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INFORMATION RELEASE * ST 2004-1

Food Definition Change Effective July 1, 2004 – Issued May, 2004

The purpose of this information release is to address the new definition of "food" in Ohio Revised Code ("R.C.") section 5739.01(EEE) that takes effect July 1, 2004. This change in the definition of "food" is one of several changes made in Am. Sub. H.B. 95 of the 125th Ohio General Assembly to bring Ohio statutes in compliance with the terms of the Streamlined Sales and Use Tax Agreement. What constitutes food is important because food consumed off the premises is not subject to Ohio sales tax.

Definition of "Food" Expiring June 30, 2004

For periods prior to July 1, 2004, vendors should continue to apply the current definition found in R.C. 5739.01(EEE)(1).

"Food" means cereals and cereal products, milk and milk products including ice cream, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruits, fruit products, and pure fruit juices, condiments, sugar and sugar products, coffee and coffee substitutes, tea, and cocoa and cocoa products. "Food" does not include spirituous liquors, wine, mixed beverages, or beer; soft drinks; sodas and beverages that are ordinarily dispensed at or in connection with bars and soda fountains, other than coffee, tea, and cocoa; root beer and root beer extracts; malt and malt extracts; mineral oils, cod liver oils, and halibut liver oil; medicines, including tonics, vitamin preparations, and other products sold primarily for their medicinal properties; and water, including mineral, bottled, and carbonated waters, and ice.

New Definition of "Food" Effective July 1, 2004

For periods on and after July 1, 2004, vendors need to apply the definition of food found in R.C. 5739.01 (EEE)(2) that provides the following:

On and after July 1, 2004, "food" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. "Food" does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.

Generally, if a substance, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form is consumed by humans for nutritional value or taste, then it is “food.” In some ways, this represents a broadening of the definition of “food.” For example, items such as bottled water, chewing gum, and breath mints, which have been considered as non-food items, will be included in the new definition of “food.”

The statute specifically excludes alcoholic beverages, dietary supplements, soft drinks, and tobacco from the definition of “food.” These exceptions are discussed below.

Alcoholic Beverages

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

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

Beer, wine, and liquor are not considered food and are subject to sales tax. This represents no substantive change in Ohio sales tax law. The term “alcoholic beverages” does not include non-alcoholic beers that contain less than one-half (0.5%) of one per cent of alcohol by volume. Also, “alcoholic beverages” do not include nonalcoholic mixers, whether in liquid, powdered or frozen form. However, some of these items may be considered “soft drinks” as discussed below. Additionally, items that contain alcohol but are not used as beverages, such as vanilla extract and cooking wines, are not considered alcoholic beverages.

Dietary Supplements

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

"Dietary supplements" means any product, other than tobacco, that is intended to supplement the diet and that is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in such a form, is not represented as conventional for use as a sole item of a meal or of the diet; that is required to be labeled as a dietary supplement, identifiable by the "supplement facts" box found on the label, as required by 21 C.F.R. 101.36; and that contains one or more of the following dietary ingredients:

- (i) A vitamin;
- (ii) A mineral;
- (iii) An herb or other botanical;
- (iv) An amino acid;

(v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake;

(vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in divisions (EEE)(3)(b)(i) to (v) of this section.

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

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

Soft Drinks

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

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

It is important to note that the definition of a “soft drink” is not controlled by whether or not the beverage is carbonated. Any sweetened nonalcoholic beverage, whether sweetened naturally or artificially, is a soft drink unless it either contains milk products or a milk substitute or it contains greater than fifty percent (50%) fruit or vegetable juice by volume. Tax applies to the sale of soft drinks.

Soft drinks include traditional soda pop beverages, but also include many fruit drinks or fruit punches that are less than fifty percent (50%) juice by volume. Bottled tea and coffee drinks, which have been considered food items, will be considered soft drinks and taxable if they contain sweeteners, unless they also contain milk or milk substitutes.

Tobacco

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

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

This represents no change in Ohio sales tax law as tobacco and tobacco products have never been considered “food.” Tax applies to sales of tobacco and tobacco products.

Exemption for Off-premise Consumption

The sale of food and food ingredients for human consumption off the premises where sold is exempt from sales tax under R.C. 5739.02 (B)(2). **The new definition of “food” does not change this exemption.** Food consumed on the premises remains taxable.

Noteworthy Items Changed from Taxable to Non-taxable Effective July 1, 2004

Prior to July 1, 2004, bottled water is taxable. Beginning July 1, 2004, bottled drinking water (including mineral, carbonated, and distilled water) is considered food. However, if the water contains natural or artificial sweeteners then it is considered a “soft drink” under R.C. 5739.01 (EEE)(3)(c) and excluded from the definition of food. Flavored water would be a food unless it also includes sweetener (natural or artificial).

Generally, ice will be considered food and not taxable. However, ice that is sold for cooling purposes is not food and therefore taxable. For administrative purposes, ice sold by grocery, convenience, and similar stores will be presumed to be food and no tax should be charged. Ice used for dual purposes, such as to cool beverages before being dispensed and also being placed in a container for consumption, will be considered food and not subject to tax.

Another change in the definition of “food” pertains to fruit juices. Prior to July 1, 2004, only 100% fruit juices were food. Under the new law, sweetened beverages with less than fifty percent (50%) fruit or vegetable juice are soft drinks and taxable. If the fruit or vegetable juice content is greater than fifty percent (50%) by volume then the beverage is a food. In the case of a beverage concentrate, the fifty percent (50%) test by volume is based upon the reconstituted beverage.

Additionally, items such as chewing gum and breath mints are food.

Due to the new definition of “food,” there may be some confusion on what qualifies as a soft drink under the new law. As stated above, carbonation is no longer the determinative factor on whether a beverage is considered to be a soft drink or not. In general, the determinative factor is whether the beverage is sweetened or not. If beverages are sweetened naturally or artificially, then they are taxable soft drinks unless they also contain milk, a milk products, or similar substitute for milk such as soy or rice.

Questions and Answers

The following is a summary of typical questions being asked along with the Department’s responses based on the provisions of the Ohio Revised Code. The responses should be used as a guide to understanding the application of the law. For purposes of these questions, the use of “non-taxable” presumes the food is consumed off-premises.

A) When is food taxable?

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

B) Is bottled water, flavored water, carbonated water, or flavored carbonated water “food” under the new definition?

Since water is a liquid substance ingested by humans for taste or nutritional value, these items would generally be considered food. Food, if purchased for consumption off the premises where sold, is not subject to Ohio sales tax. Water that contains natural or artificial sweeteners is a "soft drink" under R.C. 5739.01(EEE)(3)(c) and excluded from the definition of food.

C) Are bottled teas and coffees considered food?

As of July 1, 2004, any beverages that are artificially or naturally sweetened will be considered a “soft drink” and taxable under R.C. 5739.01(EEE)(3)(c). Bottled teas and coffees that are flavored but not sweetened are food. Sweetened tea and coffee will be taxable as a “soft drink” unless they contain milk, milk products or similar substitute for milk such as soy or rice.

D) I sell coffee, tea, hot chocolate and other beverages. In some beverages, I will add a flavored syrup. Other times I will add steamed milk or whipped cream. Are these products food?

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

If the vendor adds a sweetener, or a flavored syrup that contains a sweetener, the beverage becomes a soft drink and would be taxable regardless of where it is consumed. If the vendor adds milk or a milk product, such as whipped cream, or a milk substitute, the beverage would be a food and not taxable if it is sold for off-premises consumption. If the vendor adds both a flavored syrup and a milk product or milk substitute, the beverage would still be food.

Hot chocolate that contains milk or a milk substitute would be a food and would not be taxable if sold for off-premises consumption.

E) Are powdered drinks taxable?

If the resulting beverage would be considered a soft drink then the drink mix is taxable. If milk or a milk substitute would normally be added, the powdered mix is considered a food.

F) Are drink concentrates taxable?

If the reconstituted form of the beverage would be considered a soft drink then the drink concentrate is taxable.

G) Is non-alcoholic beer food?

If it contains less than one-half (0.5%) of one percent alcohol per volume then it is considered to be food under the new definition and it is not taxable. But if the non-alcoholic beer contains one-half percent or more of alcohol per volume then it is taxable as an alcoholic beverage. However, non-alcoholic beer like all other foods is still taxable if consumed on the premises.

H) Are protein drinks considered to be food or a dietary supplement?

Most protein drinks have a “Supplement Facts” box on their label therefore they would be a dietary supplement and not food. However, the taxability of protein drinks depends on how they are labeled. If the label has a “Supplement Facts” box, the product is not a food but a dietary supplement and taxable. If the label contains a “Nutrition Facts” box then the product is food and not taxable.

I) Are diet products food or nutritional supplements?

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

J) Are over-the-counter drugs taxable?

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

K) Will tax still be imposed on breath mints but not candy?

No. Breath mints that are ingested by humans for taste or nutritional value are considered to be food beginning July 1, 2004. Candy is still food. Therefore, candy and breath mints are not taxable.

L) Are ingredients used in baking taxable?

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

M) Is baking soda taxable?

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

N) Are cooking wines and extracts taxable or exempt?

Although cooking wines and extracts contain alcohol, they are not meant for drinking. They are used in food preparation and are an ingredient that is within the definition of a food and not taxable.

O) Are condiments such as ketchup and mustard considered food?

Since condiments are substances ingested by humans for taste or nutritional value, these items would be considered food and not taxable. Ketchup, mustard, mayonnaise, salad dressing, barbecue sauce, cocktail sauce, and hot sauce are just a few examples of condiments.

P) Are vegetable and herb plants taxable?

Yes. If it is sold in potted form (e.g. in potting soil) then it is taxable as a plant. But, if an herb is cut and packaged for consumption then it is food and not taxable.

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

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

R) How does the new definition of “food” change the taxability of products sold in vending machines?

Vendors who have predetermined rate agreements (R.C. 5739.05) prior to July 1, 2004 need to contact the Ohio Department of Taxation since the change in the definition of “food” may have an effect on their agreement. Please contact the Audit Division at 614-644-1701.

S) Some items, such as salt, have multiple uses. How will they be taxed?

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

T) Is dog and cat food taxable?

Yes. Only food that is consumed by humans is not taxable. Food purchased for household pets is taxable.

U) Does the new definition of food change what items can be purchased with food stamps?

No. The new definition does not change the eligibility of items that can be purchased with food stamps. Individuals can still purchase the same items with food stamps as they did before. Federal law governs what items may be purchased by food stamps and that determination is independent of Ohio’s definition of “food.” If you have any further questions regarding food stamps, please contact the Food and Nutrition Service (United States Department of Agriculture) at 1-877-823-4369 or visit their website at www.fns.usda.gov.

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

Reference Chart

Below is a list of items that have been categorized according to whether they are food or not under R.C. 5739.01(EEE)(2). This list is not all-inclusive but is intended as a guideline.

Food	Non-food
Bottled Water (including carbonated, distilled, and mineral)	Water-Sweetened (including artificially)
Tea-Unsweetened	Tea-Sweetened (including artificially)
Coffee-Unsweetened	Coffee-Sweetened (including artificially)
Coffee (with milk or milk product)	Soda Pop
Fruit Juice (greater than 50% juice content)	Fruit Juice (less than 50% juice content)
Vegetable Juice (greater than 50% juice content)	Vegetable Juice (less than 50% juice content)
Ice (sold at a grocery, convenience, or similar stores)	Ice (used as a refrigerant and not sold at a grocery, convenience, or similar stores)
Milk and milk products (including ice cream)	Sweetened beverages without milk or milk substitutes
Non-alcoholic beer (less than 0.5% alcohol content per volume)	Alcoholic beverages (with 0.5% or more alcohol per volume)
Soy products	Sports/Energy Drinks (e.g. Gatorade®, Powerade®)
Bakery Items (e.g. cake, cookies, pastry, etc.)	Vitamins
Cocoa, tea bags, coffee beans	Pet food
Nuts (All types)	Cough drops
Popcorn	Cod Liver Oil
Chips and other snacks	Antacids
Pudding/gelatin	Over-the-counter-drugs
Condiments (ketchup, mustard, etc)	Nicotine Gum
Baking ingredients	Gelatin Capsules
Cereals and cereal products	Diet drugs and supplements
Sugar and sugar substitutes	Mineral Oil
Popsicles/Sno-Cones	Powdered Drinks (Tang®, Kool-Aid® etc.)
Cooking oils (vegetable, canola, olive, etc.)	Lemonade
Extracts (vanilla, peppermint, almond, etc.)	Protein Drinks (with Supplemental Facts box)
Candy, chewing gum, breath mints	Toothpaste and Mouthwash

If you have any questions regarding this information release, please call the dedicated toll free number for the Streamlined Sales Tax at 1-800-304-3211, or contact Taxpayer Services at 1-888-405-4039, or e-mail us through our web site: www.tax.ohio.gov.

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