

## AGENDA

### FLORIDA DEPARTMENT OF REVENUE

Meeting Material Available on the web at:

<http://dor.myflorida.com/dor/opengovt/meetings.html>

## MEMBERS

Governor Charlie Crist  
Attorney General Bill McCollum  
Chief Financial Officer Alex Sink  
Commissioner Charles Bronson

**September 29, 2009**

Contact: Jeff Kielbasa  
(850-922-5201)

9:00 A.M.  
LL-03, The Capitol  
Tallahassee, Florida

<u>ITEM</u>	<u>SUBJECT</u>	<u>RECOMMENDATION</u>
1.	Respectfully request approval of the minutes of August 25, 2009.  <b>(ATTACHMENT 1)</b>	<b>RECOMMEND APPROVAL</b>
2.	Respectfully request adoption and approval to file and certify with the Secretary of State under Chapter 120, Florida Statutes, amendments to state tax rules and forms to better organize, update, and clarify the rules to promote better understanding and compliance.  <u>Proposed Rules on State and Local Sales and Use Tax</u>  Groceries, food, and beverage sales: help businesses understand the tax status of these sales by providing revisions that reorganize, clarify and simplify, rules. ( <i>Rules 12A-1.011, 12A-1.0115, 12A-1.071, and 12A-1.097, F.A.C.</i> )	<b>RECOMMEND APPROVAL</b>

# MEETING OF THE GOVERNOR AND CABINET AS HEAD OF THE DEPARTMENT OF REVENUE

August 25, 2009

## MINUTES

With Governor Crist presiding and all members present, the Department of Revenue was convened in LL-03, The Capitol

The following official actions were taken.

**ITEM 1.** Approved the minutes of July 28, 2009.

**ITEM 2.** Approved and granted authority to publish a Notice of Intended Action in the Florida Administrative Weekly to:

### Child Support Enforcement

- Administratively implement state statutory changes to establish procedures for:
  - Identifying support payments that could not be processed because there was not enough information to identify who the payment was for; and,
  - Retrieving collections from the federal government and the state General Revenue Fund that were previously determined to be unidentifiable, but have been subsequently identified.  
(*Rule 12E-1.0052, Florida Administrative Code/F.A.C.*)
- Administratively implement federal and state law changes to:
  - Continue collection efforts for Internal Revenue Service Tax refund offset for non-public assistance families, even if the child is no longer a minor;
  - Reduce the past-due support threshold under which a passport can be denied from \$5,000 to amounts over \$2,500, which subjects more non-custodial parents to potential passport denial; and,
  - Provide new criteria for not imposing passport denial on certain non-custodial parents.  
(*Rule 12E-1.014, F.A.C.*)

**ITEM 3.** Approved and granted authority to publish a Notice of Intended Action in the Florida Administrative Weekly to:

### General Taxes

Make changes to forms that will be used by businesses in calendar year 2010 to submit taxes and associated information.

**ATTACHMENT #1**

**ITEM 4.** Approved and granted authority to publish a Notice of Intended Action in the Florida Administrative Weekly to:

Property Tax

- Administratively implement Chapter 2008-197, Laws of Florida, by providing:
  - Uniform procedures to be used by value adjustment boards, special magistrates, and taxpayers in proceedings before value adjustment boards;
  - New and revised forms to support these uniform procedures.

September 18, 2009

**MEMORANDUM**

**TO:** The Honorable Charlie Crist, Governor  
Attention: Pat Gleason, Director of Cabinet Affairs

The Honorable Bill McCollum, Attorney General  
Attention: Rob Johnson, Cabinet Affairs

The Honorable Alex Sink, Chief Financial Officer  
Attention: Robert Tornillo, Chief Cabinet Aide  
Amber Hughes, Cabinet Aide

The Honorable Charles Bronson, Agriculture Commissioner  
Attention: Jim Boxold, Chief Cabinet Aide  
Cathy Giordano, Cabinet Aide

**FROM:** Jeff Kielbasa, Deputy Executive Director

**SUBJECT:** Rulemaking—Proposed Sales and Use Tax Rules

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**What the Department is requesting:** Final adoption of these proposed Sales and Use Tax rules, and approval to file and certify them with the Secretary of State under Chapter 120, Florida Statutes.

**Why these proposed Sales and Use Tax rule changes are necessary:** The proposed changes to the existing rules on the exemption of groceries and the taxation of prepared foods under Florida law are necessary to:

- Administratively clarify statutory provisions, and simplify the language so businesses can better understand them;
- Reorganize the current rule into two separate rules based on the two general business categories under which food-related sales fall:
  - Food sales by grocery stores, supermarkets, bakeries and similar stores; and,
  - Food sales by restaurants, cafeterias, hotels, taverns, transportation companies, and similar businesses.

**ATTACHMENT #2**

- Clarify, based on statutory provisions, the tax status of food sold for consumption on or off the premises of a business.

**What these rules do:** The Department reorganized the existing rules on sales of groceries and prepared foods into two separate rules. An existing rule will focus on provisions concerning sales of groceries and beverages (Rule 12A-1.011, F.A.C.), with other existing provisions on the sales of food products prepared, served, or sold by restaurants, hotels, taverns and similar businesses being moved to a new rule (Rule 12A-1.0115, F.A.C.). This reorganization makes it easier for businesses to find (and understand) the provisions that affect the types of sales they have. Specific provisions were also clarified, based on statutory provisions and business inquiries received by the Department.

*A) Proposed changes to provisions retained in Rule 12A-1.011, F.A.C. (Groceries):*

- Provide a list of exempt food products;
- Clarify the tax status of items sold in bakeries, pastry shops, and similar businesses;
- Discuss examples of taxable food products and beverages, and provide relevant cross-references;
- Clarify the tax status of bottled water and ice, including sales through vending machines;
- Explain the exemption for complimentary and donated food products;
- Clarify statutory provisions on sales of food products to purchasers using food stamps or "Special Supplemental Nutrition Program for Women, Infants, and Children" vouchers;
- Eliminate a provision, based on a comment by the Joint Administrative Procedures Committee, which established the taxable status of a transaction that includes both non-taxable food products and taxable items of tangible personal property.

*B) Proposed changes to provisions moved to new Rule 12A-1.0115, F.A.C. (Prepared foods):*

- Provide examples of taxable food products sold by restaurants, cafeterias, hotels, taverns, and similar businesses;
- Clarify statutory provisions, including:
  - Coupons, discounts, and donated food products;
  - Food products sold or given to employees; and,
  - Transportation companies;
  - Day nurseries;
  - Custodial camps and labor camps;
  - Meals furnished by hospitals and homes for the aged;
  - Food products sold to or by social clubs; and,
  - Food products prepared, served, or sold by nonprofit organizations.

- Discuss the tax status of gratuities;
- Explain how bakeries, pastry shops, and similar businesses handle sales of their food products for on-premises consumption by the purchaser; and,
- Clarify the tax status of food products furnished with living and sleeping accommodations.

C) *Proposed changes to existing Rule 12A-1.071, F.A.C. (Rentals, leases, or license to use tangible personal property):* Remove provisions regarding water softening services that were moved to new Rule 12A-1.011, F.A.C.

D) *Proposed changes to existing Rule 12A-1.097, F.A.C. (Public use forms):* removes an obsolete form that is no longer used by the Department.

**Were comments received from external parties:** Yes, the Department held rule development workshops on March 29, 2005 and April 18, 2007, and subsequently held public hearings on November 5, 2007, February 23, 2009, and August 31, 2009:

- Comments were received at both the March 29<sup>th</sup> and April 18<sup>th</sup> workshops, and a number of changes were made, including:
  - Clarifying that water is exempt if it has only been enhanced by the addition of minerals, as long as it doesn't contain added carbonation or flavorings;
  - Explaining how a business can determine if their food products are sold for consumption "on-the premises" or "off-the-premises";
  - Adding a description of the term "eating facility";
  - Providing examples of fruit and vegetable products that are exempt, and those that are taxable due to preparation into salads and similar food products;
  - Removing provisions which established the taxable status of a transaction that includes both non-taxable food products and taxable items of tangible personal property;
- Comments were received at the November 5<sup>th</sup> public hearing, and a change was made based on a comment from the Joint Administrative Procedures Committee (the Committee) that the Department should incorporate by reference the provisions from the Federal Food and Drug Act concerning fruit and vegetable juices.
- No comments were submitted at the February 23, 2009 public hearing.
- A Notice of Change was published in the July 31, 2009 edition of the Florida Administrative Weekly to remove a provision concerning the taxable status of food and beverages provided free of charge as part of a taxable admission. This provision will be considered for further review at a later date.

Memorandum  
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- A third public hearing was held on August 31, 2009:
  - Representatives of the catering industry provided information which resulted in the removal of proposed rule provisions for further consideration by the Department;
  - Comments were also received regarding drinking water sold through vending machines, and changes are incorporated into these proposed rules that confirm the exempt status of such transactions.

Attached are copies of:

Summaries of proposed rules

Statements of facts and circumstances justifying the rules

Federal relation statements

Summaries of workshops and hearings

Proposed rule text

STATE OF FLORIDA  
DEPARTMENT OF REVENUE  
CHAPTER 12A-1, FLORIDA ADMINISTRATIVE CODE  
SALES AND USE TAX  
AMENDING RULES 12A-1.011, 12A-1.071, AND 12A-1.097  
CREATING RULE 12A-1.0115

SUMMARY OF PROPOSED RULES

The proposed substantial rewording of Rule 12A-1.011, F.A.C. (Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice), clarifies the application of tax on the sale of food products generally sold by grocery stores, convenience stores, supermarkets, bakeries, fish markets, produce markets, and other like places of business and on the sale of bakery products by bakeries, pastry shops, or like establishments. The provisions regarding the application of tax on food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, hotels, taverns, or other like places of business will be removed from the current rule and will be provided in Rule 12A-1.0115, F.A.C., as created. The current provisions of Rule 12A-1.011, F.A.C., are included in the substantial rewording of Rule 12A-1.011, F.A.C., or the creation of Rule 12A-1.0115, F.A.C., and, when necessary, are updated to be consistent with the provisions of Section 212.08(1), F.S., as amended by Chapter 98-408, L.O.F., regarding the taxability of food products.

The substantial rewording of Rule 12A-1.011, F.A.C., provides for the application of sales or use tax for the following: (1) examples of exempt food products for human consumption;

(2) the exemption provided for food products prepared off the seller's premises when sold in the original sealed container or sliced into smaller portions; (3) bakery products when sold by bakeries, pastry shops, or like establishments that do not have eating facilities and bakery products when sold by such establishments that have eating facilities; (4) candy, gum, mints, and similar products; (5) food prepared on the seller's premises and sold for immediate consumption; (6) hot prepared food products; (7) sandwiches sold ready for immediate consumption; (8) novelty items and frozen dairy or nondairy products; (9) soft drinks, including nonalcoholic beverages, noncarbonated beverages made from milk derivatives, and beverages containing fruit or vegetable juices labeled under federal standards as containing less than 100% juice; (10) tea sold in liquid form; (11) drinking water, ice, and additives; (12) the exemption provided for samples or donated food products; and (13) food stamps or vouchers issued under authority of federal law.

The creation of Rule 12A-1.0115, F.A.C. (Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies), provides for the application of sales or use tax for the following: (1) food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, hotels, taverns, or other like places of business; (2) food products when sold by such establishments that also maintain a separate department that includes groceries; (3) sales of meal tickets or coupon books and coupons or discounts for food products; (4) the exemption provided for donated food products; (5) complimentary food products; (6) food products sold or furnished by employers to employees; (7) food products sold by airlines, railroads (except Amtrak), vessels, or other transportation companies to their passengers while in Florida; (8) gratuities consistent with the guidelines established by the court in Green v. Surf Club, Inc., 136

So.2d 354 (Fla. 3rd DCA 1961), cert. den., 139 So.2d 694 (Fla. 1962); (9) fees for preparing or serving food products; (10) food products when furnished with living or sleeping accommodations at colleges or other institutions of higher learning; (11) the exemption provided for certain complimentary food and drinks provided by public lodging establishments; (12) food products when furnished with housing at labor camps or public housing quarters; (13) food products furnished at day care facilities, day camps, or other custodial camps; (14) the exemption provided to hospital patients and inmates or to residents of homes for the aged; (15) food products sold to or prepared and served by social clubs, civic clubs, or fraternal organizations; and (16) food products sold to or by nonprofit organizations, religious institutions, and organizations sponsoring a fundraising event.

The proposed amendments to Rule 12A-1.071, F.A.C. (Rentals, Leases, or License to Use Tangible Personal Property), remove provisions regarding water softening services that will be provided in Rule 12A-1.011, F.A.C., as substantially reworded.

The proposed amendments to Rule 12A-1.097, F.A.C. (Public Use Forms), remove obsolete Form DR-46B (Examples of Nonalcoholic Preparations, Beverages and Drinks when Sold in Grocery Stores and Similar Establishments), which is no longer used by the Department.

### JUSTIFICATION OF PROPOSED RULES

The proposed changes to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), are necessary to update, consistent with current statutory provisions: (1) the application of tax on the sale of food products generally sold by grocery stores, convenience stores, supermarkets, bakeries, fish markets, produce markets, and other like places of business; (2) the application of tax on bakery products sold by bakeries, pastry shops, and like establishments; (3) the application of tax on the

sale of water or ice; and (4) the application of tax on the sale of food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, hotels, taverns, or other like places of business.

When adopted, these rules will provide for the administration of sales tax relevant to grocery stores, supermarkets, convenience stores, and others that generally sell grocery items for the following:

- Sales of grocery items, both taxable and exempt
- Sales of bakery products for consumption on the premises and those sold for consumption off the premises
- Sales of taxable soft drinks and other beverages and tax-exempt 100% juice
- Sales of hot prepared food items sold by grocery stores

These proposed rules, when adopted, will also provide for the administration of sales and use tax relevant to restaurants, lunch counters, cafeterias, hotels, taverns, transportation companies, tax-exempt organizations, or other places that generally prepare, serve, or sell prepared food items for the following:

- Meals, drinks, and food items that are taxable when prepared, served, or sold in such places of business
- How to tax meals and food items purchased with coupons or other discounts
- When gratuities are subject to tax
- The exemption for food donated to a food bank or to organizations exempt from federal tax
- The exemption from use tax on food or drinks furnished as part of a room package by hotels and other public lodging establishments

## FEDERAL COMPARISON STATEMENT

The provisions contained in these rules do not conflict with comparable federal laws, policies, or standards.

### SUMMARY OF RULE DEVELOPMENT WORKSHOP

HELD ON MARCH 29, 2005

The proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), were noticed for a rule development workshop in the Florida Administrative Weekly on March 11, 2005 (Vol. 31, No. 10, pp. 931-946). A rule development workshop was held on March 29, 2005, in Room 116, Larson Building, 200 E. Gaines Street, Tallahassee, Florida, commencing at 2:00 p.m., to allow members of the public to ask questions and make comments regarding the proposed changes to this rule chapter for the following rule sections:

- 12A-1.0011 Schools Offering Grades K through 12; Parent-Teacher Associations; and Parent-Teacher Organizations
- 12A-1.002 Practitioners of the Healing Arts
- 12A-1.011 Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops or Like Establishments; Drinking Water; Ice
- 12A-1.0115 Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies
- 12A-1.015 Industrial Gases
- 12A-1.020 Licensed Practitioners; Drugs, Medical Products and Supplies, and Prosthetic and Orthopedic Appliances
- 12A-1.021 Veterinary Sales and Services
- 12A-1.040 Sales of Containers, Wrapping and Packing Materials and Related Products
- 12A-1.071 Rentals, Leases, or License to Use Tangible Personal Property
- 12A-1.097 Public Use Forms

**PARTIES ATTENDING**

For the Department  
of Revenue

MARK ZYCH, Deputy Director, Technical Assistance and  
Dispute Resolution  
GARY GRAY, Revenue Program Administrator, Technical  
Assistance and Dispute Resolution  
RICHARD PARSONS, Tax Law Specialist, Technical Assistance  
and Dispute Resolution  
JONATHAN SWIFT, Tax Law Specialist, Technical Assistance  
and Dispute Resolution

From the Public

JIM ERVIN, Holland & Knight  
GLENN BEDONIE, C.P.A., P.A.  
DON DAVIS, Florida Dental Association  
MICHELE HOLCOMB, Florida Coca-Cola Bottling Company

Written Comments

DOUGLAS S. BELL., Pennington Moore Wilkinson Bell &  
Dunbar  
GLENN A. BEDONIE, C.P.A., P.A.

**COMMENTS RECEIVED AT THE RULE DEVELOPMENT WORKSHOP AND  
WRITTEN COMMENTS MADE A PART OF THE PROCEEDING:**

The Department will be engaging in a separate rulemaking proceeding for the following  
proposed rule sections:

- 12A-1.002 Practitioners of the Healing Arts
- 12A-1.015 Industrial Gases
- 12A-1.020 Licensed Practitioners; Drugs, Medical Products and Supplies, and  
Prosthetic and Orthopedic Appliances
- 12A-1.021 Veterinary Sales and Services
- 12A-1.097(15)(b) Public Use Forms

**Proposed Rule 12A-1.011, F.A.C., Sales of Food Products for Human Consumption by Grocery  
Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry  
Shops, or Like Establishments; Drinking Water; Ice**

Subsection (5) provides that the sale of drinking water in bottles, cans, or other containers  
is exempt, except when carbonation or flavorings have been added. Written comments were  
submitted by Mr. Douglas S. Bell, Pennington Moore Wilkinson Bell & Dunbar, dated March

29, 2005. Mr. Bell provides that this proposed subsection is inconsistent with Section 212.08(4)(a)1., F.S., which provides that “[w]ater that has been enhanced by the addition of minerals and that does not contain any added carbonation or flavorings is also exempt.” Mr. Bell requests that the proposed rule changes include provisions that “water in bottles, cans, and other containers, even when enhanced by the addition of minerals, is exempt, except when carbonation or flavorings have been added,” or, as alternative, “which has been enhanced by the addition of minerals, is exempt, except where carbonation or flavorings have been added.”

The Department concurs with the comment received and will incorporate the provisions of Section 212.08(4)(a)1., F.S., in proposed paragraph (5)(a) of Rule 12A-1.011, F.A.C., and in subsection (3) of Rule 12A-1.0115, F.A.C.

Proposed Rule 12A-1.0115, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies

Subsection (4), Restaurants and Bakeries with Seating Facilities which Sell Food Products, provides guidelines for restaurants and bakeries with eating facilities that sell food products. Mr. Jim Ervin, Holland & Knight, acknowledges that he has sought advice on behalf of a client with a bakery that sells baked products where there is an issue whether the products are sold for on-premises consumption or off-premises consumption. Mr. Ervin requests that the Department provide some level of guidance on how to determine whether a food product is for on- or off-premises consumption and how the facility might document the determination. The definition of the term “premises” does not adequately address the issue. When the vendor’s premises adjoin a food court area, a determination would have to be made whether the adjoining food court area is a part of the vendor’s premises. When the premises clearly provide eating facilities, the issue would be determining whether that person intends to eat the product right

there or take it elsewhere to eat; however, that is not the factor that determines whether the food product is taxable. Some guidance in this area would be helpful. Mr. Zych requested that Mr. Ervin provide written comment regarding this issue.

Provisions have been established in paragraph (2)(c) of Rule 12A-1.011, F.A.C., and in subsection (4) of Rule 12A-1.0115, F.A.C., to provide guidance regarding sales of food products by bakeries, pastry shops, or similar establishments without eating facilities and guidance for sales of food products by establishments with eating facilities that are sold for consumption off the seller's premises.

Subsection (5), Theaters, Arenas, Rinks, Stadiums, and Facilities that Charge for Admission, clarifies the statutory definition of theaters, arenas, rinks, stadiums, and facilities that charge admission. This subsection also provides the definition of the term "premises" to include the lobby, aisle, or auditorium of a theatre; the seating, aisle, or parking area of an arena, rink, or stadium; or the parking area of a drive-in or outdoor theatre. Mr. Glenn Bedonie commented that the proposed rule should provide clarification regarding the provision of Section 212.08(1)(c)5., F.S., which provides "the exemption provided by this subsection does not apply when the food products are sold ready for immediate consumption within a place, the entrance to which is subject to admission charge." Mr. Bedonie's position is that this statutory exemption would apply to all food products provided without charge when there is a taxable admission. Further, when you pay tax on the admission charge, the food products, unless they are sold, are exempt as "accompanying that taxable admission." Mr. Bedonie submitted written comments dated March 30, 2005, reiterating this position.

**CHANGES TO THE PROPOSED RULE TEXT OF RULES 12A-1.011 AND 12A-1.0115, F.A.C.:**

In addition to changes made in response to the comments received at the rule development workshop held on March 29, 2005, and to written comments submitted to the Department, the following additional changes were made after further review by the Department:

*Proposed Rule 12A-1.011, F.A.C., Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice*

- The scope of proposed Rule 12A-1.011, F.A.C., was changed to provide that the rule is intended to clarify the application of tax on the sale of bakery products by bakeries, pastry shops, or like establishments;
- Cookies, including chocolate-covered or cream-filled, were added to the list of tax-exempt food products;
- For fruit juices and vegetable juices, the federal citations to the Food and Drug Act were updated and “cranberry drink” was changed to “cranberry juice cocktail”;
- Changes were made to clarify when food products prepared off the seller’s premises were tax-exempt food products;
- Guidelines on how to obtain information from the Department regarding a tax-exempt food product were moved from subsection (9) to subsection (2);
- New subsection (3) was added to provide guidelines on the taxability of bakery products to bakeries, pastry shops, and other like establishments that have eating facilities and those that do not have such facilities (subsequent subsections were renumbered), including provisions on how to determine whether such facilities have eating facilities and how to separately account for tax-exempt sales of bakery products for consumption off the premises;

- Technical corrections were made to provide that dealers who sell food products at retail are not subject to sales or use tax on any food products donated to a food bank or to an organization determined to be currently exempt from federal income tax pursuant to s. 501(c) of the Internal Revenue Code of 1986, as amended; and
- The unnecessary incorporation in subsection (9), by reference, of general grocery items contained on Form DR-46NT, Nontaxable Medical and General Grocery List, was removed.

*Proposed Rule 12A-1.0115, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies*

- The title and the scope of proposed Rule 12A-1.0115, F.A.C., were changed to provide that the rule is intended to clarify the application of tax on food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, caterers, hotels, taverns, or other like places of business;
- Subsection (2) was amended and combined with the provisions of subsection (4) to provide guidelines for food products served, prepared, or sold in or by restaurants or similar places of business, and the guidelines for the sale of bakery products by bakeries, pastry shops, or similar establishments with eating facilities were revised and moved to proposed Rule 12A-1.011, F.A.C. (subsequent subsections were renumbered);
- Changes were made to provide that restaurants, lunch counters, cafeterias, hotels, taverns, or other like places of business that make sales of food products consistent with those of a grocery store must separately account for the tax-exempt sales;
- Subsection (5) was renumbered subsection (4) and amended to provide for the taxability of food products consumed in places where an admission is charged;

- Technical corrections were made to provide that dealers who sell food products at retail are not subject to sales or use tax on any food products donated to a food bank or to an organization determined to be currently exempt from federal income tax pursuant to s. 501(c) of the Internal Revenue Code of 1986, as amended; and
- Provisions were added to clarify that organizations that hold a valid Consumer's Certificate of Exemption may extend a copy of their certificate to caterers to purchase food products tax-exempt;
- Provisions were added to provide that public lodging establishments that are not required to pay tax on complimentary food and drink may extend a copy of their Annual Resale Certificate to purchase such items tax-exempt;
- New subsection (12) was added to provide guidelines to day nurseries and custodial camps regarding food products provided to students or campers; and
- Technical corrections were made to the titles of subsection (14), Meals Furnished by Hospitals and Homes for the Aged, and subsection (16), Food Products Served, Prepared, or Sold by Nonprofit Organizations.

*Proposed Rule 12A-1.005, F.A.C., Admissions*

- Amendments to Subsection (3), Taxable Admissions and Participation Fees, of Rule 12A-1.005, F.A.C., were added to provide that fees charged for entrance, such as cover charges made by a restaurant, tavern, night club, or other like places of business, are subject to tax. This provision is currently found in the rule regarding sales of food products.

SUMMARY OF RULE DEVELOPMENT WORKSHOP

HELD ON APRIL 18, 2007

The proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), were noticed for a rule development workshop in the Florida Administrative Weekly on March 23, 2007 (Vol. 33, No. 12, pp. 1372-1384). A rule development workshop was held on April 18, 2007, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida, commencing at 1:30 p.m. and concluding at 3:20 p.m.

The Department presented the following rule sections of Rule Chapter 12A-1, F.A.C., at this rulemaking proceeding to allow members of the public to ask questions and make comments regarding the proposed changes to this rule chapter:

- |                  |   |
|------------------|---|
| 12A-1.0011       | Schools Offering Grades K through 12; Parent-Teacher Associations; and Parent-Teacher Organizations   |
| 12A-1.005        | Admissions  |
| 12A-1.011        | Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice |
| 12A-1.0115       | Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies        |
| 12A-1.040        | Sales of Containers, Wrapping and Packing Materials and Related Products  |
| 12A-1.071        | Rentals, Leases, or License to Use Tangible Personal Property   |
| 12A-1.097(15)(a) | Public Use Forms  |

**PARTIES ATTENDING**

For the Department of Revenue	MARK ZYCH, Director, Technical Assistance and Dispute Resolution GARY GRAY, Revenue Program Administrator, Technical Assistance and Dispute Resolution RICHARD PARSONS, Tax Law Specialist, Technical Assistance and Dispute Resolution
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From the Public	DOUGLAS S. BELL, Coca-Cola Enterprises JIM ERVIN, Holland & Knight BOB MCGEHEE, SuperValu CHRIS MESA, Publix JULIE PENDLETON, Winn-Dixie ERIC SMITH, Publix JIM SMITH, FPMA JESSIE STORNE, Florida Coca-Cola Bottling Company
Written Comments	DOUGLAS S. BELL, Pennington Moore Wilkinson Bell & Dunbar GLENN A. BEDONIE, C.P.A., P.A. JIM ERVIN, Holland & Knight BOB MCGEHEE, SuperValu JULIE PENDLETON, Winn-Dixie

**COMMENTS RECEIVED AT THE RULE DEVELOPMENT WORKSHOP AND WRITTEN COMMENTS MADE A PART OF THE PROCEEDING:**

Rule 12A-1.0011, F.A.C., Schools Offering Grades K through 12; Parent-Teacher Associations; and Parent-Teacher Organizations

No comments or discussion were received regarding the proposed changes to this rule section.

Rule 12A-1.005, F.A.C., Admissions

No comments or discussion were received regarding the proposed changes to this rule section.

Rule 12A-1.011, F.A.C., Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishment; Drinking Water; Ice

*Subsection (2) - Tax-Exempt Food Products*

Mr. Bob McGehee, SuperValu, questioned whether a specific product was considered a cookie and exempt from tax or considered candy and subject to tax. Is there a reference that a Florida retailer could look at to determine taxability of an item, such a UPC list providing taxability of the product? Mr. Parsons and Mr. Gray responded that the Department does not

have a list of taxable and nontaxable products; however, the Department routinely receives questions from retailers regarding the taxability of specific products that it responds to with a determination.

Ms. Julie Pendleton, Winn-Dixie, questioned whether the policy to tax cookies that are chocolate-coated as taxable candy was a current policy. Mr. McGehee stated that the retailers that he represented did not care whether the products were taxable or not. His goal was to try to clarify these rules and regulations to the retailers so that they can abide by them. In written correspondence submitted by Mr. Bob McGehee on June 26, 2007, he also questioned whether the “old rule” for chocolate-covered cookies still applied, questioning whether a specific product was taxable or exempt. Mr. Parsons responded that the position was no longer valid and that he would have to look into whether a specific product was taxable.

Mr. Eric Smith, Publix, questioned the provisions of subparagraph (2)(b)3. which provides that food products that are sold frozen and then heated on the seller’s premises by the customer are exempt. He questioned, if Publix provided the cooking instruments for the customers and the customers steam or heat a product themselves, whether the product would be exempt. Mr. Gray confirmed that the product would be exempt. If Publix heated the same product for the customer, the product is taxable.

Mr. Jim Ervin, Holland & Knight, questioned whether the customer, or the retailer, who performs the act of preparation, applies to all products, such as peanuts for peanut butter or coffee beans for coffee. It appears that as long as the customer is doing their own preparation, the product remains exempt; however, if the retailer processes the product, the product potentially becomes taxable. Mr. Ervin stated that he was very worried about the peanut butter item.

Changes to Paragraph (4)(b), based on oral comments to Subsection (2), Tax-Exempt Food Products: Provisions which stated that the grinding of peanuts into peanut butter by a grocery store was taxable were removed.

*Subsection (3) - Bakery Products Sold by Bakeries, Pastry Shops, or Like Establishments*

Mr. Smith questioned whether the provisions of paragraphs (3)(a) and (b) pertain to bakeries with eating establishments or apply to Publix which has a bakery, but does not provide an eating establishment. Mr. Parsons confirmed that the provisions applied to bakeries with eating establishments.

Mr. Ervin questioned what it meant to have eating facilities, such as a place in a mall that is adjacent to the mall food court. Would such a facility be considered to have eating facilities? Mr. Parsons confirmed that the common area in a mall is considered premises. Mr. Ervin suggested that simpler and clearer provisions would be better.

Mr. Ervin continued that he is easily confused regarding the provision for five or fewer items. It is difficult to follow the proposed rule provisions in terms of what was intended. In order to be nontaxable, you would need to both have a quantity of six or higher and be packaged in a permanent-type package; or, is it nontaxable if you have one or the other of those? Mr. Bob McGehee provided that he thought that paragraphs (3)(a) and (3)(b) were in conflict.

Mr. Ervin questioned whether the Z tapes from the cash register would be sufficient to support the retailer's treatment of the product as taxable or nontaxable. Are you just going to trust the retailer that the clerk is punching the separate key at the appropriate time, or are we going to have to go beyond that? If that is the position, it is fine. He expressed his concern of getting into a situation where the retailer did not keep any extra records, and then they are told that they should be keeping extra records.

Mr. McGehee also requested confirmation whether, if a separate key on the register is used that says “to go,” “dine in,” or whatever, the two buttons were sufficient. Mr. Parsons responded that there has to be documentation, such as the Z tapes. The presumption is that anything five or fewer is taxable if you do not have the records. Mr. Ervin then confirmed that if a single cookie sale is keyed in as an order to go and treated as nontaxable, the Department would accept that the sale was nontaxable. Mr. Parsons confirmed that the Department would accept it as a nontaxable sale.

Mr. Ervin suggested that the language under subparagraph (3)(c)2. is confusing. He questioned how the packaging of the item ties into the presumption regarding “five or less presumed to be taxable.” Mr. Parsons responded that it is a two-part test; the first is if you can show that the purchase was for off-premises consumption, and the other test is if it is packaged in a manner that is consistent for to-go orders.

Mr. Ervin also questioned what type of packaging would result in a presumption of taxability. Mr. Parsons provided examples to include a napkin, on a plate, or on a plate with a fork. Paragraph (3)(d) contains provisions regarding the methods to separately account for tax-exempt sales of bakery products for consumption off the premises. Mr. Ervin questioned whether you needed both packaging and accounting methods for documentation as tax-exempt sales. He thought that we had established earlier that if you had the accounting methods, that is all that is needed. Does it have to be both accounting methods and packaging for sufficient documentation? Mr. Parsons confirmed that an auditor would look behind the Z tapes if the auditor thought they were wrong.

Mr. Ervin provided written comments, dated April 4, 2007, regarding the proposed amendments to proposed subparagraph (3)(c)2., providing that the subparagraph should be revised to read as follows:

2. For the purpose of this paragraph, there shall be a rebuttable presumption that bakery products are not intended by the customer to be consumed off the seller's premises when:

a. Such bakery products are sold in quantities of 6 or more ~~5 or fewer items~~; and  
~~or~~

b. The bakery products are not packaged in a manner consistent with an intention by the customer to consume the products off the seller's premises, such as products that are bagged or sold in packaging that is glued, stapled, wrapped, or sealed.

Mr. McGehee provided written comment, dated June 26, 2007, that this provision is difficult to manage and to explain.

*Changes to Subsection (3): Provisions regarding the sale of bakery products by establishments that have eating facilities were revised to include a description of an "eating facility," for purposes of the rule, and to provide examples of those establishments, such as a food court of a mall where tables and chairs are located in the common areas of the food court. Provisions regarding the rebuttable presumption when bakery products sold by establishments with no eating facilities are taxable were clarified.*

#### *Subsection (4) - Taxable Food Products*

In his written comments, Mr. McGehee provide that the provisions regarding candy, chewing bum, bubble gum, breath mints, and any similar product regarded as candy or confection, based on its normal use as indicated on the label or advertising, still seemed open to auditor interpretation.

*No Change in Response: Section 212.08(1)(c)11., F.S., provides that candy and any similar product regarded as candy or confection, based on its normal use, as indicated on the label or advertising thereof, is subject to tax.*

Mr. McGehee questioned why if a store slices the product and puts it in a package for a customer to take home, it is exempt; but if the store puts another product in a smaller package, it is subject to tax. Mr. Parsons responded that the statute was specific on the provisions. In his written comments, Mr. McGehee provides that these provisions are in conflict and should be the same. In written comments, Mr. McGehee questioned how to handle a transaction where the supermarket steams shrimp after the sale is complete.

*No Change in Response: Section 212.08(1)(c)9., F.S., provides that food prepared, whether on or off the premises, and sold for immediate consumption is subject to tax; however, food prepared off the premises and solid in the original sealed container, or the slicing of products into smaller portions, is exempt.*

Ms. Pendleton commented that a Technical Assistance Advisement issued several years ago regarding fresh fruit held that fresh fruit that is sliced or chopped and packaged is not subject to tax. She questioned whether that policy remained the Department's position. Mr. Parsons responded that the Department treats sliced fruit in the same way as sliced meat products. She asked whether the Department could add that as an example, because the issue could become an audit issue.

Mr. Chris Mesa, Publix, continued the discussion, questioning what would happen if you throw in a fork and tape the fork to the package. Mr. Parsons responded that it may be considered a meal. If you throw in some yogurt that you dip the fruit in and a napkin, then it becomes a meal rather than chopped up fruit.

*Changes to Paragraph (4)(b): Examples of when the exemption applies to fruit and vegetable products prepared by a supermarket into salads for sale and when the exemption does not apply to fresh salads prepared by a supermarket and packaged with eating utensils as a meal were added.*

*Subsection (7) - Water and Ice*

Mr. Smith questioned whether water sold in a bottle that contains “enhanced with minerals for a pure fresh taste” was taxable or exempt. Mr. Mark Zych provided that a bottle of water that contains added minerals, such as sodium, for flavoring is an exempt product, opposed to any carbonation or fruit flavoring that would make the product taxable. That is the intent of this provision in the rule. He advised that the Department would try to make the provision clearer. Mr. Zych also confirmed that bottled water containing natural effervescence would be exempt; however, if you add effervescence in the manufacturing process, the product would be taxable.

Mr. McGehee questioned whether the Department’s position was that a bag of ice purchased to cool soda was taxable, while a bag of ice to cool down milk was not subject to tax. Mr. Parsons responded that ice is taxable unless it is used for packaging. Mr. McGehee concluded that in a typical supermarket all ice sold would be taxable. In his written correspondence dated June 26, 2007, Mr. McGehee reiterated that the provision which taxes bottled water enhanced with carbonation or flavorings is difficult to explain to customers, as are the different taxing provisions for ice sold to customers that is taxed differing from the tax-exemption for ice used for packaging products for sale.

Ms. Pendleton questioned whether the cups, the stirrers, the filters, and other items used to provide hot coffee to grocery store shoppers are exempt. Mr. Parsons provided that generally packaging materials are not taxable when they accompany a product for ultimate sale. Mr. Gray responded that he thought those items would be subject to use tax.

Mr. McGehee commented that the word “percent” should be added after the number 25 in subparagraph (10)(b)2. Mr. Parsons confirmed that the suggested change should be made.

Mr. Douglas S. Bell, Pennington Moore Wilkinson Bell & Dunbar, submitted written comments, dated April 9, 2007, on behalf of Coca-Cola Enterprises, providing the following:

Section 212.08(4)(a)1., F.S., provides, in pertinent part that:

This exemption does not apply to the sale of drinking water in bottles, cans, or other containers if carbonation or flavorings, *except those added at a water treatment facility*, have been added. [*emphasis added*]

The draft of proposed Rule 12A-1.011(7)(a)1. states that:

Drinking water, including water enhanced by the addition of minerals, sold in bottles, cans, or other containers is exempt, except when carbonation or flavorings has been added to the water.

Because the draft proposed rule does not provide an exemption for water to which carbonation or flavorings have been added *at a water treatment facility*, the rule may not be consistent with the statute.

*Changes to Subsection (7): Provisions regarding when the exemption applies to drinking water and when it does not apply were clarified.*

#### *Subsection (11) - Items Used to Package Food Products*

Mr. McGehee commented that obviously there are items used in supermarkets that are not listed in examples of packaging items for sale. Basically, the rule is if it leaves with the customer, it is not taxable. Some of the biggest things left out of the list are styrofoam trays, cups, lids, cake boxes, wrap, and produce bags. Ms. Pendleton commented that there are some items listed under the proposed rules for restaurants and in this proposed rule for grocery stores that cross over into both areas. Mr. McGehee, acknowledging that he is not concerned with the restaurant industry, stated that he would recommend that packaging items for the restaurant industry should be provided in proposed Rule 12A-1.011, F.A.C. Mr. Zych confirmed that his request was reasonable.

Ms. Pendleton, Winn-Dixie, provided written comments, dated April 19, 2007, including a list of containers used in grocery stores and an indication whether the items were taxable or exempt from tax. She explained that because her company is unable to distinguish whether napkins and eating utensils are placed on counters for use by customers or are packaged with products for sale, the purchase of these items is taxed. The list is categorized by taxable and nontaxable bakery supplies, deli supplies, meat/seafood supplies, and produce supplies.

*Changes in Response to Oral and Written Comments: Provisions regarding the taxability of packaging materials were removed from proposed Rules 12A-1.011 and 12A-1.0115, F.A.C. These provisions will be included in a separate rulemaking proceeding to propose amendments to Rule 12A-1.040, F.A.C., Containers and Other Packaging Materials; Gift Wrapping (new title to be proposed).*

Proposed Rule 12A-1.0115, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies

*Subsection (1) - Scope*

Mr. Chris Mesa, Publix, commented that it appeared that this proposed rule is not intended to provide guidelines to grocery stores, including those grocery stores that have sit-down seating areas by their delis. He advised that Publix taxed every sale made through the deli register where the sit-down seating is located, because the assumption is that the customer is going to sit down and eat it on the premises. A sign at the register advises that tax will be collected at the register on all sales and that food stamps may not be used to make purchases at the register. He advises that he has always thought of their deli area as a similar place of business as a restaurant licensed by the Division of Hotels and Restaurants, even though they are not licensed as a restaurant. Mr. Parsons advised that the Department looks at how the establishment is licensed, whether by the Division of Hotels and Restaurants or by the Department of Agriculture.

*In Response: No changes were made by the Department.*

*Subsection (3) - Food Products Consumed in Places Where an Admission is Charged*

Mr. Glenn A. Bedonie, C.P.A., P.A., provided written comments, dated April 12, 2007, requesting that the Department include draft language which clearly states that food and drink provided without charge to those who pay a taxable admission are exempt from sales and use tax. This addition will conform the proposed rule to the statute and will resolve an issue which has certain taxpayers unsure of their use tax liability.

*In Response: No changes were made to this subsection prior to the rule hearing held on November 5, 2007; however, this subsection has been withdrawn from the proposed rule for further consideration.*

Rule 12A-1.040, F.A.C., Sales of Containers, Wrapping and Packing Materials and Related Products

The comments and discussion received regarding the proposed changes to subsection 12A-1.011(11), regarding packaging materials, apply to the proposed removal of those provisions from this rule.

12A-1.071, F.A.C., Rentals, Leases, or License to Use Tangible Personal Property

No comments or discussion were received regarding the proposed changes to this rule section.

12A-1.097(15)(a), F.A.C., Public Use Forms

No comments or discussion were received regarding the proposed changes to this rule section.

## **SUMMARY OF CHANGES TO THE PROPOSED RULE TEXT OF RULES 12A-1.011 AND 12A-1.0115, F.A.C.:**

After further review by the Department, changes were made to the following proposed text of the following rule sections in response to the comments received at the rule development workshop held on April 18, 2007, and written comments submitted to the Department:

Proposed Rule 12A-1.011, F.A.C., Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice

### *Subsection (2) - Tax-Exempt Food Products*

- The list of examples of exempt food products has been revised to include fruit that is sliced, chunked, or otherwise cut and prepared by the retailer.
- Herbal supplements and salt tablets were added to the list of tax-exempt food products.

### *Subsection (3) - Bakery Products Sold by Bakeries, Pastry Shops, or Like Establishments*

- Amended the provisions of proposed paragraphs (c) and (d) of subsection (3) to clarify when bakery products sold by bakeries, pastry shops, or like establishments that have eating facilities are tax-exempt when sold for consumption off the premises.

### *Subsection (4) - Taxable Food Products*

- The example regarding the grinding of peanuts into peanut butter was removed from the example of food prepared for immediate consumption (*Proposed sub-subparagraph (4)(b)2.c.*).
- An example regarding the preparation of fruit or vegetable salads prepared for immediate consumption was added (*Proposed new sub-subparagraph (4)(b)2.e.*).

*Subsection (7) – Water and Ice*

- Provisions regarding the exemption for drinking water were clarified to provide that when carbonation or flavorings are added to the drinking water at a water treatment facility, the sale of the drinking water in bottles, cans, or other containers remains exempt.
- Reference to the provisions of subsection (11) for packaging materials used to package food products for sale was removed.

*Subsection (11) - Items Used to Package Food Products*

- Proposed subsection (11) was removed from the proposed amendments. The Department will include the comments received at this rule development workshop in a separate proceeding to address proposed amendments to Rule 12A-1.040, F.A.C., regarding packaging materials.

Proposed Rule 12A-1.0115, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies

*Subsection (1) - Scope*

- The scope of the rule has been revised to clarify that the rule applies to places of business where food products are sold for immediate consumption on the seller's premises or packaged or wrapped and taken away from the seller's premises.

*Subsection (6) - Food Products Sold or Furnished by Restaurants or Similar Places of Business to Employees*

- Changed the proposed language regarding food or drinks sold or furnished by employers to employees to the current rule text to clarify that there was no change in policy regarding food or drinks sold or furnished by employers to employees

*Subsection (16) - Items Used to Serve Food Products*

- Proposed subsection (16) was removed from the proposed amendments. The Department will include the comments received at this rule development workshop in a separate proceeding to address proposed amendments to Rule 12A-1.040, F.A.C., regarding packaging materials.

Rule 12A-1.040, F.A.C., Sales of Containers, Wrapping and Packing Materials and Related Products

- The proposed amendments to this rule section were removed. The Department will include the comments received at this rule development workshop in a separate proceeding to address proposed amendments to Rule 12A-1.040, F.A.C., regarding packaging materials.

SUMMARY OF RULE HEARING

HELD ON NOVEMBER 5, 2007

The proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), were noticed for a rule hearing in the Florida Administrative Weekly on October 12, 2007 (Vol. 33, No. 41, pp. 4739-4750). A rule hearing was held on November 5, 2007, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida, commencing at 10:00 a.m. and concluding at 10:30 a.m.

**PARTIES ATTENDING**

For the Department  
of Revenue

MARK ZYCH, Director, Technical Assistance and Dispute  
Resolution  
RICHARD PARSONS, Tax Law Specialist, Technical Assistance  
and Dispute Resolution  
JANET YOUNG, Tax Law Specialist, Technical Assistance and  
Dispute Resolution

From the Public                      GLENN A. BEDONIE, C.P.A., P.A.  
   DOUGLAS S. BELL, Coca-Cola Enterprises  
   JULIE PENDLETON, Winn-Dixie  
   VICKI WEBER, Hopping Green & Sams, representing Walt  
   Disney World

Written Comments                    GLENN A. BEDONIE, C.P.A., P.A.  
   DENNIS MANELLI, Phelps Dunbar, LLP

**COMMENTS RECEIVED AT THE RULE HEARING AND WRITTEN COMMENTS  
MADE A PART OF THE PROCEEDING:**

Rule 12A-1.0011, F.A.C., Schools Offering Grades K through 12; Parent-Teacher Associations;  
and Parent-Teacher Organizations

No comments or discussion were received regarding the proposed changes to this rule  
section.

Rule 12A-1.005, F.A.C., Admissions

No comments or discussion were received regarding the proposed changes to this rule  
section.

Rule 12A-1.011, F.A.C., Sales of Food Products for Human Consumption by Grocery Stores,  
Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or  
Like Establishment; Drinking Water; Ice

No comments or discussion were received regarding the proposed changes to this rule  
section.

Proposed Rule 12A-1.0115, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by  
Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of  
Business and by Transportation Companies

*Subsection (3) - Food Products Consumed in Places Where an Admission is Charged*

Mr. Glenn A. Bedonie, C.P.A., P.A., provided written comments, stating that the statutes  
provide that food products are not exempt when sold in a place that charges a taxable admission.  
No one should have an objection to this interpretation, since amounts are collected in addition to  
the taxable admission. However, when the patron has paid a taxable admission and has full

knowledge and expectation that the taxable admission also includes a lunch or dinner and has been put on notice of such expectation, it does not appear that the Department's interpretation has a statutory basis in fact. The Department's interpretation of "sold" within this rule has been expanded to mean "furnished, served, or sold," which we believe expands the meaning of such term beyond its clear meaning within the statute. By expanding the term "sold" to include these other terms, the Department has clearly determined additional "use" tax is due, which is beyond the statutory authority delegated to the Department within its rulemaking process. Mr. Bedonie requested an additional review of the intention of adopting this provision of the rule, which appears to exceed its statutory authority and causes additional tax burdens for various taxpayers of the state.

In oral comments received at the rule hearing, Mr. Bedonie reiterated his position regarding this rule provision. There is an exemption under Section 212.08, F.S., for "food products which are provided for immediate consumption within a place, the entrance to which is subject to admission charge. It appears that the Department is ignoring the specific language contained in that specific exemption." In addition, the Department appears to expand the word "sold" to mean furnished, served, prepared or sold and to make the terms "furnished, served, and prepared" synonymous with the word "sold."

Mr. Bedonie continued that it is his understanding of the statute that if you have dinner theaters that charge an amount for admission, as long as that is a taxable admission and the attendees have an expectation or knowledge that they are going to actually receive a dinner as part of that taxable admission and no separate charge for eating meals prepared at the dinner theater is made, those food products should be exempt from the sales and use tax, particularly the use tax. This applies to dinner theaters, as well as to golf courses that have tournaments where a

lunch is provided, or when a taxable admission is charged for a New Year's Eve party and food is provided at midnight. It should also apply to hotels that have the same type of New Year's Eve parties.

Mr. Bedonie continued that he is at a loss in terms of why the Department wants to collect tax on a taxable admission and also impose an additional use tax on the food products that are generally expected to be provided within that taxable admission.

Mr. Dennis Manelli provided recommended changes on behalf of StarShip, dated April 8, 2008, to added proposed paragraph (3)(d), offering four alternatives of the suggested language as follows:

(d) When a charge that could be deemed an admission does not separately itemize and price food products that are included in the charge, there is a presumption that the total charge is an admission. The dealer may establish by clear and convincing evidence that the charge primarily represents the cost of furnishing food products to patrons. In this case, the charge shall not be deemed an admission and the food products may be purchased for resale, as provided in Rule 12A-1.039, F.A.C.

(d) When dining privileges are furnished to patrons who have paid a set charge for food products and there is no separately itemized charge to the patron for the dining privileges, the charge shall not be deemed an admission, tax is required to be collected on the sales price of the food products and the food products may be purchased for resale, as provided in Rule 12A-1.039, F.A.C.

(d) When food products are furnished to patrons who have paid a set charge for the privilege of participating in a dining event and the set charge represents the price of food products furnished to the patron and not the price for admitting the patron to the place or for the privilege of entering or staying in the place, the charge shall not be deemed an admission whether or not the charges for food products are separately itemized and said food products may be purchased for resale, as provided in Rule 12A-1.039, F.A.C.

(d) When food products are furnished to patrons on the premises of a place which restricts access to those who have paid a charge and such charge is measured on the price for food products furnished and not the price for admitting the patron to the place or for the privilege of entering or staying in the place, the charge shall not be deemed an admission whether or not the charges for food

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resale, as provided in Rule 12A-1.039, F.A.C.

*In Response:* No changes were made to this subsection prior to the rule hearing held on February 23, 2007; however, this subsection has been withdrawn from the proposed rule for further consideration.

The Joint Administrative Procedures Committee provided written comments, dated November 19, 2007, advising of the need to clarify the provisions of subparagraph 27. of paragraph (a) of subsection (2) of Rule 12A-1.011, F.A.C., and to incorporate by reference the appropriate provisions of the Federal Food and Drug Act cited in that subparagraph. In response, subparagraph 27. of paragraph (a) of section (2) of Rule 12A-1.011, F.A.C., has been changed, so that, when adopted, the subparagraph will read as follows:

27. Natural fruit or vegetable juices or their concentrates or reconstituted natural concentrated fruit juices in any form, whether frozen or unfrozen, aerated, dehydrated, powdered, granulated, sweetened or unsweetened, seasoned with salt or spice, or unseasoned. Only those juices that are permitted by federal law and regulation to be labeled “100 percent juice” or “100 percent juice with added-” “ingredient(s),” “preservative,” or “sweetener” will be considered natural fruit or vegetable juices. [Title 21 (Food and Drug), Chapter 9 (Federal Food, Drug, and Cosmetic Act), Subchapter IV (Food) 21 U.S.C. ss. 341; 343 (January 24, 2002), hereby incorporated by reference]; [21 C.F.R. Ch. 1, ss. 101.30; 102.5; 102.33, 146.114-146.187; 156.3; 156.145 (4-1-06), hereby incorporated by reference].

In addition, technical changes have been made to the law implemented section of Rule 12A-1.0015, F.A.C., to include the following: Sections 212.07(1)(b), 212.08(6), (7), 212.18(3)(c), and 213.37, F.S.

## **ADDITIONAL CHANGES TO PROPOSED RULE 12A-1.0115, F.A.C.:**

After further review by the Department, proposed Rule 12A-1.0011, F.A.C. (Schools Offering Grades K through 12; Parent-Teacher Associations; and Parent-Teacher Organizations), and proposed Rule 12A-1.005, F.A.C. (Admissions), have been withdrawn.

The following changes were made to the proposed substantial rewording of Rule 12A-1.011, F.A.C. (Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice):

- Subsection (1) has been titled "SCOPE" and the following unnecessary sentence was removed: "Section 212.08(1), F.S., exempts food products for human consumption, with certain exceptions."
- The phrase "original container" was corrected to read "original sealed container" in subparagraph 2.a. of paragraph (b) of subsection (4)
- The provisions of paragraph (e) of subsection (7) regarding water conditioning (water softening) were clarified

In addition, the following changes were made to proposed new Rule 12A-1.0115, F.A.C. (Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies):

- The following unnecessary sentence was removed from paragraph (a) of subsection (1): "Section 212.08(1), F.S., exempts food products for human consumption, with certain exceptions."

- The term "food products" was changed to read "taxable food products" in paragraphs (b) and (c) of subsection (5). Unnecessary language was also removed.
- Paragraph (d) of subsection (5) has been withdrawn
- Previously numbered paragraph (e) has been renumbered (d), and the term "food product" has been changed to read "food or beverage"
- Paragraph (a) of subsection (6) has been changed to clarify when food products furnished by an employer to its employees are not subject to tax
- The phrase "food products ready for immediate consumption" in paragraph (a) of subsection (7) was corrected
- Paragraphs (a) through (e) of subsection (8) have been changed to clarify when food products furnished or served by caterers are subject to tax, and paragraph (f) has been withdrawn
- Subparagraph 2. of paragraph (a) of subsection (9) has been changed to clarify when gratuities charged to customers are not subject to tax
- Paragraph (d) of subsection (9) has been changed to clarify when the charge for preparing food products furnished by the customer is subject to tax
- The term "food products" in paragraph (a) of subsection (10) has been changed to "food or drinks"
- The terms "food products" and "meals and beverages" in subsection (11) have been changed to "food or drinks"
- The term "food products" in paragraph (d) of subsection (12) has been changed to "meals"
- The title to subsection (13) has been changed to "HOSPITALS AND HOMES FOR THE AGED"

- The provisions of subsections (14) and (15) have been combined into substantially revised subsection (14), "NONPROFIT ORGANIZATIONS; SOCIAL OR CIVIC CLUBS"

SUMMARY OF RULE HEARING

HELD ON FEBRUARY 23, 2009

The proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), were noticed for a rule hearing in the Florida Administrative Weekly on January 23, 2009 (Vol. 35, No. 3, pp. 328-336). A rule hearing was held on February 23, 2009, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida. There was one attendee present to observe the proceedings without comment. No written comments have been received by the Department.

**PARTIES ATTENDING**

For the Department of Revenue	RICHARD PARSONS, Tax Law Specialist, Technical Assistance and Dispute Resolution Resolution JANET YOUNG, Tax Law Specialist, Technical Assistance and Dispute Resolution
From the Public	EDWIN BODO, Florida Association of Homes and Services for the Aging

The Joint Administrative Procedures Committee, in written correspondence dated November 19, 2007, requested that the Department identify the specific statutory authority that gives rise to the establishment of 25% of the value of the package as representing a taxable event. Proposed Rule 12A-1.011(10), F.A.C., provides that when the taxable components of a package consisting of taxable items and tax-exempt food items is more than 25% of the value of the package, the package is subject to tax. When the value of the taxable items falls below 25% of the value of the package, the package is not subject to tax.

The 25% value threshold is the Department's long-standing administration of the statutory limitation on taxing packaging materials, provided in Section 212.02(14)(c), F.S. Pursuant to discussions with the Committee on July 17, 2008, the Department was to retain the current language in the proposed rule while the Department seeks statutory clarification from the Legislature during the 2009 regular session of the Legislature.

The Department requested that the 2009 Legislature provide specific authority to support this long-standing position; however, no legislation was enacted. The Department has withdrawn these provisions from the proposed rule and, when adopted, these provisions will no longer be contained in the Department's rule. A Notice of Change was published in the June 19, 2009, edition of the Florida Administrative Weekly (Vol. 35, No. 24, p. 2959).

In addition, Subsection (3), Food Products Consumed in Places Where an Admission is Charged, of Rule 12A-1.0115, F.A.C., has been withdrawn for further consideration. Proposed subsections (4) through (14) have been renumbered (3) through (13). A Notice of Change was published in the July 31, 2009, edition of the Florida Administrative Weekly (Vol. 35, No. 30, p. 3623).

### SUMMARY OF RULE HEARING

#### HELD ON AUGUST 31, 2009

The proposed amendments to Rule Chapter 12A-1, F.A.C. (Sales and Use Tax), were noticed for a rule hearing in the Florida Administrative Weekly on August 7, 2009 (Vol. 35, No. 31, p. 3770). A rule hearing was held on August 31, 2009, in Room 118, Carlton Building, 501 S. Calhoun Street, Tallahassee, Florida, commencing at 2:06 p.m. and concluding at 4:13 p.m.

## **PARTIES ATTENDING**

For the Department of Revenue	JEFF KIELBASA, Deputy Director MARSHALL STRANBURG, General Counsel MARK ZYCH, Director, Technical Assistance and Dispute Resolution GARY GRAY, Revenue Program Administrator I, Technical Assistance and Dispute Resolution RICHARD PARSONS, Tax Law Specialist, Technical Assistance and Dispute Resolution
From the Public	GLENN A. BEDONIE, C.P.A., P.A. JIM ERVIN WARREN DIETEL, Puff 'n Stuff Catering, LLC TONY GREGORY, Puff 'n Stuff Catering, LLC LISA BRUTTELL GRANT, Arthur's Creative Events & Catering MARK LEGGETT, Arthur's Creative Events & Catering RICHARD E. TURNER, Florida Restaurant & Lodging Association VICKI WEBER, Hopping Green & Sams, Walt Disney World
Written Comments	STEVE HAYDEN, Automatic Merchandising Association of Florida DANIEL P. FELTON, International Bottled Water Association KELLEY CARLINE, Tax Director, Universal Orlando RICHARD E. TURNER, Florida Restaurant & Lodging Association

## **COMMENTS RECEIVED AT THE RULE HEARING AND WRITTEN COMMENTS MADE A PART OF THE PROCEEDING:**

Rule 12A-1.011, F.A.C., Sales of Food Products for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishment; Drinking Water; Ice

*Subsection (6) Vending Machines and Mobile Vendors*  
*Subsection (7) – Water and Ice*

Mr. Steve Hayden, Automatic Merchandising Association of Florida, provided written comment, dated August 18, 2009, requesting confirmation that water sold through vending machines is tax-exempt. Mr. Gary Gray, Department of Revenue, confirmed at the public hearing that the exemption for water applies to water sold through vending machines.

Mr. Daniel P. Felton, International Bottled Water Association, provided written comment, dated August 28, 2009, requesting clarification of the application of tax on the sale of drinking water through vending machines and mobile vendors. Mr. Felton encourages the Department to consider changing reference to “drinking water” to “bottled water” in this subsection of the proposed rule. Bottled water is comprehensively regulated as a packaged food product of the Florida Department of Agriculture and Consumer Services, as well as by the Food and Drug Administration under the federal Food, Drug, and Cosmetic Act. The exemption for “bottled water” would be clearer if the proposed rule were changed in this manner. As currently proposed, subsection (6) of this rule, and subsection (3) of proposed Rule 12A-1.0115, F.A.C., tax may apply to bottled water delivered from vehicles to homes and offices in Florida. The Association does not believe it is the Department’s intent to apply tax in this manner and would appreciate clarification of the matter.

*In Response: Changes were made to subsection (6) of proposed Rule 12A-1.011, F.A.C., and to subsection (3) of proposed Rule 12A-1.0115, F.A.C., to provide that “drinking water in bottles, cans, or other containers sold through a vending machine, push cart, motor vehicle, or any other form of vehicle is exempt.” A Notice of Change was published in the September 11, 2009, edition of the Florida Administrative Weekly (Vol. 35, No. 36, p. 4414).*

Proposed Rule 12A-1.0115, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Caterers, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies

*Subsection (2) - Food Products Served, Prepared, or Sold in or By Restaurants or Similar Places of Business*

Subsection (2) of this rule provides examples of taxable food products sold in or by restaurants, lunch counters, cafeterias, caterers, hotels, taverns, or other like places of business. Ms. Vicki Weber, Hoping, Green & Sams, representing Walt Disney World, questioned whether it was the intent to remove the reference to amusement parks included in the current rule, or was

it an oversight. Ms. Weber assumes that the exemption for true grocery items would apply to the sale of grocery items within a small convenience store located within Disney. Mr. Gray responded that a separate accounting of the tax-exempt grocery items would be required. Mr. Jeff Kielbasa, Department of Revenue, responded that the Department would look at the issue and see if there is a way to clarify this provision.

*No Change in Response: Issues regarding the taxability of food products sold or consumed in places where an admission is charged have been withdrawn from this rulemaking for further consideration. A Notice of Change was published in the July 31, 2009, edition of the Florida Administrative Weekly (Vol. 35, No. 30, p. 3623).*

#### *Subsection (7) Caterers*

Mr. Gray provided that the Department's historical administration of this rule has been that, like a restaurant, a caterer is using tableware, tablecloths, pots, pans, dishes, silverware, and similar items in providing food products to its customers. The items cannot be purchased tax-free for resale. However, items that are not used to furnish or serve food or drinks may be purchased by caterers for resale or for release to their customers.

Ms. Kelley Carline, Tax Director, Universal Orlando, provided written comments, dated August 28, 2009, that the catering and special events departments have concerns with the proposal to begin taxing dishes, silverware, glasses, chairs, tables, tablecloths, and similar items that are used by guests at special events to consume food or drinks. A separate charge to the special events customers is made for these items either by contract or by invoice. Tax is collected on the charge. The possession, control, or enjoyment of such items transfers to the customer and their guests attending the event. Universal Orlando is not the consumer of these items.

Subsection (7) of this rule, as proposed, conflicts with existing Rule 12A-1.071(2)(a) and (33), F.A.C., and is essentially a new tax.

Ms. Carline continues that the catering and special event business is different from the restaurant business. Catering and special event planners are in the rental business, as well as the food service business. Restaurants are not in the rental business. They do not separately itemize and charge their customers for the use of silverware, napkins, tablecloths, plates, tables, or chairs. Restaurants are the end consumers of such items. Catering and special event businesses are not the end consumers of such items. Ms. Carline requests that the resale exemption apply to all items used or enjoyed by the guests attending a special event, including items used by event guests to consume food or beverages. It is understood that the purchase or lease of these items must be exclusively for rental to customers, that caterers must separately itemize a price for these items to customers on an invoice or contract, and that tax must be charged.

Mr. Richard Turner, General Counsel, Florida Restaurant & Lodging Association, provided written comment, dated August 31, 2009, stating that the Association has two issues with the proposed rule changes concerning caterers. The first issue is that the hospitality industry simply wants to avoid double taxation. Mr. Turner provides that Chapter 212, F.S., states:

... it is hereby declared to be the legislative intent that, whenever in the construction, administration, or enforcement of this chapter there may be any question respecting a duplication of the tax, the end consumer, or the last retail sale, be the sale intended to be taxed and insofar as may be practicable there be no duplication or pyramiding of the tax.

Mr. Turner continues that the second issue involves existing rules that conflict and cause confusion as to which items used by caterers are taxed and which are exempt. For many years, the Department has ruled that a caterer can purchase certain items tax-exempt if the items are purchased “exclusively” for rental to customers. At the same time, there was also a rule stating that the caterer is always considered the consumer of these items, even when making a separate charge for them, and should always pay tax when they are purchased. During audit, tax was

assessed on certain items, but, when under protest, the tax would be compromised in full or in part; however, the Department would never agree that the tax was not due.

Further, the Association encourages the Department to continue its efforts to draw a bright line in the rules to avoid uncertainty by the auditors and by the taxpayers. The resale exemption should apply to all items used or enjoyed by the guests attending an event. It is understood that the purchase or lease of these items must be exclusively for rental to the customer, that there must be separate itemized prices on an invoice or contract, and that the sales tax applies to the resale/rental price.

At the rule hearing, Mr. Turner continued that the Association would like the Department to make a distinction based on whether the guest has control over a particular item. In restaurants, you are seeing the same customer. In the catering side of food service, every customer is extremely unique.

Mr. Tony Gregory, C.P.A., representing Puff 'n Stuff, elaborated to explain the difference between a restaurant and the catering business. A person who is going to have an event can do one of two things. The first way is to call a caterer to deliver food and then go to a rental company and rent items needed for the event. The second way is to call a caterer to provide a "one-stop, turnkey" event, where the caterer presents the food and the rental items concurrently in the same transaction. This way, there is a food transaction and a rental transaction, each priced separately. The rental items are separate and unique to that event. There is no difference in how a special events company operates as compared to a rental company that just rents tables, chairs, linens, glassware, and similar items. These rental items are not a part of the food and beverage delivery. Special event companies operate as much as a rental organization as they do as a food and beverage catering company.

Mr. Gregory continued that the difference between a restaurant and a catering business is the possession, use, and control by the guests. The caterer has performed its duty to prepare and serve the food. The client is actually using things that they have rented one way or another to use or take enjoyment from.

Mr. Warren Dietel, President, Puff 'n Stuff, reiterated that their customers come to them with a concept, theme, or an idea and then they elaborate and create an event for the customer. There are a number of components that go into the event. A majority of the things used in producing the event are internal items, and, in many cases, outside sources are used to create the event. In many cases, these items from outside sources are marked up when charged to the customer.

Mr. Dietel continued that the words “separately itemized charge” were in contention during an audit by the Department. During the audit, the company was able to demonstrate that there is a separate and itemized charge for absolutely every component that goes into building and creating an event. These items are grouped under a category called “Rentals” when charged to the customer. However, it seemed that the auditor wanted to see each individual item. Mr. Dietel contends that customers do not want to see it broken down. He encourages the Department to consider the charge for “Rentals” as a “separately itemized charge.”

Mr. Mark Leggett, Arthur's Creative Events and Catering, summarized that his company operates in the same manner and that smaller caterers operate like the larger caterers. His company builds an event and has different charges, such as for staff, for rentals, or for flowers. He also agrees that there are items that are not consumed by the customer. The host is purchasing items for a certain reason. Everything is a special order. Different events are charged differently. All of these items are sold under “Rentals,” encompassing tables, chairs, linens, china,

silverware, and maybe tents, AV equipment, or a foliage package. Smaller caterers rent everything and do not own any of the products. It should not matter whether you own the product or the rental company owns the product. The main contention with the rule is that the statute says there is no double taxation.

Mr. Richard Parsons, Department of Revenue, asked Mr. Leggett whether tables and chairs were rented without the food. Mr. Leggett responded that, in some cases, when a customer asked for tables and chairs, they would charge the customer for the tables and chairs, plus make a delivery charge. He continued that, in general, they try to sell food and then everything else is a part of the food.

Mr. Mark Zych, Department of Revenue, asked whether the tables and chairs were used by them or were donated or used for in-kind purchases. Mr. Leggett responded that if an employee needed such items, they would allow that. If a church needed to borrow items, they would allow that. Mr. Glenn Bedonie questioned whether there was accounting evidence of that provision to those persons. Mr. Leggett responded that there is no revenue for these transactions. Mr. Gregory responded that there may be a discounted charge for a charity or fundraiser. Mr. Kielbasa commented that even a true rental company can donate some chairs to its church. Mr. Marshall Stranburg, Department of Revenue, confirmed that they were not in the business of giving stuff away to be used at no charge. Mr. Bedonie added that the rule should be clarified, so that caterers understood that nonprofit organizations qualified to make tax-exempt purchases.

Mr. Buzz M<sup>c</sup>Kown, Department of Revenue, questioned whether all of the purchases by these catering companies were made tax-free, or, if tax was paid on all purchases. Mr. Leggett responded that they pay tax on spoons, pots, pans, ovens, and things that are not resold to the client. Mr. Dietel responded that they pay tax on anything going into the preparation of the food.

They do not pay tax on anything that is rented. Mr. Leggett continued that equipment which is rented from a company for use in providing an event should be a resale under the resale tax laws.

Mr. Marshall Stranburg, Department of Revenue, requested confirmation regarding the four items that, collectively as a group, are important elements. The first is that the guest at the event will possess, use, or control these items. The second is that the host has the ability to make the choice of what items are going to be utilized. The third is that these items are purchased or rented exclusively for resale. The fourth is that there is either a separate charge made to the host in the bill, or there is a separate charge that is maintained within the books and records kept by the caterer.

Mr. Gregory responded that it would capture ninety-nine percent of the individual items that the caterer would be concerned with. The guest has the possession, use, and control, even if temporary, of these items. Mr. Dietel responded that the easiest way to categorize these items is that anything outside of the preparation of food would fall within a resale, which can be demonstrated by a fee charged for the items. For example, every time that a generator is used, there is a charge for use of the generator.

Mr. Leggett continued that he does not own a generator, but he would rent the generator. Mr. Stranburg asked whether he would agree that if the generator were used to prepare food, the generator would fall outside of the category of items that are rented. How would it be determined whether the generator was used to prepare food or to light the facility? Mr. Leggett responded that if the generator is being used at an event, and the purpose is to have a generator for use at events, the use would be for rental.

Mr. Gregory commented that different companies operate differently and that you cannot categorize the items name by name. The issue is the possession, use, and control of each caterer

or each event company. We cannot speak on behalf of everyone in the industry on whether a generator is purchased with the intent of renting it to customers.

Mr. Stranburg stated that he was trying to identify where the problem areas are, so that they could be covered. The intent of the discussion is to obtain whether there is a way to expand the category or to add a category, so that uncertainty is eliminated.

Mr. Dietel stated that if he could demonstrate to the Department that the moneys received far exceed the purchase price, that should be enough. Mr. Leggett agreed with Mr. Dietel. Mr. Jeff Kielbasa commented that it is not in the law that when you receive more money from the item in using it than the amount of money paid for the item, that does not change the identity of the item; however, the Department will consider everything that is discussed.

*Changes to subsection (7): In response to comments received, the provisions of proposed subsection (7), Caterers, have been withdrawn from this rulemaking for further consideration. A Notice of Change was published in the September 11, 2009, edition of the Florida Administrative Weekly (Vol. 35, No. 36, p. 4414).*

#### Proposed Rule 12A-1.071, F.A.C., Rental, Leases or License to Use Tangible Personal Property

##### *Proposed Removal of Subsection (33) - Rentals by Caterers*

The written comments and oral comments received and made a part of the rule hearing regarding the proposed provisions of subsection (7) of Rule 12A-1.0115, F.A.C., apply to the proposed removal of this subsection regarding the rental of items by caterers.

*Changes to subsection (33): In response to comments received, the proposed removal of subsection (33) of Rule 12A-1.071, F.A.C., has been withdrawn from this rulemaking for further consideration. A Notice of Change was published in the September 11, 2009, edition of the Florida Administrative Weekly (Vol. 35, No. 36, p. 4414).*

Rule 12A-1.011, F.A.C., Sales of Food Products Served, Prepared, or Sold in or by Restaurants, Lunch Counters, Cafeterias, Hotels, Taverns, or Other Like Places of Business and by Transportation Companies

*Withdrawal of Subsection (3), Food Products Consumed in Places Where an Admission is Charged for Further Consideration*

A Notice of Change was published in the July 31, 2009, edition of the Florida Administrative Weekly (Vol. 35, No. 30, p. 3623) to withdraw for further consideration the provisions of proposed subsection (3) of Rule 12A-1.0115, F.A.C., regarding the taxability of food products consumed in places where an admission is charged. Comments were received at the rule hearing regarding this subsection. Participants made various comments that a taxpayer who makes a charge for an admission does not owe use tax on the cost price of food products that are provided with the admission.

*In Response: The provisions of subsection (3), Food Products Consumed in Places Where an Admission is Charged, remain withdrawn from the proposed rule for further consideration. A Notice of Change was published in the July 31, 2009, edition of the Florida Administrative Weekly (Vol. 35, No. 30, p. 3623).*

DEPARTMENT OF REVENUE  
CHAPTER 12A-1, FLORIDA ADMINISTRATIVE CODE  
SALES AND USE TAX  
AMENDING RULES 12A-1.011, 12A-1.071, AND 12A-1.097  
CREATING RULE 12A-1.0115

(Substantial Rewording of Rule 12A-1.011 follows. See Florida Administrative Code for present text.)

12A-1.011 Sales of Food Products and Drink for Human Consumption by Grocery Stores, Convenience Stores, and Supermarkets; Sales of Bakery Products by Bakeries, Pastry Shops, or Like Establishments; Drinking Water; Ice ~~Sales of Food or Drinks Served, Cooked, Prepared, or Sold by Restaurants or Other Like Places of Business.~~

(1) SCOPE.

(a) The purpose of this rule is to clarify the application of tax on the sale of food products generally sold in or by grocery stores, convenience stores, supermarkets, bakeries, fish markets, produce markets, and other like places of business. This rule is also intended to clarify the application of tax on the sale of bakery products by bakeries, pastry shops, or like establishments and on the sale of drinking water or ice.

(b) Rule 12A-1.0115, F.A.C., is intended to clarify the application of tax on food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, caterers, hotels, taverns, or other like places of business.

(2) TAX-EXEMPT FOOD PRODUCTS.

(a) Food products for human consumption, whether processed, cooked, raw, canned, or in

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list of exempt food products:

1. Baby foods and baby formulas;
2. Baked goods and baking mixes, including ready-to-eat and ready-to-bake products;
3. Baking and cooking items advertised and normally sold for use in cooking or baking,  
such as chocolate morsels, flavored frostings, glazed or candied fruits, marshmallows, powdered  
sugar, or food items intended for decorating baked goods;
4. Cereals and cereal products, including ready-to-eat, instant, and regular hot cereals;
5. Cheeses, including cured and whey cheese, cream, natural, grating, processed, spread,  
dip, and other miscellaneous cheeses;
6. Cocoa;
7. Coffee and coffee substitutes;
8. Condiments and relishes, including seasoning sauces and spreads, such as mayonnaise,  
ketchup, or mustard;
9. Cookies, including chocolate-coated or cream-filled;
10. Dairy products;
11. Dairy substitutes;
12. Dietary supplements (including herbal supplements) and meal replacements,  
including liquid food supplements and nutrition bars, including those that are candy-coated or  
chocolate-coated;
13. Eggs and egg products, including liquid, frozen, or dried eggs;
14. Fish, shellfish, and other seafood products, whether fresh or frozen;
15. Food coloring;

16. Frozen dinners and other frozen food products;

17. Fruit (including fruit sliced, chunked, or otherwise cut by the retailer), fruit snacks, fruit roll-ups, and dried fruit, including those sweetened with sugar or other sweeteners;

18. Gelatins, puddings, and fillings, including flavored gelatin desserts, puddings, custards, parfaits, pie fillings, and gelatin base salads;

19. Grain products and pastas, including macaroni and noodle products, and rice and rice dishes;

20. Honey;

21. Ice cream, frozen yogurt, sherbet, and similar frozen dairy or nondairy products sold in units larger than one pint;

22. Jams and jellies;

23. Marshmallows;

24. Meat and meat products;

25. Meat substitutes;

26. Milk, including natural fluid milk, homogenized milk, pasteurized milk, whole milk, chocolate milk, buttermilk, half and half, whipping cream, condensed milk, evaporated milk, powdered milk, or similar milk products, and products intended to be mixed with milk;

27. Natural fruit or vegetable juices or their concentrates or reconstituted natural concentrated fruit juices in any form, whether frozen or unfrozen, aerated, dehydrated, powdered, granulated, sweetened or unsweetened, seasoned with salt or spice, or unseasoned. Only those juices that are permitted by federal law and regulation to be labeled “100 percent juice” or “100 percent juice with added-” “ingredient(s),” “preservative,” or “sweetener” will be considered natural fruit or vegetable juices. [Title 21 (Food and Drug), Chapter 9 (Federal Food,

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hereby incorporated by reference]; [21 C.F.R. Ch. 1, ss. 101.30; 102.5; 102.33, 146.114-146.187; 156.3; 156.145 (4-1-06), hereby incorporated by reference].

28. Peanut butter;

29. Poultry and poultry products;

30. Salad dressings and dressing mixes;

31. Salt, salt tablets, pepper, spices, seeds, herbs, seasonings, blends, extracts, and flavorings, whether natural or artificial;

32. Sandwich spreads;

33. Sauces and gravies;

34. Snack foods, including chips, corn chips, potato chips, cheese puffs and curls, cereal bars, cracker jacks, granola bars, nuts and edible seeds, pork rinds, and pretzels, whether such products are chocolate-coated, honey-coated, or candy-coated.

35. Soups and soup mixes;

36. Sugar, sugar products, and sugar substitutes;

37. Tea (including herbal tea), unless sold in a liquid form;

38. Vegetables and vegetable products;

39. Vegetable oils, lard, olive oil, shortenings, and oleomargarine.

(b) Food products prepared off the seller's premises are exempt when:

1. Sold in the original sealed container;

2. Sliced into smaller portions; or

3. The product is sold frozen and then heated on the seller's premises by the customer.

(c) Taxpayers who have a question regarding the taxable status or exempt status of a food

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label to the Department to obtain a determination of the taxability of the product. This request should be addressed to the Florida Department of Revenue, Technical Assistance and Dispute Resolution, P.O. Box 7443, Tallahassee, Florida 32314-7443.

(3) BAKERY PRODUCTS SOLD BY BAKERIES, PASTRY SHOPS, OR LIKE ESTABLISHMENTS.

(a) Bakery products sold by bakeries, pastry shops, or like establishments as hot prepared food products are taxable.

1. Bakery products that are kept warm by a heat source used to maintain them in a heated state, or to reheat them, are hot prepared food products.

2. Bakery products that are sold while still warm from the initial baking are not hot prepared food products.

3. Example: A bakery establishment toasts a bagel for a customer. The sale of the bagel is subject to tax, whether the bakery establishment has eating facilities or does not have eating facilities.

(b)1. Bakery products, excluding bakery products sold for consumption off the premises, sold by bakeries, pastry shops, or like establishments that have eating facilities are subject to tax.

2. For purposes of this subsection, “eating facility” is a place that facilitates the consumption of the bakery products on the seller's premises on items such as benches, chairs, stools, tables, and counters. For example, a pastry shop that has bar stools and a counter where the bakery products and drinks are served to patrons will be considered a pastry shop with eating facilities. A bakery located within the food court of a mall where tables and chairs are located in the common areas of the food court for patrons to consume food products will be considered a

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(c)1. Bakery products, excluding items sold as hot prepared food products, sold for consumption off the premises are exempt.

2. For the purpose of this paragraph, there shall be a rebuttable presumption that the sale of bakery products by bakeries, pastry shops, or like establishments that have eating facilities are taxable when:

a. Such bakery products are sold in quantities of five (5) or fewer items; or

b. The bakery products sold, regardless of the quantity, are not packaged in a manner consistent with an intention by the customer to consume the products off the seller's premises.

3. Bakery products that are sold, regardless of the quantity, in packaging that is glued, stapled, wrapped, or sealed are examples of packaging consistent with an intention by the customer to consume products off the seller's premises.

4. Bakeries, pastry shops, or like establishments that have eating facilities and make tax-exempt sales of bakery products that are for consumption off the premises are required to separately account for the tax-exempt sales of bakery products for consumption off the premises.

a. Examples of methods to separately account for tax-exempt sales of bakery products for consumption off the premises are: using sales invoices which contain documentation that the sale of the bakery product is for consumption off the premises; using a separate key on a cash register to record tax-exempt sales of bakery products; or using a separate cash register to record tax-exempt sales of bakery products.

b. Example. A bakery operates an establishment with eating facilities. The bakery sells donuts, toasted bagels, and other pastries, as well as coffee and other drinks. The bakery sells bakery products to patrons who take the products home for consumption in sealed containers.

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uses separate keys on its cash registers to account for the sales of tax-exempt bakery products to patrons who purchase the products for consumption off the premises in sealed containers separately from the accounting for taxable sales of toasted bagels, coffee, other drinks, and bakery products for consumption on the premises. The bakery products sold for consumption off the premises are exempt, because the bakery's packaging and accounting methods overcome the rebuttable presumption that the products are sold for consumption on the premises.

(d) Bakery products, excluding items sold as a hot prepared food products, that are sold by bakeries, pastry shops, or like establishments that do not have eating facilities are exempt.

(4) TAXABLE FOOD PRODUCTS. The exemption for food products for human consumption does not apply to any of the items specified in this subsection.

(a) Candy, chewing gum, bubble gum, breath mints, and any similar product regarded as candy or confection, based on its normal use as indicated on the label or advertising, is subject to tax. The term "candy and similar products" does not include snack foods not regarded as candy or confection, as indicated on the label or advertising of the product.

(b) Food prepared, whether on or off the seller's premises, and sold for immediate consumption is subject to tax. This does not apply to food prepared off the seller's premises and sold in the original sealed container, or to the slicing of products into smaller portions.

1. Food prepared for immediate consumption is food prepared to a point generally accepted as ready to be eaten without further preparation and that is sold in a manner that suggests readiness for immediate consumption. In determining whether an item of food is sold for immediate consumption, the customary consumption practices prevailing at the selling

facility shall be considered.

2. Examples:

a. Potato salad is prepared and delivered to a dealer in bulk. The dealer repackages the potato salad into smaller containers. Because the potato salad is not sold in the original sealed container, the sale of the repackaged smaller containers of potato salad is subject to tax.

b. A grocery store buys cold cuts in five-pound packages. The grocery store slices cold cuts for the customer according to the thickness and the amount the customer desires. The food is then packaged for sale to the customer. Because the cold cuts are sliced into smaller portions, the sale of the cold cuts is exempt from tax.

c. A supermarket offers freshly popped popcorn for shoppers for sale. The sale of the popcorn is subject to tax.

d. A supermarket prepares seafood products, such as smoked fish or steamed shrimp, for sale. The sale of the smoked fish or steamed shrimp is subject to tax.

e. A supermarket prepares fruit and vegetable products into various fresh salads for sale. When packaged without eating utensils and sold as a grocery item, the sale of the prepared fresh fruit or vegetable salad is exempt. When the prepared fresh salads are packaged with eating utensils, such as with a fork and a napkin, the salad is a food product prepared and sold for immediate consumption and is subject to tax.

(c)1. Hot prepared food products, whether sold separately or in combination with other food items, when the food is heated by the seller rather than by the customer, is subject to tax.

2. Hot prepared food products are those products, items, or components that have been prepared for sale in a heated condition and sold at any temperature that is higher than the air

temperature of the room or place where the products are sold. Preparation of a “hot prepared food product” includes cooking, microwaving, warming, toasting, or any other method of heating the food. Food products, including bakery products, are considered “hot prepared food products” when a heat source is used to maintain the food product in a heated state or is used to reheat the food product. Bakery products that are sold while still warm from the initial baking are not “hot prepared food products.” Their temperature is a result of the timing of the customer’s purchase rather than an indication of preparation to be sold in a heated condition.

3. When a single price is charged for a combination of hot prepared food products and cold food items or other components, the single price charged for the combination is subject to tax.

4. Examples:

a. A supermarket sells barbecued chicken that is kept hot by a rotisserie to be taken home and eaten. The sale of the chicken is subject to tax.

b. A grocery store bakes bread in an oven. The bread is packaged for sale while it is still warm. A customer purchases a package of the bread while it is still warm. The sale of the warm bread is not subject to tax.

c. A single price is charged for a combination of a hot meal, hot pizza, hot specialty dish, or hot sandwich, with cold components, such as a salad or fruit or other side items, by a convenience store. The single price charged for the combination is subject to tax.

(d) Sandwiches sold ready for immediate consumption, whether refrigerated or heated by the customer or by the retailer, are subject to tax. An example of a sandwich not sold ready for immediate consumption would be a frozen sandwich or a sandwich with a frozen or partially frozen filling.

(e) Meals sold for consumption on or off the seller's premises are subject to tax.

(f) Ice cream, frozen yogurt, and similar frozen dairy or nondairy products in cones, small cups, or pints, and popsicles, frozen fruit bars, or other novelty items, whether sold separately or in multiple units, are subject to tax.

(5) TAXABLE SOFT DRINKS. The exemption for food products for human consumption does not apply to soft drinks. The following sales of soft drinks are subject to tax:

(a) Nonalcoholic beverages, whether carbonated or noncarbonated.

(b) Any noncarbonated beverage made from milk derivatives, such as ice cream sodas, milkshakes, or malts.

(c) Any beverages and preparations commonly referred to as a “soft drink,” such as sodas, soda water, ginger ale, colas, root beer, tonic, fizzes, or cocktail mixes.

(d) Any beverage containing fruit or vegetable juice labeled with the word(s) “ade,” “beverage,” “cocktail,” “drink,” or “fruit or vegetable flavor, flavored, or flavorings.” Federal law and regulations require that any beverage containing more than 0 percent juice, but less than 100 percent fruit or vegetable juice, which represents or suggests by its physical characteristics, name, labeling, ingredient statement, or advertising that it contains fruit or vegetable juice, be labeled in a manner that is appropriate to advise the consumer that the product is less than 100 percent juice. [Title 21 (Food and Drug), Chapter 9 (Federal Food, Drug, and Cosmetic Act), Subchapter IV (Food) 21 U.S.C. ss. 341; 343 (January 24, 2002)]; [21 C.F.R. Ch. 1, ss. 101.30; 102.5; 102.33, 146.114-146.187; 156.3; 156.145 (4-1-06)]. Examples of taxable beverages include: apple blend, cranberry juice cocktail, grape juice beverage, lemonade, limeade, orangeade, raspberry and cranberry flavored drink, fruit drink, fruit punch, diluted fruit juices, and diluted vegetable juices.

(e) Tea sold in a liquid form.

(6) VENDING MACHINES AND MOBILE VENDORS. Food products sold through a vending machine, push cart, motor vehicle, or any other form of vehicle are subject to tax. Drinking water in bottles, cans, or other containers sold through a vending machine, push cart, motor vehicle, or any other form of vehicle is exempt. See Rule 12A-1.044, F.A.C., for sales through vending machines.

(7) WATER AND ICE.

(a) Drinking water, including water enhanced by the addition of minerals, sold in bottles, cans, or other containers is exempt, except when carbonation or flavorings have been added to the water in the manufacturing process. When carbonation or flavorings are added to drinking water at a water treatment facility, the sale of the drinking water in bottles, cans, or other containers remains exempt.

(b) The sale of ice, including dry ice, is subject to tax, except when the ice is purchased for use as a packaging material to package food products for sale. See Rule 12A-1.040, F.A.C., for provisions for packaging materials.

(c) Fluoride used in the treatment of drinking water is exempt.

(d) Germicides (such as chlorine), sodium silicate, activated charcoal, and similar purification agents used in the treatment of drinking water are exempt.

(e) The charge for water conditioning (water softening) is not subject to tax. The sale of salt for use in water softeners to regenerate the minerals required for softening water is not the sale of a purification agent used in the treatment of drinking water and is subject to tax. Dealers must pay tax on items used to provide water conditioning to their customers, such as minerals, tanks, equipment, and other materials.

(8) COMPLIMENTARY AND DONATED FOOD PRODUCTS.

(a) 1. Dealers that primarily sell food products at retail are not subject to sales or use tax on any food or drink provided without charge as a sample or for the convenience of customers, even when cooked or prepared on the dealer's premises. For example, hot coffee provided in a grocery store for shoppers is not subject to sales or use tax.

2. Dealers that primarily sell food products at retail are not subject to sales or use tax on any item given to a customer as part of a price guarantee plan related to point-of-sale errors.

3. The exemption, as provided in this paragraph, does not apply to businesses whose primary activity is to serve prepared meals or alcoholic beverages for immediate consumption.

(b) Dealers that sell food products at retail are not subject to sales or use tax on any food product donated to a food bank or to an organization determined to be currently exempt from federal income tax pursuant to s. 501(c) of the Internal Revenue Code of 1986, as amended.

(9) FOOD STAMPS AND VOUCHERS.

(a) Food products are exempt when purchased with food stamps issued by the United States Department of Agriculture, or with Special Supplemental Food Program for Women, Infants, and Children (WIC) vouchers issued under authority of federal law.

(b) When a purchase of food products is made partly with food stamps or vouchers and partly with cash or manufacturer's coupons, the food stamps or vouchers will first be used to defray the cost of the taxable food and drinks, less the value of any manufacturer's coupons, that can be purchased with the food stamps or vouchers. When the food stamps or vouchers are insufficient to purchase the taxable items, tax is due on the remaining sales price of taxable food and drinks.

Rulemaking Specific Authority 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented

212.02(14)(c), (20), 212.05(1)(a)1.a., 212.06(1)(a), 212.07(2), 212.08(1), (4)(a)1., (7)(oo), (pp);  
212.18(2) FS. History-Revised 10-7-68, 6-16-72, 9-28-78, 10-29-81, Formerly 12A-1.11,  
Amended 12-8-87, 1-2-89, 8-10-92, 6-19-01, 4-17-03,\_\_\_\_\_.

12A-1.0115 Sales of Food Products Served, Prepared, or Sold in or by Restaurants,  
Lunch Counters, Cafeterias, Hotels, Taverns, or Other Like Places of Business and by  
Transportation Companies.

(1) SCOPE.

(a) The purpose of this rule is to clarify the application of tax on food products generally served, prepared, or sold in or by restaurants, lunch counters, cafeterias, caterers, hotels, taverns, or other like places of business where food products are sold for immediate consumption on the seller's premises or packaged or wrapped and taken away from the seller's premises.

(b) Rule 12A-1.011, F.A.C., is intended to clarify the application of tax to the sale of food products generally sold by grocery stores, convenience stores, supermarkets, bakeries, fish markets, produce markets, and other like places of business, the sale of bakery products by bakeries, pastry shops, and like establishments, and the sale of drinking water or ice.

(2) FOOD PRODUCTS SERVED, PREPARED, OR SOLD IN OR BY  
RESTAURANTS OR SIMILAR PLACES OF BUSINESS.

(a) Food products served, prepared, or sold in or by restaurants, lunch counters, cafeterias, hotels, taverns, or other similar places of business are subject to tax.

(b) Food products that are furnished, prepared, or served for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware are subject to tax. The food products are subject to tax, even though the tables, chairs, or counters and the trays, glasses,

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furnish, prepare, or serve the food products to others.

(c) Food products that are ordinarily sold for immediate consumption on the seller's premises or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the location are subject to tax. The food products remain subject to tax even when the product is sold on a "take out" or "to go" basis and are packaged or wrapped and taken away from the dealer's facility. The customary practices prevailing at the dealer's facility will be used to determine whether a food product is sold for immediate consumption at the selling facility. The premises of a caterer, with respect to catered meals or beverages, is the place where such meals or beverages are served.

(d) Restaurants, lunch counters, cafeterias, hotels, taverns, or other like places of business that also maintain a separate department that includes groceries are not required to collect tax on tax-exempt sales of food products, as provided in Rule 12A-1.011, F.A.C., when separate records are maintained for the separate department; however, food products that are sold as prepared food through a separate department are subject to tax.

(3) VENDING MACHINES AND MOBILE VENDORS. Food products sold through a vending machine, push cart, motor vehicle, or any other form of vehicle are subject to tax. Drinking water in bottles, cans, or other containers sold through a vending machine, push cart, motor vehicle, or any other form of vehicle is exempt. See Rule 12A-1.044, F.A.C., for sales through vending machines.

(4) COUPONS, DISCOUNTS, AND DONATED FOOD PRODUCTS.

(a) When a dealer sells two meals for the price of one meal, the dealer is required to collect tax on the total amount charged. No tax is due on the second meal.

(b) The sale of a meal ticket or coupon book to be redeemed for the purchase of taxable food products is not subject to tax at the time of sale. When the ticket or coupon is redeemed by a customer, the seller is required to collect the tax on the total consideration received, including the value of the ticket or coupon redeemed and any additional compensation received by the seller.

(c) When the seller provides a customer taxable food products without charge after purchasing a designated number of taxable food products, tax is due on the sales price of the taxable food products sold. No tax is due on the item provided to the customer without charge. For example, a sandwich shop offers customers a coupon that will entitle the customer to receive a free sandwich after purchasing five sandwiches. When the customer's coupon indicates that the customer has purchased five sandwiches, the customer redeems the coupon for the free sandwich. The sandwich shop is required to collect tax on the sale of the first five sandwiches. No tax is due on the sandwich provided, without charge, to the customer, who has purchased the required five sandwiches.

(d) Dealers that sell food products at retail are not subject to tax on any food or beverage donated to a food bank or to an organization determined to be currently exempt from federal income tax pursuant to s. 501(c) of the Internal Revenue Code of 1986, as amended.

(5) FOOD PRODUCTS SOLD OR FURNISHED BY RESTAURANTS OR SIMILAR PLACES OF BUSINESS TO EMPLOYEES.

(a) Food products furnished by an employer to its employees are not subject to tax, provided no cash changes hands as payment for the food products furnished and the assigned value of the food products is not required to be reported as income to the employee for federal income tax purposes.

(b) Food products sold by a restaurant to its employees are subject to tax.

(c) Food products consumed by the owner and his family are not subject to sales tax.

(6) TRANSPORTATION COMPANIES.

(a) Food products sold ready for immediate consumption by airlines, railroads (except Amtrak), vessels, or other transportation companies to their passengers, while within Florida, are subject to tax. A transportation company may extend a copy of its Annual Resale Certificate to the selling dealer instead of paying tax on the purchase of food products ready for immediate consumption for purposes of resale to its passengers.

(b)1. Transportation companies, except Amtrak, are required to pay tax on their purchases of meals and food products ready for immediate consumption when:

a. The food products are delivered to the transportation company in this state, whether consumed in this state or outside this state;

b. The food products are furnished to the passengers; and

c. There is no separately itemized charge to the passenger for the food product.

2. For the partial exemption available to airlines, see Section 212.0598, F.S. For the partial exemption available to vessels engaged in interstate or foreign commerce under Section 212.08(8), F.S., see Rule 12A-1.0641, F.A.C.

(c) The purchase or sale of food products ready for immediate consumption by Amtrak, an instrumentality of the United States government, is not subject to tax.

(7) GRATUITIES.

(a) Any charge made by a dealer to a customer for gratuities, tips, or similar charges is a part of the taxable sales price of the food or drinks except when:

1. The charge is separately stated as a gratuity, tip, or other charge on the customer's

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2. The dealer receives no monetary benefit from the gratuity. Money withheld by the dealer for purposes of payment of the employee's share of social security or federal income tax or any fee imposed by a credit card company on the amount of the gratuity, or money withheld pursuant to judicial or administrative orders, is not a monetary benefit for purposes of this rule.

(b) The charge for room service made by hotels for serving meals in guests' rooms is included in the total price of the meal and is subject to tax.

(c) Service charges, minimum charges, corkage fees, setup fees, or similar charges imposed by a restaurant, tavern, nightclub, or other like place of business as part of the charge for furnishing, serving, or preparing food products are subject to tax.

(d) The charge for the preparation of food products furnished by the customer to the preparer is subject to tax, whether prepared for immediate consumption on the preparer's premises or for consumption off the premises.

(8) FOOD OR DRINKS FURNISHED WITH LIVING OR SLEEPING ACCOMMODATIONS.

(a) Food or drinks served or sold at community colleges, junior colleges, and other institutions of higher learning, or at fraternities and sororities, are subject to tax. If a lump sum amount is charged by the institution for living or sleeping accommodations and meals, a portion of the lump sum amount must be allocated to the sale of food or drinks to reasonably reflect the value of the food or drinks. Tax is due on the portion that is reasonably allocated to the sale of the food or drinks.

(b)1. Public lodging establishments that advertise that they provide complimentary food and drinks are not required to pay sales or use tax on food or drinks when:

- a. The food or drinks are furnished as part of a packaged room rate;
  - b. No separate charge or specific amount is stated to the guest for such food or drinks;
  - c. The public lodging establishment is licensed with the Division of Hotels and Restaurants of the Department of Business and Professional Regulation; and
  - d. The public lodging establishment rents or leases transient accommodations that are subject to sales and use tax.
2. The public lodging establishment may extend a copy of its Annual Resale Certificate to the selling dealer to purchase food and drinks used for this purpose tax-exempt, as provided in Rule 12A-1.039, F.A.C.

(9) DAY NURSERIES AND CUSTODIAL CAMPS. Day care facilities, nurseries, kindergartens, day camps, and custodial camps that primarily provide professional and personal supervisory and instructional services are not required to collect tax on their charges to the students or campers for providing food or drinks as part of their services. However, when the charges for furnishing food or drinks are separately itemized and separately priced to the student or camper, tax is required to be collected on the sales price of food or drinks.

(10) MEALS SERVED AT LABOR CAMPS.

(a) Labor camps and commercially operated public housing quarters are operated to house and feed workers on a contract basis. The provisions of this subsection are intended to provide the taxability of the housing and meals provided to workers under such contracts.

(b) When the contract provides for meals, and no housing is furnished under the contract, the charge for the meals is subject to tax.

(c)1. When the contract provides for housing and meals for the workers, the charge for meals is subject to tax.

2. When the contract provides for housing for the workers, but the workers buy groceries and prepare their own meals, no tax is due on the prepared meals.

(d) Workers residing in public housing quarters or labor camps may enter into agreements under which one worker is appointed to purchase groceries and prepare all meals. The worker may be selected and directed by the group of workers or may be designated and directed by the employer. The employer may deduct from each employee's wages the pro rata share of the groceries purchased for the group or a contracted charge for the meals prepared and served by the employer's designated cook.

1. When the employees select the designated worker to purchase groceries and prepare meals, no tax is due on the amount deducted by the employer for each employee's pro rata share of the cost of the groceries purchased by the designated worker.

2. When the employer selects the worker to be the designated cook who prepares all meals, tax is due on the amount deducted from the employee's wages by the employer for the meals.

#### (11) HOSPITALS AND HOMES FOR THE AGED.

(a) Meals furnished to residents of homes for the aged, as defined in Section 212.08(7)(i), F.S., are exempt.

(b) Meals furnished to patients and inmates of any hospital or other institution designed and operated primarily for the care of persons who are ill, aged, infirm, mentally or physically incapacitated, or for any reason dependent upon special care or attention are exempt.

(c) Meals sold and delivered as a charitable function by a nonprofit volunteer organization to handicapped, elderly, or indigent persons at their residences are exempt.

#### (12) NONPROFIT ORGANIZATIONS; SOCIAL OR CIVIC CLUBS.

(a) Food or drinks sold at fundraisers and similar types of events are subject to tax, unless such sales qualify as occasional sales, as provided in Rule 12A-1.037, F.A.C.

(b) Organizations that hold a valid Florida Consumer's Certificate of Exemption may extend a copy of their certificate to purchase meals and beverages used in the normal nonprofit activities of the organization tax-exempt.

(c) Food or drinks sold by a religious institution that holds a valid Florida Consumer's Certificate of Exemption and has an established physical place for worship at which nonprofit religious services and activities are regularly conducted and carried on are exempt.

(d) Food or drinks served or sold to or by social, civic, and similar organizations are subject to tax.

(e) When charges for meals and beverages to members of an organization are separately itemized and priced from the dues for membership, the charges for meals and beverages are subject to tax. If the organization indicates on its dues invoices, membership billing statements, dues notices, or membership applications that a specified portion of the dues payment is attributed to the furnishing of meals and beverages, the specified portion attributed to the furnishing of the meals and beverages is subject to tax.

Rulemaking Authority 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented 212.02(14)(c), (20), 212.05(1)(a)1.a., 212.06(1)(a), 212.07(1)(b), (2), 212.08(1), (4)(a)1., (6), (7), (7)(i), (k), (m), (oo), (pp), 212.18(3)(c), and 213.37 FS. History-New \_\_\_\_\_.

12A-1.071 Rentals, Leases, or License to Use Tangible Personal Property.

(1) through (36) No change.

~~(37) The charge for water conditioning (soft water service) is exempt. The dealer shall pay tax on the acquisition of tanks, minerals, and other equipment used in furnishing such service, unless such materials and supplies are actually sold to the customer.~~

(38) through (47) renumbered (37) through (46) No change.

Rulemaking Specific Authority 212.17(6), 212.18(2), 213.06(1) FS. Law Implemented 212.02(1), (4), (10)(g), (12), (14)(a), (15)(a), (16), (19), 212.04, 212.05(1)(c), (d), (f), (h), (i), 212.06(1)(a), (2)(e), (8), 212.08(7)(e), (f), (v), (y), 212.11(2), (3), 212.12(9), 212.18(2), 402.61 FS. History-Revised 10-7-68, 1-7-70, 6-16-72, Amended 12-11-74, 12-31-81, 7-20-82, Formerly 12A-1.71, Amended 1-2-89, 10-5-92, 11-16-93, 8-15-94, 10-17-94, 3-20-96, 8-1-02, 6-12-03, 9-28-04,\_\_\_\_\_.

12A-1.097 Public Use Forms.

(1) No change.

Form Number	Title	Effective Date
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(2) through (14) No Change.

(15)(a) <del>DR-46B</del>	<del>Sales Tax Status of Some Nonalcoholic Preparations, Beverages and Drinks When Sold In Grocery Stores and Similar Establishments</del>	
	(r. 10/89)	08/92

~~(b)~~ No change.

(16) through (23) No change.

Rulemaking Specific Authority 201.11, 202.17(3)(a), 202.22(6), 202.26(3), 212.0515(7), 212.07(1)(b), 212.08(5)(b)4., (7), 212.11(5)(b), 212.12(1)(b)2., 212.17(6), 212.18(2), (3), 213.06(1), 376.70(6)(b), 376.75(9)(b), 403.718(3)(b), 403.7185(3)(b), 443.171(2), (7) FS. Law Implemented 92.525(1)(b), (3), 95.091, 125.0104, 125.0108, 201.01, 201.08(1)(a), 201.133, 201.17(1)-(5), 202.11(2), (3), (6), (16), (24), 202.17, 202.22(3)-(6), 202.28(1), 203.01, 212.02, 212.03, 212.0305, 212.031, 212.04, 212.05, 212.0501, 212.0515, 212.054, 212.055, 212.06, 212.0606, 212.07(1), (8), (9), 212.08, 212.084(3), 212.085, 212.09, 212.096, 212.11(1), (4), (5), 212.12(1), (2), (9), (13), 212.13, 212.14(4), (5), 212.17, 212.18(2), (3), 213.235, 213.29, 213.37, 219.07, 288.1258, 376.70, 376.75, 403.717, 403.718, 403.7185, 443.036, 443.121(1), (3), 443.131, 443.1315, 443.1316, 443.171(2), (7) FS. History-New 4-12-84, Formerly 12A-1.97, Amended 8-10-92, 11-30-97, 7-1-99, 4-2-00, 6-28-00, 6-19-01, 10-2-01, 10-21-01, 8-1-02, 4-17-03, 5-4-03, 6-12-03, 10-1-03, 9-28-04, 6-28-05, 5-1-06, 4-5-07, 1-1-08, 4-1-08, 6-4-08, 1-27-09, 9-1-09,\_\_\_\_\_.