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## **Sales by Restaurants, Taverns, and Similar Establishments**

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### **Introduction**

This bulletin explains when the sales of food and beverages (both alcoholic and nonalcoholic) made by restaurants, taverns, and other similar establishments are subject to sales tax. In this bulletin, the word *restaurant* includes:

- diners,
- cafeterias,
- drive-ins,
- pizzerias,
- taverns,
- delicatessens,
- food courts,
- street carts,
- concession stands, and
- any other establishment that sells "restaurant-type" food.

Special rules apply to sales of food and drink through vending machines. For more information, see Tax Bulletin [Food and Beverages Sold from Vending Machines \(TB-ST-280\)](#).

For information on purchases made by restaurants, see Tax Bulletin [Purchases by Restaurants, Taverns, and Similar Establishments \(TB-ST-695\)](#).

### **"Restaurant-type" food**

"Restaurant-type" food can generally be described as food or drink which is sold in a form ready to be eaten. It includes:

- food or drink sold for on-premises consumption;
- sandwiches;
- self-service salad bars;
- food or drink sold in a heated state; and
- unheated food or beverages sold for off-premises consumption that are not sold in the same form, condition, quantities and packaging as they are ordinarily sold in grocery stores.

### **Sales of food and drink**

When food or drink is sold for on-premises consumption, it is taxable, whether it is sold hot or cold. On-premises consumption includes consumption at:

- restaurants and diners,
- tables in a food court at a mall, and
- picnic tables located outside a drive-in restaurant.

When the food and drink is sold by a restaurant to-go, it is taxable **unless**:

- the food (other than sandwiches) or drink is being sold unheated, and
- it is being sold in the same way (in the same form, condition, quantities, and packaging) you would normally find it in a supermarket or grocery store.

*Example: A customer comes into your deli and orders a sandwich to go. In addition to the sandwich, the customer purchases a bottle of soda and a bag of pretzels. In this sale, the sandwich and the soda would both be subject to sales tax. You do not have to collect sales tax on the bag of pretzels because it is sold in the same form, condition, quantity, and packaging as it would normally be sold at a grocery store.*

*Example: Three customers enter a bagel shop. Customer #1 orders a dozen bagels to go. The employee puts the bagels in a bag and the customer proceeds to the checkout. The sale of a dozen bagels for off-premises consumption is not taxable.*

*Customer #2 orders a plain bagel and a cup of coffee to eat at one of the tables located within the bagel shop. The sale of the bagel and coffee is taxable because the sale is made for on-premises consumption.*

*Customer #3 orders a toasted bagel with cream cheese and a cup of iced coffee to go. The bagel is prepared as ordered and put into a bag for the customer. The coffee is poured into a cup and topped with a lid. Both the coffee and the bagel are taxable as restaurant food even though the food and beverage will not be consumed within the bagel shop.*

When you go to the grocery store and buy a pound of bologna, a pound of cheese, and a loaf of bread, these items are not taxable. But when these items are made into and sold as a sandwich, they become a taxable food item, whether you eat the sandwich where you buy it or take it with you to eat somewhere else.

For information on what food and beverages sold in a grocery store are subject to tax, see Tax Bulletins [Food and Food Products Sold by Food Stores and Similar Establishments \(TB-ST-283\)](#) and [Candy and Confectionery \(TB-ST-103\)](#).

### **Sales of heated food**

All sales of heated food are taxable whether sold by a restaurant or a supermarket. Heated food is food sold at a temperature warmer than the surrounding air temperature. If you are keeping food warm by using a heat lamp or warming trays, sales of the food are all subject to sales tax. Heated food sold as a sit-down dinner at a fine dining restaurant, sold as take-out from the window of a drive-through, or sold at a deli is taxable.

*Example: A pizzeria has cooked pizza in its display case under a heat lamp to be sold by the slice. Sales of the heated slices are subject to sales tax, even if the customer takes the slice of pizza somewhere else to eat it.*

*Example: A customer comes into a supermarket and orders a fish fry to go at the seafood counter. The fish fry is prepared and placed into a container. The customer pays for the meal and takes it home. The supermarket is required to collect sales tax on the fish fry, since it is food sold in a heated state.*

### **Packaging of food items**

The circumstances of each sale determine whether a food item is being sold in the same form, condition, quantities, and packaging commonly used by grocery stores. For example, a carton of milk or a bag of potato chips are not taxable when sold in a supermarket or food store. These same items sold by a restaurant for off-premises consumption are also not taxable.

*Example: Mr. W. goes to a fast food restaurant. He orders a cheeseburger, french fries, and a carton of milk at the drive-through window. Because the carton of milk is sold in the same form, condition, quantities, and packaging commonly sold by food stores, and it is being sold for off-premises consumption, the restaurant is not required to collect sales tax on the milk. See Recordkeeping requirements below.*

However, if those same items are sold to be eaten at the restaurant, they will be taxable (see *Sales of food and drink*, above, for information about *on-premises consumption*).

*Example: Mrs. R brings her son to a fast food restaurant. They decide to go in and eat their food at the tables provided. When Mrs. R orders a cheeseburger, french fries, and a carton of milk to eat on the premises, the entire charge is subject to sales tax.*

When both taxable and exempt food and drink are sold together for one price, such as a meal special where the customer can order a combination of taxable and exempt food for one price, the entire price is subject to sales tax.

*Example: Mrs. R brings her son to the drive-through of the restaurant and orders a kids' meal, which includes a hamburger, french fries, toy, and a beverage, for a less expensive price than if she purchased the items separately. Mrs. R orders a carton of milk for the beverage. Even though the milk would not be subject to sales tax if purchased separately, because it is purchased in combination with taxable food for one price, the entire price of the kids' meal is subject to sales tax.*

## **Complimentary food and beverage**

Occasionally hotels, restaurants, and similar places may serve complimentary food and beverages to their customers. It may range from something as simple as a bowl of pretzels at the bar to a full meal. Since there is no charge to the customer, no sales tax is due from the customer.

However, any food and beverages given away without charge are subject to use tax. To learn more about any sales or use tax due on purchases made and then given away without charge, see Tax Bulletin [Purchases by Restaurants, Taverns, and Similar Establishments \(TB-ST-695\)](#).

## **Gratuities and service charges**

Voluntary gratuities and tips left by a customer for the wait staff are not subject to sales tax.

Mandatory gratuities are different because they are automatically added onto the bill given to the customer. However, if the mandatory gratuity meets all 3 of the conditions below, it is not subject to sales tax:

- the charge is shown separately on the bill,
- the charge is specifically identified as a *tip* or *gratuity*, and
- all the money collected is given to the employees.

If all three of these conditions are not met, the mandatory gratuity is subject to sales tax along with the rest of the restaurant bill.

Separately stated service charges or other charges not specifically listed as *gratuities* on a bill or invoice are subject to sales tax.

For more information, see [TSB-M-09\(13\)S](#), *Sales Tax on Gratuities and Service Charges*.

## Corkage fee

Corkage fees charged to customers who bring their own wine to a restaurant are another form of a service charge and are taxable as part of the total charge for the taxable food and beverage.

## Cover charges

All cover, drink minimum, entertainment, or other charges to customers are taxable.

## Delivery charges

If you charge your customers a fee to deliver taxable food and drink, the charge for the delivery must be included in the total amount subject to tax.

## Coupons

When a customer uses a coupon as a discount on the purchase price of food or beverage, there are times when you may subtract the value of the coupon before calculating the sales tax on the bill. This depends on the type of coupon being used.

Coupons and discounts offered by individual restaurants that are printed in coupon books, mailers, and newspapers that reduce the cost of the food or beverage are generally subtracted from the total bill before the sales tax is calculated. However, if the restaurant accepts the coupon as partial payment for the meal, and is then reimbursed that amount by a third party, the sales tax is calculated on the full amount of the bill before subtracting the value of the coupon or discount. For more details, see Tax Bulletin [Coupons and Food Stamps \(TB-ST-140\)](#).

## Gift certificates and gift cards

Gift certificates for a set dollar amount, whether given away for no charge or sold to a customer, are not subject to sales tax. When the gift certificate is used, the sales tax is charged if a taxable purchase is made. The customer uses the gift certificate as if it were cash to pay for his or her purchases. If the purchase is subject to tax, the customer must also pay the tax, either by using the gift certificate or with additional cash.

*Example: Mr. W. comes into your restaurant and purchases a \$25 gift certificate for his parents' anniversary. When Mr. W. purchases the gift certificate, the sale of the certificate is not subject to sales tax. Mr. W's parents come in to the restaurant to eat, and after the meal, the wait person gives them their check for a total of \$22.13 for food, beverages, and sales tax. The purchase of the gift certificate was not subject to sales tax, but the purchase of food and beverages is subject to the tax. Mr. W's parents can use the gift certificate to pay the entire bill including the sales tax.*

## Employee meals

Meals that are provided to employees during their scheduled work time are not subject to sales tax as long as:

- the employer does not receive any cash from the employee or deduct money from their wages or accept other consideration for the meal from the employee, and
- the value of the meal is not income to the employee under federal or New York State income tax laws.

The employer is liable for use tax on any taxable components of the food and any taxable drinks given to the employee. Any charge by the employer to an employee for food or drink is taxable, whether paid by the employee or withheld from the employee's wages.

## Recordkeeping requirements

Keeping detailed records for your business will help you prepare accurate and complete sales tax returns. For complete information on these requirements, see Tax Bulletin [Recordkeeping Requirements for Sales Tax Vendors \(TB-ST-770\)](#).

With respect to records of your business's sales, guest checks should be sequentially numbered and all cash register tapes must be dated. **All** guest checks and cash register tapes must be kept for **at least three years** from the due date of the return to which those records relate, or the date the return is filed, if later. Sales records and cash register receipts must have enough detail to prove the taxability of individual items sold. **Note:** Summary reports and daily summary or "Z" tapes are **not sufficient**. Your records must also be able to prove the amount of nontaxable "to-go" sales.

If you use a point-of-sale (POS) system each POS transaction record must provide enough detail to independently determine the taxability of each sale and the amount of tax due and collected. See Tax Bulletin [Recordkeeping Requirements for Sales Tax Vendors \(TB-ST-770\)](#) for a complete discussion of recordkeeping and internal control requirements for businesses using a POS system.

If you use a POS system and your system lacks the storage capacity to comply with the three-year retention period, you must transfer, maintain, and have available in a machine-sensible and auditable<sup>1</sup> form any data that has been removed from the POS system. If you change POS systems, you must ensure that the data from the old system is transferred, maintained, and available in a machine-sensible and auditable form.

You should also keep any other record or document that, given the nature of your business, would be necessary to prove that you have collected and paid the proper amount of sales or use tax due.

If you are not able to provide adequate records on audit, you may be subject to an estimated audit methodology to determine any additional taxes due. If you owe additional taxes, you will also be subject penalties and interest and could have your *Certificate of Authority* suspended or revoked.

## Purchases

For information on the purchases made by restaurants, see Tax Bulletin [Purchases by Restaurants, Taverns, and Similar Establishments \(TB-ST-695\)](#).

**Note:** A Tax Bulletin is an informational document designed to provide general guidance in simplified language on a topic of interest to taxpayers. It is accurate as of the date issued. However, taxpayers should be aware that subsequent changes in the Tax Law or its interpretation may affect the accuracy of a Tax Bulletin. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.

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<sup>1</sup> *Machine-sensible and auditable form* means that the data should be stored in a commonly used format and not stored or presented to the department in a format readable only by proprietary software.

**References and other useful information**

**Tax Law:** 1105(d) and 1135

**Regulations:** Sections 527.8 and 533.3

**Memoranda:**

[TSB-M-09\(13\)S](#), *Sales Tax on Gratuities and Service Charges*

**Bulletins:**

[Candy and Confectionery \(TB-ST-103\)](#)

[Coupons and Food Stamps \(TB-ST-140\)](#)

[Food and Beverages Sold from Vending Machines \(TB-ST-280\)](#)

[Food and Food Products Sold by Food Stores and Similar Establishments \(TB-ST-283\)](#)

[Purchases by Restaurants, Taverns, and Similar Establishments \(TB-ST-695\)](#)

[Recordkeeping Requirements for Sales Tax Vendors \(TB-ST-770\)](#)