



## Application Of The Reduced West Virginia Consumer Sales And Service Tax To Food

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The Sales Tax and Use Tax on the sales, purchases and uses of food and food ingredients intended for human consumption has ceased. However, the cessation of tax does not apply to sales, purchases and uses by consumers of prepared food, food sold through vending machines and soft drinks. The purpose of this publication is to explain and clarify the application of the Sales and Use Taxes to sales of food.

Please note that applicable definitions are found at the end of this document.

**A number of items sold by grocery stores, supermarkets, and similar type businesses are classified in this document under the headings "Food Items" and "Prepared Food Items." Food Items fall within the definition of "food and food ingredients" and are subject to cessation of sales tax and Prepared Food Items, food sold through vending machines and soft drinks are subject to the Sales Tax at the regular rate of 6%. The following examples are for illustrative purposes and are not intended to be all-inclusive.**

### I. FOOD ITEMS

The cessation of tax applies to the sale of food and food ingredients listed below if sold unheated and without eating utensils provided by the seller.

- Baby food
- Bakery items (including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas).
- Baking chocolate (whether liquid, powder, or solid)
- Baking soda or other forms of leavening agents
- Beverages containing greater than 50% fruit or vegetable juice or containing milk, milk products or milk substitutes
- Broths and bouillons (whether liquid, instant, freeze dried, or cubes)
- Butter
- Candy and confections including breath mints
- Cereal and cereal products
- Cheese
- Chewing Gum
- Chip dip
- Chocolate covered nuts
- Cocoa
- Coconut (whether whole, shredded, sweetened, processed or raw)
- Coffee and coffee substitutes (coffee beans, ground coffee, freeze dried coffee, coffee in brewing bags and instant coffee)
- Condiments
- Cooking oil
- Cooking wine (that exceeds alcohol content of .5%, that is intended for use in cooking and that is not an alcoholic beverage)
- Dairy products
- Deli items when sold unheated by weight or volume as a single item
- Dried fruit
- Eggs and egg products or substitutes
- Extracts and flavorings intended as a cooking ingredient
- Fish and fish products (including all other forms of seafood)
- Flour (including wheat, whole wheat, rye, corn, rice, barley, buckwheat, soy or other forms of milled grains or nuts)
- Food coloring
- Food sold by a seller whose primary NAICS classification is manufacturing in sector 311, except subsector 3118 (bakeries)
- Food sold unheated by weight or volume as a single item
- Food only sliced, repackaged, or pasteurized by the seller such as meat from a deli counter, sliced and wrapped for a customer
- Frozen meals such as pizza or french fries
- Fruit and fruit products (whether fresh, frozen, canned or dehydrated, but excludes fruit on salad bars)
- Gelatins (whether powdered or prepared)
- Gravies
- Herbs (seasonings)
- Honey
- Ice except block or dry ice (which remain taxable at 6%)
- Ice cream (including prepackaged novelties)
- Jams and jellies (including marmalades and preserves)
- Ketchup
- Lard
- Margarine

Marshmallows (including marshmallow crème)  
 Meat and meat products (whether fresh, frozen, cured, canned, or dehydrated)  
 Meatloaf - uncooked  
 Milk and milk products  
 Mustard  
 Nuts (including salted nuts)  
 Olive oil  
 Packaged popcorn  
 Pasteurized eggs  
 Peanut butter  
 Pepper  
 Pickles  
 Popsicles  
 Powdered drink mixes (including sweetened mixes)  
 Pumpkins except pumpkins decorated at the time of sale (which remain taxable at 6%)  
 Relishes  
 Salad dressings and mixes  
 Salad purchased for resale and repackaged in smaller containers by the seller unless heated and/or sold with eating utensils  
 Salads or other deli dishes unless heated and/or sold with eating utensils  
 Salt except rock salt (which remains taxable at 6%)  
 Sauces  
 Seasonings  
 Sherbets and sorbets  
 Shortenings  
 Soups  
 Snack chips and pieces (includes potato chip or crisp type chips, corn chips, pork rinds, pretzels and trail mixes)  
 Spices  
 Sandwich spreads  
 Sugar, sugar products and sugar substitutes  
 Sunflower seeds  
 Syrups (including molasses and dietetic syrups and similar products)  
 Tea (bags, leaves, or instant only)  
 Vegetables and vegetable products (whether fresh, frozen, canned or dehydrated, but excludes food on salad bars)  
 Vegetable oils  
 Water

Sales of dietary supplements are subject to the cessation of tax. The term “dietary supplements” means any product that:

- (a) is intended to supplement the diet;
- (b) contains one or more of the following ingredients:
  - (i) vitamins,
  - (ii) minerals,
  - (iii) herbs or other botanicals,
  - (iv) amino acids,
  - (v) a dietary substance for use by humans to increase the total dietary intake,
  - (vi) concentrates, metabolites, constituents, extracts or a combination of any of the above ingredients;
- (c) is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in the above form, is not represented as a conventional food and is not represented for use as a sole item of a meal or of the diet; and
- (d) is required to be labeled as a dietary supplement, identifiable by the “Supplemental Facts” box found on the label and as required under 21 CFR 101.36.

Dietary supplements include products such as Figurines, Carnation Diet Drinks, Slimfast, Slender, and Ensure.

## II. PREPARED FOOD ITEMS

The Sales Tax rate of 6% applies to the sale of prepared food items listed below **if prepared by the seller**:

All food sold in a heated state or heated by the seller  
 Bakery items if sold with eating utensils provided by the seller  
 Bakery items sold in a heated state  
 Cold soups, casseroles, beans, potatoes, etc.

Combined raw meats - that do not require cooking  
Drinks prepared by the seller (coffee, tea, etc.)  
Fried chicken  
Frozen yogurt dispensed as cones, sundaes, etc.  
Fruits cut and combined by the seller (fruit tray)  
Ice cream novelties, cakes or pies  
Ice cream or ice milk dispensed as cones, sundaes, etc.  
Marinated raw meats - that do not require cooking  
Marinated raw seafood - that do not require cooking  
Party trays  
Rotisserie chicken  
Salad greens mixed by the seller  
Salads and deli items if heated and/or sold with eating utensils  
Sandwiches  
Soups, casseroles or meals sold warm  
Warmed nuts

- (1) All food sold with eating utensils provided by the seller including plates, knives, forks, spoons, glasses, cups, napkins or straws. Food is considered to be sold with eating utensils provided by the seller when the food is intended for consumption with the utensils provided. Prepared Food Items therefore includes all food sold by an eating establishment that sells meals, sandwiches, or other food for consumption on or off the premises. Additionally, Prepared Food Items includes self-service food such as salad bars or drink islands. The presence of self-service utensils in a facility does not change Food Items (not taxed) into Prepared Food Items (taxable at 6%) unless it is intended that the food be consumed with those utensils. Further, items provided solely pursuant to sanitary statutes or regulations and not for purposes of consumption do not qualify as utensils.
- (2) Prepared Food Items remain taxable at 6% if previously heated by the seller and are ready to eat without further cooking by the purchaser.
- (3) Food that is only sliced, repackaged or pasteurized by the seller is not considered to be prepared Food and is subject to the cessation of tax.
- (4) Two or more food ingredients that are mixed or combined by the seller and then sold as a single food item.

Heated food sold in combination with unheated food is taxable at 6%. For example, hot chicken prepared by the seller with a pint of potato salad that was not prepared by the seller is sold for a single price.

- (5) Food sold by a seller whose proper primary NAICS classification is 311, food manufacturing (except subsector 3118, bakeries), if:
  - (a) sold with eating utensils provided by the seller; or  
If the manufacturer, rather than the seller, provides an eating utensil with the food, such food is not considered to be provided with eating utensils. For example, a box of crackers and cheese that includes a spreader is not subject to tax because the spreader is not provided by the seller.
  - (b) sold in a heated state

**If these conditions in (a) and/or (b) exist, these items would be classified as Prepared Food and therefore taxable at the Sales and Use Tax rate of 6%.**

### III. OTHER ITEMS

The Sales Tax rate of 6% applies to the sale of the items listed below:

All food sold through vending machines  
Alcoholic beverages and nonintoxicating beer  
Cocktail mixes (dry or liquid)  
Cooking utensils  
Liver Oils  
Lozenges  
Over the counter medicines

Paper products  
Pet food and supplies  
Soap and soap products  
Soft drinks  
Tobacco and tobacco products  
Tonics  
Toothpaste and mouthwash

#### IV. BUNDLED TRANSACTIONS

When an item subject to the rate of 6% is sold with an item subject to cessation of tax, for a single non-itemized price, the purchase amount is subject to the rate of 6%.

Example:

Popcorn prepared by the seller and sold with a drink and candy for one price is a bundled transaction subject to the 6% rate. However, if the popcorn, drink and candy are sold individually, the popcorn and drink are subject to the 6% rate while the candy is subject to cessation of tax.

#### V. DEFINITIONS

West Virginia Code § 11-15B-2(b) provides the following selected definitions.

**“Food and food ingredients”** 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” does not include alcoholic beverages, prepared food, or tobacco.

**“Prepared food”** means:

Food sold in a heated state or heated by the seller;  
Two or more food ingredients mixed or combined by the seller for sale as a single item; or  
Food sold with eating utensils provided by the seller, including plates, knives, forks, spoons, glasses, cups, napkins, or straws. A plate does not include a container or packaging used to transport the food.

**“Prepared food”** does not include food that is only cut, repackaged, or pasteurized by the seller, and 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 its Food Code of 2001 so as to prevent food borne illnesses.

Additionally, **“prepared food,”** as defined in this subdivision does not include:

Food sold by a seller whose proper primary NAICS classification is manufacturing in sector 311, except subsection 3118 (bakeries);  
Food sold in an unheated state by weight or volume as a single item; or  
Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, tortillas.

**“Soft drink”** means nonalcoholic beverages that contain natural or artificial sweeteners. “Soft drinks” do not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than fifty percent of vegetable or fruit juice by volume.

**“Vending machine”** means a machine or other mechanical device that accepts payment.

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