



FYI Sales 4

Taxable and Tax Exempt Sales of Food and Related Items

The following guidelines should be used to determine whether a food item is exempt from sales tax. Colorado's principal sales tax exemption guideline is based upon what can be purchased for home consumption with food stamps [U.S.C. section 2012 (g)] and WIC vouchers (WIC is the federal supplemental food program for women, infants and children.) (42 U.S.C. section 1786). Colorado statute also imposes other criteria, in addition to the food stamp/WIC guidelines. [Reg. 39-26-102.4.5]

FOOD PURCHASES EXEMPT FROM COLORADO SALES TAX

Exempt items eligible for purchase with food stamps or WIC vouchers include:

1. Food purchased for human consumption at home.
2. Seeds and plants which produce food for human consumption.
3. Food purchased with food stamps or WIC vouchers. (§39-26-707, C.R.S.)

FOOD AND RELATED ITEMS NOT EXEMPT FROM COLORADO SALES TAX

The Department of Agriculture guidelines prohibit the use of food stamps or WIC vouchers for the purchase of the following items. These items are sales **taxable**:

1. Nonfood items such as soaps, paper products and household supplies, grooming items and cosmetics, and food not for human consumption, such as pet and bird food.
2. Alcoholic beverages. (cooking wine, wine vinegar and , alcohol-filled candies are exempt.)
3. Cigarettes, tobacco and tobacco products.
4. Food to be eaten in the store, hot foods ready to eat and food marketed to be heated in the store.
5. Food preservation equipment and items.
6. Vitamins, dietary supplements, and medicines. (Prescription drugs are exempt under [Reg. 39-26-717.1])
7. Ice used for refrigeration.

ITEMS EXEMPT FROM TAX IF PURCHASED WITH FOOD STAMPS OR WIC VOUCHERS -- BUT TAXABLE WHEN PAID WITH CASH

The following items, if purchased with food stamps or WIC vouchers/checks are exempt from the 2.9% state sales tax, but are taxable if purchased with cash:

1. Carbonated water marketed in containers.
2. Soft drinks.
3. Chewing gum.
4. Candy
5. Seeds and plants to produce food for human consumption.
6. Prepared salads and salad bar items.
7. Cold sandwiches.
8. Deli trays.

Sales and purchases of food sold through vending machines are exempt from Colorado sales tax. Sales of hot and cold beverages in unsealed containers sold by vending machine are not exempt. [39-26-102(4.5), C.R.S.]

NOTE: Food used by a business or commercial entity, such as coffee or bottled water served to customers or employees, is subject to state sales tax.

In addition, all food and drink sold by the following establishments are taxable: restaurants, snack shops, carryout shops, pushcarts and other sellers of food and drink as specified in §39-26-104 (1) (e), C.R.S. However, meals sold by colleges in dormitories, by assisted living facilities to its residents, by private clubs to its members, and by restaurants at no cost or reduced cost to employees of restaurants and other such establishments are exempt.

DETERMINING WHETHER LOCAL TAX AND SPECIAL DISTRICT TAXES ARE DUE ON FOOD

Cities and counties have the option of taxing food. However, if they exempt food from sales tax they must use the same criteria as the state in determining which items are taxable and which are exempt. This includes home-rule cities that administer their own sales tax. Localities that elect to tax food still must exempt purchases made with food stamps or WIC vouchers.

To find out whether a city or county taxes food, retailers should refer to Colorado Sales/Use Taxes (DR 1002). This publication lists tax rate information for Colorado cities and counties and indicates which counties and statutory cities have a sales tax exemption for food. The publication can be obtained on our Web site at www.TaxColorado.com or the rates can be found through the Business button on Revenue Online at www.Colorado.gov/RevenueOnline. Contact home-rule cities directly to find out if they exempt food from sales tax.

Regional Transportation District (RTD) tax, and Scientific and Cultural Facilities District (CD) taxes are due on any food item sold within RTD/CD boundaries and that is subject to the state sales tax. (The boundaries of these three special districts encompass most of the seven-county Denver metropolitan area.) The DR 1002 provides boundaries and tax rates. If the item is not subject to state sales tax, RTD/CD taxes are not due.

The Rural Transportation Authority (RTA) tax is due on any food item sold within the RTA boundary, and that is subject to the state sales or use taxes. The DR 1002 will list the various RTA boundaries and tax rates.

All state sales tax and, if applicable, state-collected local and RTD/CD, or RTA taxes must be reported and remitted with the Retail Sales Tax Return (DR 0100).

Effective March 1, 2010 sales and purchases of nonessential food items and packaging provided with purchased food and beverage items are taxable at the state sales and use tax rate of 2.9%.

Nonessential articles or containers furnished in connection with sale of taxable food. On or after March 1, 2010, a retailer of food, meals, or beverages who purchases nonessential food items or nonessential containers or bags and furnishes the article or container to a consumer in connection with a taxable retail sale of food, meals, or beverages, must pay sales or use tax on the purchase of the nonessential article or container.

Nonessential articles and containers. An article or container is nonessential if it is primarily used for the convenience of the consumer and is not necessary to effectuate the sale of food.

Examples of nonessential articles or containers include, but are not limited to, non-reusable:

- utensils
- skewers
- napkins and towelettes
- bibs
- serving trays, platters, and dome lid covers to plates or platters
- placemats, tray liners, and tablecloths
- sacks
- grocery bags
- bags and bag ties for bulk grocery produce or bread
- carryout containers for leftover food sold for immediate consumption
- straws
- toothpicks
- stirring sticks
- cup sleeves
- portion dividers
- single-use baking dishes
- condiments, including ketchup, mustard, relish, and spices that are not incorporated into a prepared meal at the time it is transferred to the consumer but, rather, are provided separately from the transfer of the meal to the consumer, such as at a convenience counter. Another example of condiments provided separately from the meal are packets of ketchup placed in a bag that are given to the customer. Condiments sold as food for domestic home consumption (for example, condiment sales sold in grocery stores) are exempt from state sales and use tax.

Examples of essential articles or containers include, but are not limited to, non-reusable:

- plates, cups, or bowls (and lids for such items) on, or in which, unwrapped or unpackaged hot or prepared food and beverages are served to the consumer;
- Cups used in vending machines dispensing beverages;
- Disposable containers or packaging material* on, or in which, food is transferred to the consumer, including pizza delivery box, sleeve for French fries, buckets, clamshells or other containers if the retailer cannot transfer the food to the consumer without such article or container. However, a carryout container used by a consumer to carry leftover meals from the restaurant is not essential.

*packaging material used in a non-essential manner would be taxable. Example: butcher paper used as a table liner would not be considered an essential use.

Articles or containers not furnished to consumer. A retailer is liable for sales or use tax for its purchase, use, storage, or consumption of an article or container, regardless of whether it is essential to the consumer, if the article or container is not transferred to the consumer. An article or container is treated as transferred to the consumer if the food retailer makes the article or container available to consumers on the food retailer's premises. Examples of non-transferred articles include, but are not limited to:

- Reusable articles such as glassware, ceramic plates, cloth napkins, and silverware;
- Non-reusable articles the retailer uses to cook or store food, such as plastic storage wrap for storage, aluminum foil used primarily for cooking, food labels, single use baking dish, and cooking tray liners.

Taxable Food. Articles or containers that are essential to the consumer and, therefore, otherwise exempt under this regulation, are taxable to the food retailer if the purchase of the food by the consumer is not subject to tax. For example, a food retailer must pay tax on free beverage samples furnished in disposable paper cups and free food furnished with napkins or with disposable utensils. In such cases, there is no retail sale from the food retailer to the consumer and there is no tax due on the transfer of the free article to the consumer. However, the retailer is responsible to pay the tax on both the food and the container.

Separate charge for essential article or container. Sales of an article or container by a food retailer to a consumer is subject to tax, regardless of whether the article or container is essential to the consumer, if the food retailer separately states on the consumer's invoice a charge for such article or container or if the food retailer separately sells the article or container for a charge and not as part of a retail sale of food.

Example 1: A theater sells a canned beverage and cup for a single charge. Prior to March 1, 2010, the theater could purchase the cup from suppliers as an exempt wholesale purchase for resale. After March 1, 2010, the theater must pay sales or use tax on its purchase of cups from suppliers.

Example 2: Same facts as Example No. 1, except the theater sells non-reusable cups to consumers who do not also purchase a beverage. Theater may purchase such cups as an exempt wholesale purchase and must collect sales tax on the charge for the cup.

Example 3: Airport food retailer separately charges for food and disposable utensils used by the consumer. Retailer may purchase the utensils from suppliers as an exempt wholesale purchase for resale to consumer and must collect sales tax on the sale of utensils to the consumer.

Example 4: Food retailer sells plastic bottles or cups with beverage for a single charge, but the plastic bottle is designed for reuse by the consumer. Retailer may purchase the reusable bottle or cup from the supplier as an exempt wholesale purchase and collect sales tax from the consumer.

Who collects and remits this tax? The vendor or supplier of the items known to be nonessential (forks, napkins, lids, straws) is responsible for charging and remitting the sales tax. For those items that may be essential (paper plates used in the restaurant), then become nonessential (paper plates provided along with food already in containers), the restaurant/retailer using or providing those items is responsible for remitting use tax on those items.

FYIs provide general information concerning a variety of Colorado tax topics in simple and straightforward language. Although the FYIs represent a good faith effort to provide accurate and complete tax information, the information is not binding on the Colorado Department of Revenue, nor does it replace, alter, or supersede Colorado law and regulations. The Executive Director, who by statute is the only person having the authority to bind the Department, has not formally reviewed and/or approved these FYIs.