
State of South Carolina
Department of Revenue
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SC INFORMATION LETTER #08-16

SUBJECT: Regulation Approved by the General Assembly
(Sales and Use Tax)

DATE: July 21, 2008

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000; Supp. 2007)
S.C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #05-2

SCOPE: An Information Letter is a written statement issued to the public to announce general information useful in complying with the laws administered by the Department. An Information Letter has no precedential value.

On June 20, 2008, the General Assembly approved SC Regulation 117-337 which will become an official regulation upon publication in the State Register on **July 25, 2008**.

SC Regulation 117-337 was promulgated to provide guidance as to the application of Code Section 12-36-2120(75) which exempts from the state sales and use tax the gross proceeds of sales or sales price of “unprepared food that lawfully may be purchased with United States Department of Agriculture food coupons.” This exemption does not apply to local sales and use taxes that are administered and collected by the Department on behalf of the counties and other jurisdictions, unless the local tax law specifically exempts the sales of such unprepared food.

The regulation is attached as published on the General Assembly website at <http://www.scstatehouse.net/regs/3189.doc> (excluding the initial page of legislative history).

Document No. 3189
DEPARTMENT OF REVENUE
CHAPTER 117
Statutory Authority: 1976 Code Section 12-4-320

117-337. Food Tax Regulation

Synopsis:

The South Carolina Department of Revenue is considering adding SC Regulation 117-337 to provide guidance as to the application of Code Section 12-36-2120(75) which exempts from the state sales and use tax the gross proceeds of sales or sales price of “unprepared food that lawfully may be purchased with United States Department of Agriculture food coupons.” This exemption does not apply to local sales and use taxes that are administered and collected by the Department on behalf of the counties and other jurisdictions, unless the local tax law specifically exempts the sales of such unprepared food.

Under the proposed regulation, the determination as to whether a sale of unprepared food is exempt from the state sales and use tax is based on whether the food is of a type that is eligible to be purchased with USDA food stamps, the type of location selling the food, and whether the food is being sold for immediate consumption, business or institutional consumption, or home consumption.

In other words, a food must be of a type eligible to be purchased with USDA food stamps and must also be sold for home consumption (based on the type of food and the type of location selling the food) to qualify for the exemption from the state sales and use tax under Code Section 12-36-2120(75). For example, bottled soft drinks are eligible to be purchased with USDA food stamps, but if bottled soft drinks are sold at a concession stand at a festival, then the bottled soft drinks are sold for immediate consumption and not home consumption and the sale at the festival would be subject to the full state sales tax rate.

This regulation will explain which sales of food qualify or do not qualify for the exemption from the state sales and use tax under Code Section 12-36-2120(75). This exemption does not apply to local sales and use taxes that are administered and collected by the Department on behalf of the counties and other jurisdictions, unless the local tax law specifically exempts the sales of such unprepared food.

Instructions:

Add SC Regulation 117-337 to provide guidance as to the application of Code Section 12-36-2120(75) which exempts from the state sales and use tax the gross proceeds of sales or sales price of “unprepared food that lawfully may be purchased with United States Department of Agriculture food coupons.”

Text:

117-337. Sales of Unprepared Food

Effective November 1, 2007, Code Section 12-36-2120(75) exempts from the state sales and use tax the gross proceeds of sales or sales price of “unprepared food that lawfully may be purchased with United States Department of Agriculture food coupons.” This exemption does not apply to local sales and use taxes that are administered and collected by the Department on behalf of the counties and other jurisdictions, unless the local tax law specifically exempts the sales of such unprepared food.

The determination as to whether a sale of unprepared food is exempt from the state sales and use tax is based on whether the food is of a type that is eligible to be purchased with USDA food stamps, the type of location selling the food, and whether the food is being sold for immediate consumption, business or institutional consumption, or home consumption.

In other words, a food must be of a type eligible to be purchased with USDA food stamps and must also be sold for home consumption (based on the type of food and the type of location selling the food) to qualify for the exemption from the state sales and use tax under Code Section 12-36-2120(75). For example, bottled soft drinks are eligible to be purchased with USDA food stamps, but if bottled soft drinks are sold at a concession stand at a festival, then the bottled soft drinks are sold for immediate consumption and not home consumption and the sale at the festival would be subject to the full state sales tax rate.

This regulation will explain which sales of food qualify or do not qualify for the exemption under Code Section 12-36-2120(75).

117-337.1. “Eligible Food” Defined

For purposes of this regulation, the term “eligible food” is food eligible for the exemption under Code Section 12-36-2120(75) that will be defined to include and exclude the following:

(A) Foods eligible for the exemption under Code Section 12-36-2120(75) include:

(1) Any food intended to be eaten at home by people, including snacks, beverages and seasonings;

(2) Seeds and plants intended to grow food (not birdseed or seeds to grow flowers);
and

(3) Cold items, which may include salads or sandwiches, intended to be eaten at home by people and that are not considered “prepared meals or food” as discussed below.

(B) Food and other items which are not eligible for the exemption under Code Section 12-36-2120(75) and are, therefore, subject to the full state sales and use tax rate (unless otherwise exempt) include:

(1) Alcoholic beverages, such as beer, wine, or liquor;

(2) Hot beverages ready-to-drink such as coffee;

(3) Tobacco;

(4) Hot foods ready to eat;

(5) Foods designed to be heated in the store;

(6) Hot and cold food to be eaten at a lunch counter, in a dining area or anywhere else in the store or in a nearby area such as a mall food court;

(7) Vitamins and medicines;

(8) Pet food;

(9) Any non-food items such as tissue, soap or other household goods;

(10) Meals or food shipped or delivered to businesses or institutions (hospitals, prisons, jails, nursing homes, etc.); and

(11) Prepared meals or food as defined in Regulation 117-337.2.

117-337.2. "Prepared Meals or Food" Defined

(A) "Prepared meals or food" is food for immediate consumption (based on the type of food and the type of location selling the food) and is not eligible for the exemption under Code Section 12-36-2120(75), but is subject to the full state sales and use tax rate.

"Prepared meals or food" are meals or food sold by a business, or from an identifiable location within a business, which advertises, holds itself out to the public (e.g., offers hot food or the ability to heat food, provides seating, or provides utensils with the meal or food), or is perceived by the public as being engaged in the sale of ready-to-eat food or beverages to customers for their immediate consumption on or off the premises. Such a business, or identifiable location within a business, may be mobile or immobile and may or may not provide seating accommodations for its customers. For example, "prepared meals or food" includes, but is not limited to (a) meals or food sold by a restaurant, cafeteria, lunch wagon or cart, lunch counter, cafeteria, ice cream stand, tavern, night club, or other similar places or businesses engaged in the business of selling prepared meals or food for immediate consumption, (b) meals prepared and delivered by a meal delivery service; (c) meals sold to or at congregate meal sites; (d) meals or food sold at a

grocery store, convenience store or any other similar store for the purpose of eating at or near the store, such as meals or food sold with eating utensils (e.g., plates, knives, forks, spoons, cups, napkins) provided by the seller, (e) meals or food sold at hotels, motels, or other places furnishing accommodations; (f) meals or food sold at newsstands, gift shops, and snacks bars located in offices or other public or commercial buildings; (g) meals or food sold at movies theaters, opera houses, fairs, carnivals, stadiums, auditoriums, amphitheaters, or similar entertainment or sports facilities; and (h) food sold through vending machines.

(B) Exception: If a store, or an identifiable location within a store, advertises, holds itself out to the public (e.g., offers hot food or the ability to heat food, provides seating, or provides utensils with the meal or food), or is perceived by the public as being engaged in the sale of ready-to-eat food or beverages to customers for their immediate consumption on or off the premises and also sells food that is prepared for home consumption, sold for home consumption, and is not the type of food intended for immediate consumption, then such “home consumption” food is not considered “prepared meals or food” and would be “eligible food” exempt from the state sales and use tax under Code Section 12-36-2120(75), provided it is not one of the foods listed above in Regulation 117-337.1(B) – Items (1) through (10).

The following are examples of this exception:

(A) A grocery store has a deli/bakery that provides tables, chairs, benches, booths, counters or an area where customers may consume food in or near the store. In addition to other items, this deli/bakery area sells loaves of baked bread (the bread it is not hot at the time of sale).

The sales at retail of the loaves of bread are exempt from the state sales and use tax under Code Section 12-36-2120(75), provided the sale is not for a party or gathering held at the store or delivered to a location other than a private residence.

(B) A coffee shop sells individual slices of cake to be eaten with the coffee and other drinks sold at the shop. The shop also sells entire sheet cakes.

The sale at retail of the sheet cake is exempt from the state sales and use tax under Code Section 12-36-2120(75), provided the sale is not for a party or gathering held at the shop or delivered to a location other than a private residence.

(C) Some sales of meals or food may be exempt from the sales and use tax under other exemption provisions. For example, Code Section 12-36-2120(10) provides exemptions from the sales and use tax for (1) meals or foodstuff used in furnishing meals to school children within school buildings on a nonprofit basis; (2) meals or foodstuff provided to elderly or disabled persons at home by certain nonprofit organizations; (3) prepared or packaged foodstuff sold to nonprofit organizations for the homeless and needy; or (4) meals or prepared or packaged foodstuff sold to public and nonprofit organizations for congregate or in-home service to the homeless, needy, disabled adults over eighteen years

of age or persons over sixty years of age (provided the meals or packaged foodstuffs in this item (4) are eligible for purchase with USDA food coupons). Code Section 12-36-2120(41) exempts from the sales and use tax tangible personal property, including meals or food, sold by certain nonprofit organizations.

117-337.3. General Rules

(A) Sales of “Eligible Food” by Grocery, Convenience and Similar Stores Authorized to Accept Food Stamps:

Sales of “eligible food” by a grocery, convenience or similar store authorized to accept food stamps shall be deemed to be for home consumption and exempt from the state sales and use tax under Code Section 12-36-2120(75).

However, if the store has an identifiable location which advertises, holds itself out to the public (e.g., offers hot food or the ability to heat food, provides seating, or provides utensils with the meal or food), or is perceived by the public as being engaged in the sale of ready-to-eat food or beverages to customers for their immediate consumption on or off the premises, then all sales of food from that identifiable location shall be deemed to be for immediate consumption and subject to the sales tax at the full state rate, unless the sale falls within the exception noted above in Regulation 117-337.2. For example, if a neighborhood grocery store also has a lunch counter, then sales from that lunch counter are for immediate consumption and subject to the tax at the full sales tax rate. If the lunch counter also sold entire sheet cakes, then the sale at retail of a sheet cake would be exempt from the state sales and use tax under Code Section 12-36-2120(75) provided the sale is not for a party or gathering held at the store or delivered by the store to a business or institution.

(B) Sales of “Eligible Food” by Grocery and Other Stores Not Authorized to Accept Food Stamps:

Sales of “eligible food” by a grocery, convenience or similar store not authorized to accept food stamps but which is engaged in the retail sale of all sorts of canned foods and dry goods (e.g., tea, coffee, spices, sugar, and flour), and may also be engaged in the retail sale of fresh fruits and vegetables and fresh and prepared meats, fish, and poultry, shall be deemed to be for home consumption and exempt from the state sales and use tax under Code Section 12-36-2120(75).

However, if the store has an identifiable location which advertises, holds itself out to the public (e.g., offers hot food or the ability to heat food, provides seating, or provides utensils with the meal or food), or is perceived by the public as being engaged in the sale of ready-to-eat food or beverages to customers for their immediate consumption on or off the premises, then all sales of food from that identifiable location shall be deemed to be for immediate consumption and subject to the sales tax at the full state rate unless the sale falls within the exception noted above in Regulation 117-337.2. For example, if a convenience store has an area where a customer can get a hot dog or sandwiches that are

intended for immediate consumption (including ones intended to be heated in a microwave), then the sale of the hot dogs and sandwiches are for immediate consumption and subject to the full state rate. Any chips or drinks (whether fountain drinks or bottled drinks) sold with that hot dog or sandwich at the lunch counter are also for immediate consumption and subject to the full state rate.

(C) Sales of “Eligible Foods” to or by Vending Machine Operators for Sale through Vending Machines:

Sales of “eligible food” to or by vending machine operators for sale through vending machines are for immediate consumption and subject to the sales tax at the full state rate.

(D) Sales of “Eligible Food” to Institutions:

Sales of “eligible food” to the SC Department of Corrections, city or county jails, hospitals, nursing homes, and colleges for use in providing meals to the prisoners, patients, or students are sales to institutions who, under the sales and use tax law, are the users or consumers of such food in carrying out their primary functions of incarcerating convicts, providing medical care or providing an education. As such, sales of such food are not for home consumption and are subject to the sales tax at the full state rate.

(E) Sales of “Eligible Food” Prepackaged with a Non-Eligible Item

Sales of “eligible food” that is prepackaged with a non-eligible item, or sales in which a single price is established for a combination of an “eligible food” and a non-eligible item, are subject to the tax at the full state rate.

For example, if a grocery store advertises and sells a basket containing fruit and a bottle of wine, the exemption under Code Section 12-36-2120(75) is not applicable. The full state rate applies.

(F) “Eligible Food” Purchased with Food Stamps:

“Eligible food” purchased with food stamps from a retailer authorized by the United States Department of Agriculture to accept food stamps are exempt from the sales and use tax.

117-337.4. Examples

The following examples are provided to assist in understanding the above provisions of this regulation:

(a) Sales at retail of food delivered to offices and businesses are subject to tax at the full state rate.

(b) Sales at retail of food delivered to day care centers and similar facilities are subject to tax at the full state rate.

(c) Sales at retail of bottled water delivered to an individual's home are exempt from the state sales and use tax under Code Section 12-36-2120(75). However, the lease of a water cooler unit to a residential customer is subject to the full state rate.

Sales at retail of bottled water delivered to a commercial enterprise are subject to the tax at the full state rate. The lease of a water cooler unit to a commercial enterprise is also subject to the full state rate.

(d) Sales at retail of ground coffee, creamer, sugar, tea bags and other "coffee service" products delivered to a commercial enterprise are subject to the tax at the full state rate.

(e) Sales at retail of drinks, coffee supplies, and snacks by an office supply store are exempt from the state sales and use tax under Code Section 12-36-2120(75), unless shipped or delivered to a location other than a private residence. Shipments or deliveries to a location other than a private residence are subject to the full state rate.

(f) Sales at retail by a coffee shop of packaged cold sandwiches, salads, and containers of cut fruit, cookies, muffins, donuts, slices of nut bread, cupcakes, brownies, whole fruit, or similar food products sold individually are subject to the tax at the full state rate.

However, sales at retail of these same food products by the loaf or tray are subject exempt from the state sales and use tax under Code Section 12-36-2120(75) unless such loaf or tray is sold for a party or gathering held at or near the coffee shop or is delivered to a location other than a private residence. Sales at retail of these products by the loaf or tray for a party or gathering held at or near the coffee shop or that are delivered a location other than a private residence are subject to the tax at the full state rate.

(g) Sales at retail at a location that contains both a restaurant and a convenience or similar store under one roof are taxed at the full state rate for sales from the restaurant portion of the business and are exempt from the state sales and use tax under Code Section 12-36-2120(75) for sales from the convenience or similar store portion of the business, unless an exception discussed previously in this regulation applies. For more detailed information, see the above sections of this regulation concerning restaurants and convenience or similar stores.

(h) Sales at retail of loaves of bread baked in and sold at a bakery in a grocery store are exempt from the state sales and use tax under Code Section 12-36-2120(75), provided the loaf of bread sold is not "hot food."

117-337.5. Local Taxes

The exemption in Code Section 12-36-2120(75) for "unprepared food that lawfully may be purchased with United States Department of Agriculture food coupons" does not apply

to local sales and use taxes that are administered and collected by the Department on behalf of the counties and other jurisdictions, unless the local tax law specifically exempts the sales of such unprepared food.

This regulation is not applicable to any local tax administered and collected by a local jurisdiction.

117-337.6. Records

The seller of “eligible food” exempt from the state sales and use tax under Code Section 12-36-2120(75) shall maintain sufficient documentation to substantiate that a sale qualifies for the exemption from the state sales and use tax, using any method of recording that properly reflects all purchases and sales of such items.

Fiscal Impact Statement:

There will be no impact on state or local political subdivisions expenditures in complying with this proposed legislation.

Statement of Rationale:

The purpose of this proposal is to add SC Regulation 117-337 to provide guidance as to the application of Code Section 12-36-2120(75) which exempts from the state sales and use tax the gross proceeds of sales or sales price of “unprepared food that lawfully may be purchased with United States Department of Agriculture food coupons.” The proposal to add SC Regulation 117-337 is needed to ensure taxpayers understand the application of the tax to the sale of food, whether prepared food taxed at the 6% rate or unprepared food exempt from the state sales and use tax under Code Section 12-36-2120(75). The proposal to add SC Regulation 117-337 is also reasonable in that it is consistent with the department’s prior position on the issue as sales of the same unprepared food were subject to a reduced sales and use tax rate of 3% from October 1, 2006 through October 31, 2007.