is promulgated pursuant to R.I. Gen. Laws Chapter 44-18.1 as amended.

#### 4.3 Application

These rules and regulations shall be liberally construed so as to permit the Rhode Island Division of Taxation to effectuate the purpose of R.I. Gen. Laws § 44-18-18.1 and other applicable state laws and regulations.

#### 4.4 Severability

If any provision of these rules and regulations, or the application thereof to any person or circumstances, is held invalid by a court of competent jurisdiction, the validity of the remainder of the rules and regulations shall not be affected thereby.

#### 4.5 Definitions

- A. “Alcoholic beverages” means beverages that are suitable for human consumption and contain one half of one percent (.05%) or more of alcohol by volume.

- B. "Beverage" means all nonalcoholic beverages, as well as alcoholic beverages, beer, lager beer, ale, porter, wine, similar fermented malt or vinous liquor.
- C. "Candy" means any preparation of sugar, honey, or other natural or artificial sweeteners as an ingredients in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the forms of bars, drops, or pieces. The term "candy" does not include any preparation containing flour and shall require no refrigeration.
- D. "Caterer" means a person engaged in the business of providing meals, food, and/or beverages on the premises of customers but does not include employees hired by the hour or the day. The term caterer also includes a delicatessen store or deli area within a food store that sells prepared food as part of a party platter, deli tray, sandwiches etc.
- E. "Dietary supplements" means any product, other than tobacco, intended to supplement the diet that:
1. Contains one or more of the following dietary ingredients:
    - a. A vitamin;
    - b. A mineral;
    - c. An herb or other botanical;
    - d. A dietary substance for use by humans to supplement the diet by increasing the total dietary intake; or
    - e. A concentrate, metabolite, constituent, extract, or combination of any ingredient described above; and
  2. Is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and
  3. Is required to be labeled as a dietary supplement identifiable by the "Supplemental Facts" box found on the label and as required pursuant to 21 C.F.R. § 101.36.
- F. "Eating and/or drinking establishments" includes but is not limited to restaurants, bars, taverns, lounges, cafeterias, lunch counters, drive-ins, roadside ice cream and refreshments stands, fish and chip places, fried chicken places, pizzerias, food and drink concessions, or similar facilities in amusement parks, bowling

alleys, clubs, caterers, drive-in theaters, industrial plants, race tracks, shore resorts or other locations, lunch carts, mobile canteens and other similar vehicles, and other like places of business which furnish or provide facilities for immediate consumption of food at tables, chairs or counters or from trays, plates, cups or other tableware or in parking facilities provided primarily for the use of patrons in consuming products purchased at the location.

- G. "Food and food ingredients" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. Food and food ingredients do not include candy, soft drinks, dietary supplements, alcoholic beverages, tobacco, food sold through vending machines or prepared food.
- H. "Meal" means any prepared food or beverage offered or held out for sale by any eating and/or drinking establishment for the purpose of being consumed by any person to satisfy the appetite and which is ready for immediate consumption. All such food and beverage, unless otherwise specifically exempted or excluded herein shall be included, whether intended to be consumed on the seller's premises or elsewhere, whether designated as breakfast, lunch, snack, dinner, supper or by some other name, and without regard to the manner, time or place of service.
- I. "Prepared food" means any one of the following:
1. Food sold in a heated state or heated by the seller;
  2. Food items that are a result of the combination of two or more food ingredients by the seller to make single items except:
    - a. Food that is only cut, repackaged, or pasteurized by the seller; or
    - b. Eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the U.S. Food and Drug Administration; or
    - c. Food sold in an unheated state by weight or volume as a single item unless sold by the seller with utensils; or
    - d. Bakery items sold as such, including but not limited to bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pie, tarts, muffins, bars, cookies, and tortillas unless sold by the seller with utensils; or

- e. Food sold by a seller that is primarily manufactured in accordance with NAICS Section 311, except Bakeries (NAICS § 3118) unless sold by the seller with utensils.
- 3. Food sold with eating utensils (plates, cutlery items, glasses, cups, napkins or straws). Plates do not include containers for transport, refer to § 4.8 of this Part for the threshold test.
- J. “Soft drinks” means nonalcoholic beverages that contain natural or artificial sweeteners. “Soft drinks” do not include beverages that contain milk or milk products (including soy, rice, or similar milk products) or greater than 50 percent (50%) vegetable or fruit juice by volume.

#### **4.6 Local Meal and Beverage Tax General**

- A. All eating and/or drinking establishments are required to charge and collect a one percent (1%) local meals and beverage tax on the sales of meals and/or beverages within this State, effective August 1, 2003. The tax applies whether or not the meals and/or beverages are prepared in the eating and/or drinking establishment and whether or not consumed on the premises.
- B. The one percent (1%) local meals and beverage tax is to be separately stated from the seven percent (7%) state sales tax on the sales check or other proof of sale. In the event that this requirement causes a hardship to a business, that business may issue sales checks or other proof of sale with the taxes combined at an eight percent (8%) rate. Although the sales check or other proof of sale to the customer may combine rates, the business must still maintain its books and records in such a manner to segregate the two taxes in order to properly report them to the Division of Taxation.
- C. The one percent (1%) local meals and beverage tax is administered and collected by the Division of Taxation and unless provided herein, all the administration, collection and other provisions of the State sales tax law (R.I. Gen. Laws Chapters 44-18 and 44-19) apply.
- D. The one percent (1%) local meals and beverage tax received by the Division of Taxation will be distributed to the city or town where the meals and/or beverages were delivered. Accordingly, each eating and/or drinking establishment must report the one percent (1%) local meals and beverage tax on its monthly or quarterly meals and beverage tax returns by city or town where the meals and/or beverages were delivered. The one percent (1%) local meals and beverage tax does not apply if the meal and/or beverage is delivered outside of this state.

## 4.7 Ancillary Changes

A. Many retailers of catered events or functions, whether the function or event is held on the retailer's premises or off-site, list charges on their invoice or statement for services and non-food items provided in connection with the sale of meals and beverages. Certain charges are not subject to the one percent (1%) local meals and beverage tax if they are marginally related to the sale or service of a meal or beverage are reasonable in amount and are separately stated. These charges include, but are not limited to:

1. Valet parking;
2. Coat checking;
3. Fees charged or deposits forfeited for the cancellation of a function when no meal was served;
4. Slippage (parking of boats at harbor side facilities);
5. Transportation provided to or from a catered function;
6. Lodging provided in connection with a catered function or meal;
7. Entrance fees to nearby tourist attractions or sites of interest;
8. Ceremony fees if the ceremony is provided outside of the facility room where the meal is served;
9. Portable commodes or toilets furnished for an outdoor function;
10. Facility charge for lecture or instruction class when a meal is not included (incidental beverage and food provided is not considered a meal);
11. Cover charge when admittance to a facility is the only thing received (if cover charge includes a meal or beverage it is subject to tax);
12. Membership fees when member is charged an amount to comply with the minimum spending requirement for an agreed period;
13. Charges for entertainment (including bands, orchestras and disc jockeys);
14. Any minimum or attrition fees (as long as the contracted meals were not provided);
15. Decorations, ice sculpture or flowers;

16. Charges for any tents or canopies provided when a catered event or function is held outdoors; or
  17. Audio visual equipment.
- B. Other charges are deemed to be reasonably related to the sale or service of a meal or beverages and are taxable, regardless if separately stated or not. These charges include, but are not limited to:
1. Charges for glassware, linen, china or silverware;
  2. Charges for tables or chairs;
  3. Gratuities stated on an invoice or statement by the retailer;
  4. Corkage or set up fees;
  5. Any special labor or service charges such as bartender, chef's station or white glove service; or
  6. Charges for the public room wherein the catered event or function is held.
- C. The above lists of taxable and nontaxable ancillary charges are not exhaustive and are intended to be illustrative only. Charges for items of tangible personal property provided in connection with a meal that are not subject to tax under the Meals and Beverage Tax may be taxable under the Sales & Use Tax Laws. In addition, certain charges may also be taxable under the Hotel Tax (R.I. Gen. Laws § 44-18-36.1).

#### **4.8 Convenience & Food Stores, Delicatessens, & Bakery/Cafes**

- A. There are two criteria that must be met for a sale to be subject to the one percent (1%) local meals and beverage tax. The first criterion is whether or not the item sold is a meal and/or beverage as defined by § 4.5 of this Part. The second criterion is whether the meal and/or beverage is sold by an eating and/or drinking establishment as provided by § 4.5 of this Part.
- B. As a general rule, eating and/or drinking establishments do not include food stores and supermarkets. However, the law defines eating and/or drinking establishments as restaurants, bars, taverns, lounges, cafeterias, lunch counters and other like places of business which furnish or provide facilities for immediate consumption of food at tables, chairs or counters or from trays, plates, cups or other tableware provided primarily for the use of patrons in consuming products purchased at the location. Since the activities of some food stores and supermarkets fall within this definition, such stores or a certain area of the stores

would qualify as eating and/or drinking establishment when selling prepared food and/or beverages. Therefore, such sales would be subject to the one percent (1%) local meals and beverage tax on those receipts.

- C. In the event that a food/delicatessen store or bakery/café provides facilities for immediate consumption of prepared food at tables, chairs, or counters in a general area, the entire store is considered an eating and/or drinking establishment and the one percent (1%) local meals and beverage tax, as well as the seven percent (7%) state sales tax applies to food catering sales as well as all prepared food and/or beverages purchased throughout the store, whether consumed on the premises or not.
- D. If the same facts stated above exist and a separate register is maintained in a specific area to record sales of prepared and catered food from this area only, this area is considered an eating and/or drinking establishment and any prepared food and/or beverages sold from the other areas would not be subject to the one percent (1%) local meals and beverage tax.
- E. Examples:
  - 1. Example 1: A convenience or food store provides facilities for immediate consumption of prepared food and/or beverages at tables, chairs, or counters in a general area of the store. However, there is no separate cash register to ring up the prepared food nor are their employee(s) attending to customers in the area where the tables are located. Customers may purchase prepared food and/or beverages from anywhere in the store and use the tables, chairs, or counter to consume the items. In this example, the store is considered an eating and/or drinking establishment and the one percent (1%) local meals and beverage tax applies to all prepared food and/or beverages purchased throughout the store, whether consumed on the premises or not.
  - 2. Example 2: A convenience or food store provides facilities for immediate consumption of prepared food and/or beverages at tables, chairs, or counters in a specific area of the store. The prepared food and/or beverages are purchased by customers from employee(s) or at a cash register in that specific area only. The specific area is considered an eating or drinking establishment and all sales of prepared food and/or beverages from that specific area only are subject to the one percent (1%) local meals and beverage tax., whether consumed on the premises or not. Prepared food and/or beverages sold from the grocery section of the store are not subject to the one percent (1%) local meals and beverage tax.

3. Example 3: A convenience or food store sells prepared food but does not provide facilities for immediate consumption (tables, chairs or counters); the store is not an “eating and/or drinking establishment; therefore, the one percent (1%) local meals and beverage tax does not apply.

#### **4.9 Food Stamp Purchases**

- A. When an individual purchases eligible food items in an order containing both taxable and nontaxable food items and presents both cash and food stamps for the order, the retailer shall apply the food stamps first to the taxable portion of the transaction.
- B. Example: A food stamp recipient arrives at the check-out with a \$25 order consisting entirely of eligible food items. However, eleven (\$11) dollars' worth of the food is taxable under state law (i.e., soda, gum, candy) and the remainder is not taxable. The recipient pays for the order with five dollars (\$5) in food stamps and twenty dollars (\$20) in cash. The five dollars (\$5) in food stamps must first be applied to the eleven (\$11) dollars' worth of taxable items, resulting in a tax being charged for the six (\$6) dollars' worth of taxable items not purchased with food stamps.

#### **4.10 Meal Services Generally**

Under R.I. Gen. Laws § 44-18-30(9), the sale of food and food ingredients purchased for human consumption is exempt from sales tax.

#### **4.11 Items Not Included as Food or Food Ingredients**

- A. The following items are not considered food and food ingredients and are therefore subject to sales and use tax.
  1. Alcoholic Beverages as defined in § 4.5(A) of this Part are subject to tax.
  2. Candy as defined in § 4.5(C) of this Part is subject to sales tax, however many products commonly categorized as candy contain flour therefore packaging labels must be examined to determine which items are deemed taxable candy or exempt food products (contains flour).
    - a. Examples of items exempt after January 1, 2007 include KitKats, Twix, some licorice, Nestle Crunch, and Milky Way.
    - b. If an item that would otherwise be included in the definition of “candy” above requires refrigeration under health regulations, it would be deemed an exempt food product. Candy that does not require refrigeration is taxable even if sold as such. 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 of a convenience store. These products are refrigerated for customer preference rather than as directed on the label. Therefore, these items are not exempt from sales tax.

3. Dietary Supplement as defined in § 4.5(E) of this Part is subject to tax. This means any product intended to supplement the diet required to be labeled as a dietary supplement, identifiable by the “Supplemental Facts” box found on the label and as required pursuant to Federal law. Dietary supplements sold on prescription are not subject to tax.
4. Prepared Food and Meals are subject to tax based on the definitions in § 4.5(I) of this Part and the application of the Threshold Test in § 4.13 of this Part.
5. Soft Drinks as defined in § 4.5(J) of this Part are subject to sales tax.
  - a. Frozen, or powdered soft drink mixes are not deemed to fall within the definition of “soft drink”, which must be in liquid form, and are therefore exempt as foods.
  - b. Taxable soft drinks include, but are not limited to:
    - (1) Naturally and artificially sweetened water,
    - (2) Teas containing sweeteners,
    - (3) Drinks labeled as containing 50 percent or less fruit or vegetable juice,
    - (4) Sports drinks (Gatorade, PowerAde, etc.), and
    - (5) Sodas (colas, root beer, artificially sweetened diet colas, ginger ales, etc.).
  - c. Items that are deemed exempt food products, rather than taxable soft drinks include, but are not limited to:
    - (1) Unsweetened Water (regardless of carbonation),
    - (2) Fruit or vegetable juices that contain more than 50 percent juice by volume,
    - (3) Nutritional drinks that contain soy (Ensure, Boost, etc.),

- (4) Apple cider,
- (5) Beverage powders (Kool-Aid, lemonade, sweetened iced tea), and
- (6) Frozen fruit juice concentrates (product is not in liquid form).

#### **4.12 Seed, Plants, Fertilizers**

- A. The following items are subject to sales and use tax:
1. Seeds and plants that ordinarily produce food for human consumption;
  2. Fertilizers (including limestone); and
  3. Insecticides and fungicides, seed inoculants and plant hormones.
- B. The items mentioned on § 4.12(A) of this Part are exempt if sold to farmers that hold a valid exemption number with the State of RI.

#### **4.13 Threshold Test**

- A. The following rules have been adopted by the Streamlined Sales Tax Governing Board to determine how utensils are treated and their impact on the sale of various food items. Under the approved interpretation, a Threshold Test, which determines the percentage of sales considered to be prepared food, was created to add consistency to the meaning of the term “provided by the seller.” The Division is required to use this test in making determinations of the taxability of prepared food and beverage sales. The calculation is as follows:
1. The numerator includes sales of prepared food under §§ 4.5(l)(1) and (2) of this Part of the definition of prepared food; and food where plates, bowls, glasses or cups are necessary to receive the food (e.g., dispensed milk, fountain beverages, salad bar). Alcoholic beverages are not included in the numerator.
  2. The denominator includes sales of all food and food ingredients, including prepared food, candy, dietary supplements, and soft drinks. Alcoholic beverages are not included in the denominator.
- B. Application of the Threshold Test
1. For sellers with a sales percentage of (Seventy-Five Percent) 75% or less, utensils are provided by the seller if the seller’s practice for the item (as represented by the seller) is to physically give or hand the utensil to the

purchaser, except that plates, bowls, glasses, or cups necessary for the purchaser to receive the food (e.g., dispensed milk, salad bar) need only be made available.

2. For sellers with a sales percentage greater than (seventy-five percent) 75%, utensils are provided by the seller if they are merely made available to purchasers. Thus, utensils at a kiosk or common area are treated as utensils “provided by the seller.”
3. For sellers with a sales percentage greater than (seventy-five percent) 75% who sell items that contain (four) 4 or more servings packaged as one item sold for a single price, an item does not become prepared food due to the seller having utensils available (e.g. ground coffee, whole cakes, loaves of bread). However, if the seller provides utensils for the item, the item is considered prepared food. Whenever available, serving sizes will be determined based on a label on an item sold. If no label is available, a seller will reasonably determine the number of servings in an item.
4. When a seller sells food items that have a utensil placed in a package by a person other than the seller, and that person’s NAICS classification code is that of a manufacturer (sector 311), the seller shall not be considered to have provided the utensil except as provided in §§ 4.13(B)(1) through (3) of this Part. For any other packager with any other NAICS classification code (e.g., sector 722 for caterers), the seller shall be considered to have provided the utensil.
5. The prepared food sales percentage will be calculated by the seller for each tax year or business fiscal year, based on the seller’s data from the prior tax year or business fiscal year, as soon as possible after accounting records are available, but not later than (ninety) 90 days after the beginning of the tax or business fiscal year.
6. A single prepared food sales percentage will be determined annually, for all of the seller’s establishments in a state. A new business will make a good faith estimate of their prepared food sales percentage for their first year. A new business should adjust its good faith estimate prospectively after the first three months of operation if actual prepared food sales percentages materially affect the (Seventy-Five percent) 75% Threshold Test.

## 4.14 Additional Tax Applications

- A. Gratuities and other charges: When a retailer bills a customer for the rental of a public room or for gratuities, service charges, cover charges, or entertainment charges (including charges for bands or orchestras) in connection with the serving of meals or soft/alcoholic drinks, the amount billed or received by the retailer will be considered as part of the gross receipts from the sale of the meal or soft/alcoholic drinks and must be included in the measure of tax. Amounts designated as service charges, added to the price of meals, are a part of the selling price of the meals and, accordingly must be included in the retailer's gross sales subject to tax.
- B. Sales by Caterers: The tax applies to the entire charge made by caterers for serving meals, food, and soft/alcoholic drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals. Sales of meals by caterers to social clubs, fraternal organizations, or other persons are sales for resale if a valid resale certificate is issued from the retailer of the meal.
- C. Social Clubs and Fraternal Organization: "Social clubs and fraternal organizations" as used herein includes any corporation, partnership, association, group, or combination acting as a unit, such as service clubs, lodge organizations, community, country and athletic clubs. The tax applies to receipts from the furnishing of meals, food, and soft/alcoholic drinks by social clubs, and fraternal organizations.
- D. Meals Served to Students and Teachers: The tax does not apply to the sale of meals by public, private, or parochial schools, school districts, colleges, universities, student organizations, and parent-teacher associations to the students or teachers of a school, college, or university whether the meals are served by the said educational institution or by a food service or management entity under contract to said educational institution. This applies even though the school is operated for profit. Items sold through vending machines located in areas designated primarily for students and teachers shall be considered a meal or a portion thereof. Those designated areas include cafeterias, student unions, classroom buildings, teachers' lounges, dormitories and faculty buildings. Food items and soft/alcoholic drinks sold by college/university rathskellers or taverns located on campus are subject to tax.
- E. Subsidized Employer Cafeterias and Food Service Operations: An employer who engages a caterer or food service contractor to provide food and soft drinks or service in connection therewith to employees at the employer's expense is the purchaser of food and soft drinks and must pay the sales tax thereon. Any subsidy given by an employer to a caterer or food service contractor (whether

termed a management fee, guarantee of profit or other designation) is taxable as a receipt from the sale of food and soft drinks. Where the subsidy is paid by an employer in addition to a specific amount paid by the employee, both amounts are taxed as the receipt from the sale of food and soft drinks.

- F. Meals Sold to Employees: The tax does not apply to meals served to employees where the compensation of such employees includes the providing of such meals without charge.
1. Example: a waitress working in a restaurant who, as compensation for services, receives her meals without charge and who, in addition thereto receives a salary. The tax does apply to meals served to employees where a separate charge or deduction is made therefore by the employer.
  2. Example: where the contract of employment provides that the employer shall deduct the cost of meals served to the employee from the latter's salary, or where an actual charge is made for meals served to the employees.

#### **4.15 Cafeterias Operated by Tax Exempt Hospitals**

Although, under the provisions of R.I. Gen. Laws § 44-18-30(5) of the Rhode Island sales and use tax act, hospitals not operated for profit are exempted from paying either a sales tax or a use tax on tangible personal property which is sold to them, nevertheless when such hospitals operate cafeterias where meals, food or beverages are regularly sold to employees or other persons, such sales are subject to the tax. Accordingly, the tax shall apply to the gross receipts derived from such sales.

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**CHAPTER 20 - DIVISION OF TAXATION**

**SUBCHAPTER 70 - SALES AND USE TAX**

**PART 4 - LOCAL MEALS AND BEVERAGE TAX (280-RICR-20-70-4)**

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