

ILLINOIS REGISTER
DEPARTMENT OF REVENUE
NOTICE OF PROPOSED AMENDMENTS

- 1) Heading of the Part: Retailers' Occupation Tax

- 2) Code Citation: 86 Ill. Adm. Code 130

- 3) Section Number: Emergency Action:
130.310 Amendment

- 4) Statutory Authority: 35 ILCS 120/12; 20 ILCS 2505/2505-795

- 5) Effective Date of Emergency Rule:

- 6) If this Emergency Amendment is to expire before the end of the 150-day period, please specify the date on which it is to expire: The Emergency Amendment expires 180 days after the effective date. Pursuant to Section 900-5 of P.A. 101-0027, Section 5-45 of the Illinois Administrative Procedure Act is amended to provide that the Department of Revenue may adopt emergency rules to implement the Cannabis Regulation and Tax Act and the rules are effective for 180 days. 5 ILCS 100/5-45(gg).

- 7) Date filed with the Index Department:

- 8) A copy of the emergency amendment, including any material incorporated by reference, is on file in the agency's principal office and is available for public inspection.

- 9) Reason for Emergency: P.A. 101-0027 enacted the Cannabis Regulation and Tax Act. The Act permits the sale of cannabis to adults for personal use. The sale of adult cannabis is subject to the Retailers' Occupation Tax. The Emergency Amendment clarifies the correct rate of Retailers' Occupation Tax to be imposed on cannabis sold to adults by cannabis dispensaries beginning January 1, 2020. P.A. 101-0593, effective December 4, 2019. In order to provide for the expeditious and timely implementation of the Cannabis Regulation and Tax Act and P.A. 101-0027, the Department of Revenue is authorized to adopt emergency rules. The adoption of emergency rules authorized by P.A. 101-0027 is deemed to be necessary for the public interest, safety, and welfare. See Section 900-5 of P.A. 101-0027 and 5 ILCS 100/5-45(gg).

- 10) A Complete Description of the Subjects and Issues Involved: P.A. 101-0593 amends Section 2-10 of the Retailers' Occupation Tax Act. The amendments to Section 2-10 clarify that that food consisting of or infused with adult use cannabis is taxed at the general merchandise rate of 6.25%, not the 1% rate imposed on food for human consumption that is to be consumed off the premises where it is sold. "Adult use cannabis" is defined as cannabis subject to tax under the Cannabis Cultivation Privilege Tax Law and the Cannabis Purchaser Excise Tax Law and does not include cannabis subject to tax under the Compassionate Use of Medical Cannabis Program Act.
- 11) Are there any proposed rulemakings to this Part pending? Yes

| <u>Section Numbers</u> | <u>Proposed Actions</u> | <u>Illinois Register Citations</u> |
|------------------------|-------------------------|---------------------------------------|
| 130.330 | Amendment | 43 Ill. Reg. 13190; November 15, 2019 |
| 130.1957 | New Section | 43 Ill. Reg. 13190; November 15, 2019 |
| 130.425 | Amendment | 44 Ill. Reg. 485; January 10, 2020 |
| 130.455 | Amendment | 44 Ill. Reg. 485; January 10, 2020 |

- 12) Statement of Statewide Policy Objectives: This rulemaking neither imposes a State mandate, nor modifies an existing mandate.
- 13) Information and questions regarding this Emergency Amendment shall be directed to:

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 Illinois Department of Revenue
 101 West Jefferson
 Springfield, Illinois 62794

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The full text of the Emergency Amendment begins on the next page:

Section 130.310 Food, Soft Drinks and Candy
EMERGENCY

- a) Food. *With respect to food for human consumption that is to be consumed off the premises where it is sold (other than alcoholic beverages, food consisting of or infused with adult use cannabis, soft drinks, candy and food that has been prepared for immediate consumption), the tax is imposed at the rate of 1%. Food for human consumption that is to be consumed off the premises where it is sold includes all food sold through a vending*

machine, except soft drinks, candy, and food products that are dispensed hot from a vending machine, regardless of the location of the vending machine. (Section 2-10 of the Act) Public Acts 96-34, 96-37 and 96-38 included changes to the definition of soft drinks and provided that candy is not considered "food for human consumption that is to be consumed off the premises where it is sold". For further information on the definition and taxation of soft drinks, see subsection (d)(6). For further information regarding the definition and taxation of candy, see subsection (d)(7).

b) The manner in which food is taxed depends upon 2 distinct factors that must both be considered in determining if food is taxed at the high rate as "food prepared for immediate consumption" or the low rate as "food prepared for consumption off the premises where sold".

1) The first factor is whether the retailer selling the food provides premises for consumption of food. If so, a rebuttable presumption is created that all sales of food by that retailer are considered to be prepared for immediate consumption and subject to tax at the high rate. As a result of this presumption, even bulk food could potentially be taxable at the high rate. However, this presumption is rebutted if a retailer demonstrates that:

A) the area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and

B) the retailer has a separate means of recording and accounting for collection of receipts from sales of both high and low rate foods. For purposes of this subsection (b)(1)(B), the phrase "separate means of recording and accounting for collection of receipts" includes cash registers that separately identify high rate and low rate sales, separate cash registers, and any other methods by which the tax on high and low rate sales are recorded at the time of collection.

2) The second factor is the nature of the food item being sold. As provided in subsection (c), some foods, such as hot foods, are always considered to be "food prepared for immediate consumption", and thus subject to the high rate of tax.

3) Numerous examples applying these factors to different types of food and food retailers are provided in subsection (d)(4)(A)-(I).

c) Definitions

1) "Food". Food is any solid, liquid, powder or item intended by the seller primarily for human internal consumption, whether simple, compound or mixed, including foods such as condiments, spices, seasonings, vitamins, bottled water and ice.

2) "Food Prepared for Immediate Consumption". Food prepared for immediate consumption means food that is prepared or made ready by a retailer to be eaten without substantial delay after the final stage of preparation by the retailer.

A) Food prepared for immediate consumption includes, but is not limited to, the following:

- i) all hot foods, whether sold in a restaurant, delicatessen, grocery store, discount store, concession stand, bowling alley, vending machine or any other location. At a grocery store, hot foods subject to the high rate of tax include, but are not limited to, pizza, soup, rotisserie or fried chicken and coffee; other examples of food prepared for immediate consumption include popcorn or nachos sold at a movie concession stand; hot dogs sold by a street vendor; and hot precooked meals sold to customers, such as a Thanksgiving dinner. For purposes of this Section, "hot" means any temperature that is greater than room temperature;
- ii) sandwiches, either hot or cold, prepared by a retailer to the individual order of a customer;
- iii) salad, olive or sushi bars offered by a retailer at which individuals prepare their own salads (hot or cold);
- iv) all coffee, tea, cappuccino and other drinks prepared by a retailer for individual consumption, whether hot or cold, are subject to the high rate of tax;
- v) all food sold for consumption on the premises where sold.

B) "Food prepared for immediate consumption" does not include:

- i) doughnuts, cookies, bagels or other bakery items prepared by a retailer and sold either individually or in another quantity selected by the customer, provided they are for consumption off the premises where sold;
- ii) whole breads, pies and cakes prepared by a retailer, even when prepared to the individual order of a customer;
- iii) sandwiches that are prepared by a retailer and placed in a deli case or other storage unit;
- iv) cold salads, jellos, stuffed vegetables or fruits sold by weight or by quart, pint or other quantity by a retailer;
- v) cheese, fruit, vegetable or meat trays prepared by a retailer, either to the individual order of a customer or premade and set out for sale;
- vi) food items sold by a retailer that are not prepared or otherwise manufactured by that retailer, such as pre-packaged snacks or chips, unless these items will be consumed on the premises where sold (e.g., in a sandwich shop). For grocers, such items include, but are not limited to, fruits, vegetables, meats, milk, canned goods and yogurt. In addition, effective September 1, 2009, all sales of "candy", as defined in subsection (d)(7), are subject to the high rate of tax.

C) The provisions of subsection (c)(2)(B) are subject to the rebuttable presumption described in subsection (d). That is, the items listed in

subsection (c)(2)(B) are taxable at the low rate only if the retailer had a separate means of recording and accounting for high and low rate sales, and the retailer provides no on-premises facilities for consumption of the food or, if the retailer does provide such facilities, they are physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold.

3) "Premises". Premises is that area over which the retailer exercises control, whether by lease, contract, license or otherwise, and, in addition, the area in which facilities for eating are provided, including areas designated for, or devoted to, use in conjunction with the business engaged in by the vendor. Vendor premises include eating areas provided by employers for employees and common or shared eating areas in shopping centers or public buildings if customers of food vendors adjacent to those areas are permitted to use them for consumption of food products.

4) "Adult use cannabis." "Adult use cannabis" means cannabis subject to tax under the Cannabis Cultivation Privilege Tax Law and the Cannabis Purchaser Excise Tax Law and does not include cannabis subject to tax under the Compassionate Use of Medical Cannabis Program Act. (Section 2-10 of the Act)

d) Test to Determine Applicable Rate. The rate at which food is taxable is determined as follows:

1) If retailers provide seating or facilities for on-premises consumption of food, all food sales are presumed to be taxable at the high rate as "food prepared for immediate consumption". However, this presumption can be rebutted by evidence that:

A) the area for on-premises consumption is physically separated or otherwise distinguishable from the area where food not for immediate consumption is sold; and

B) the retailer utilizes a means of recording and accounting for collection of receipts from the sales of food prepared for immediate consumption (high rate) and the sales of food that are not prepared for immediate consumption (low rate).

2) If a retailer does not provide seating or facilities for on-premises consumption of food, then the low rate of tax will be applied to all food items except for "food prepared for immediate consumption by the retailer" as provided in subsection (b) and soft drinks, candy and alcoholic beverages. However, in order for the low rate of tax to apply, retailers that sell both food prepared for immediate consumption and food for consumption off the premises where sold must utilize means of recording and accounting for collection of receipts from the sales of food prepared for immediate consumption (high rate) and the sales of food that are not prepared for immediate consumption (low rate). If these receipts are not maintained, all sales will be presumed to be at the high rate of tax.

3) Illustration C is a decision tree to assist in making high rate/low rate determinations.

4) Examples:

- A) Grocery Store – On-premises Facilities for Consumption of Food. Provided that the requirements of subsection (d)(1) are met, examples of high rate items include, but are not limited to, hot foods (soup, pizza, rotisserie or fried chicken, stuffed potatoes, hot dogs); all sandwiches, either hot or cold, that are prepared to the individual order of a customer; salads prepared by customers at a salad/olive/sushi bar; and all food sold for consumption on the premises. Also included are hot precooked meals sold to customers, such as a Thanksgiving dinner; however, if precooked meals are sold in an unheated state of preparation, they are considered to be low rate. Meal packages sold by a grocer (e.g., 2 or more pieces of fried chicken with choice of two sides and dinner rolls sold at one price) that include at least 1 hot food item are taxable at the high rate, even if some foods in the package, sold alone, would be taxable at the low rate. Low rate items would include, but are not limited to, doughnuts (regardless of quantity), bagels, rolls and whole breads or bakery items prepared by the retailer; sandwiches that are premade by the retailer and set out for sale to customers; cold pizzas prepared by the retailer and set out for sale to customers; stuffed olives or peppers prepared by the retailer and set out for sale in individual sized containers; and deli items sold by the retailer to customers by size or weight (prepared salads, e.g., potato, pasta, bean or fruit salads; jello; pudding; stuffed olives).
- B) Grocery Store – No On-premises Facilities for Consumption of Food. Provided that the requirements of subsection (d)(2) are met, examples of high rate items would include, but are not limited to, hot foods (soup, pizza, rotisserie or fried chicken, hot dogs); all sandwiches, either hot or cold, that are prepared to the individual order of a customer; and salads that are made by customers at a salad/olive/sushi bar. In addition, effective September 1, 2009, all sales of "candy", as defined in subsection (d)(7), are subject to the high rate of tax. Also included are hot precooked meals sold to customers, such as a Thanksgiving dinner. If precooked meals are sold in an unheated state of preparation, however, they are considered to be low rate. Low rate items would include, but are not limited to, doughnuts (regardless of quantity), bagels, rolls and whole breads or bakery items prepared by the retailer; sandwiches that are premade by the retailer and set out for sale to customers; cold pizzas prepared by the retailer and set out for sale to customers; stuffed olives or peppers prepared by the retailer and set out for sale in individual sized containers; and deli items sold by the retailer to customers by size or weight.
- C) Restaurants and Cafeterias. All foods sold by a restaurant or a cafeteria are considered food prepared for immediate consumption. Such food can either be prepared to the individual order of a customer or premade and set out for selection by the customer. However, if a restaurant or cafeteria also sells whole pies, cakes or individual pastries for sale, these items are taxable at the low rate, as long as the requirements of subsection (d)(1) are met.
- D) Bakery. Provided that the requirements of either subsection (d)(1) or (d)(2) are met, the following items are taxable at the low rate: doughnuts, cookies or individual pastries, regardless of quantity, sold for consumption off the

premises where sold, and whole cakes or pies, such as wedding or special occasion cakes. Food sold for consumption on the premises, such as doughnuts and coffee, are subject to the high rate of tax.

- E) Delicatessen. Provided that the requirements of either subsection (d)(1) or (d)(2) are met, meat, cheese and prepared salads sold by weight or volume are taxable at the low rate. Individual sandwiches prepared to the individual order of a customer are high rate, as well as other food sold for consumption on the premises.
 - F) Ice Cream Store. Ice cream items in individual sizes, either prepared to the individual order of a customer or premade and offered for sale by a retailer, constitute "food prepared for immediate consumption" and are subject to the high rate of tax. These items include ice cream cones, cups of ice cream, sundaes, shakes and premade ice cream sandwiches, bars or cookies. However, provided that the requirements of either subsection (d)(1) or (d)(2) are met, ice cream cakes or rolls or ice cream packaged in premeasured containers, such as a pint, quart or gallon, are subject to tax at the low rate.
 - G) Food Sold at Food Courts. All hot food and food prepared to the individual order of a customer by a retailer at a food court is subject to the high rate of tax. In addition, all other food sold for consumption on the premises of a food court is subject to the high rate of tax.
 - H) Convenience Stores. Provided that the requirements of either subsection (d)(1) or (d)(2) are met, prepackaged food items not prepared by a convenience store retailer are subject to the low rate of tax. These items include, but are not limited to, chips, snacks, bread products and cookies. The sale of hot food items, such as hot dogs, nachos or pretzels, are subject to the high rate of tax, as well as other food sold for consumption on the premises. In addition, effective September 1, 2009, all sales of "candy", as defined in subsection (d)(7), are subject to the high rate of tax.
 - I) Coffee Shops. Provided that the requirements of either subsection (d)(1) or (d)(2) are met, coffee, latte, cappuccino and tea (prepared either hot or cold) and food sold for consumption on the premises (e.g., pastries, cookies, snacks) are subject to the high rate of tax. Bulk coffees (beans or grounds, for instance) and teas, or pastries that are not consumed on the premises, are subject to the low rate of tax.
- 5) Alcoholic Beverages. The reduced rate does not extend to alcoholic beverages. An alcoholic beverage is any beverage subject to the tax imposed under Article VIII of the Liquor Control Act of 1934 [235 ILCS 5/Art. VIII].
 - 6) Soft Drinks. The reduced rate does not extend to soft drinks. Soft drinks are taxed at the State sales tax rate of 6.25%. Soft drinks are taxable at the high rate regardless of the type of establishment where they are sold, e.g., a grocery store, restaurant or vending machine.
- A) Until September 1, 2009, the term "soft drinks" means any *complete, finished, ready-to-use, non-alcoholic drink, whether carbonated or not*,

including but not limited to soda water, cola, fruit juice, vegetable juice, carbonated water, and all other preparations commonly known as soft drinks of whatever kind or description that are contained in any closed or sealed bottle, can, carton, or container regardless of size. "Soft drinks" does not include coffee, tea, non-carbonated water, infant formula, milk or milk products as defined in Section 3(a)(2) and (4) of the Grade A Pasteurized Milk and Milk Products Act [410 ILCS 635], or drinks containing 50% or more natural fruit or vegetable juice. (Section 2-10 of the Act) Frozen concentrated fruit juice, dry powdered drink mixes and fruit juices that are reconstituted to natural strength are not soft drinks.

- B) *On and after September 1, 2009, the term "soft drinks" means non-alcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" do not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or greater than 50% of vegetable or fruit juice by volume. (Section 2-10 of the Act)*
- C) Natural and artificial sweeteners include, but are not limited to, corn syrup, high fructose corn syrup, invert sugar, dextrose, sucrose, fructose, lactose, saccharose, fruit juice concentrates, molasses, evaporated cane juice, rice syrup, barley malt, honey, Rebaudioside A (Reb A), erythritol, xylitol, aspartame, saccharin, acesulfame K, sucralose and sorbitol. Beverages that list in the ingredient list natural and/or artificial sweeteners including, but not limited to, those listed in this subsection (d)(6)(C), meet the definition of "soft drinks". (Note, for purposes of this Section, natural and artificial sweeteners do not include natural or artificial flavors.)
- D) Examples of soft drinks include, but are not limited to:
- i) soda pop;
 - ii) carbonated and noncarbonated water that contains natural or artificial sweeteners;
 - iii) root beer;
 - iv) sport or energy drinks;
 - v) sweetened tea or coffee (without milk or milk products; see subsection (d)(6)(E));
 - vi) non-alcoholic beer;
 - vii) fruit drinks containing 50% or less fruit juice; and
 - viii) "ready-to-use" non-alcoholic beverage mixers containing 50% or less vegetable or fruit juice by volume, e.g., ready-to-use margarita mixes.
- E) Examples of products that are not considered soft drinks include, but are not limited to:

- i) beverage powders or dry mixes;
 - ii) concentrates, e.g., frozen concentrate lemonade;
 - iii) ground or whole bean coffee and loose leaf tea or tea bags;
 - iv) carbonated and noncarbonated water that does not contain natural or artificial sweeteners;
 - v) carbonated and noncarbonated water that does not contain natural or artificial sweeteners but does contain natural or artificial flavor;
 - vi) vegetable or fruit juices containing greater than 50% vegetable or fruit juice, even if these beverages contain natural or artificial sweeteners;
 - vii) any drinks that contain milk or milk products, soy, rice or similar milk substitutes; and
 - viii) brewed unsweetened black coffee or tea. (Note, even though brewed unsweetened black coffee and tea are not considered soft drinks, hot coffee or hot tea, regardless of whether they contain natural or artificial sweeteners or milk or milk products, are subject to tax at the 6.25% rate because they are considered to be "food prepared for immediate consumption". (See subsection (c)(2)(A)(iv).))
- 7) Candy. On and after September 1, 2009, the reduced rate does not extend to "candy". Candy is taxed at the State sales tax rate of 6.25%.
- A) *"Candy" means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts or other ingredients or flavorings in the form of bars, drops, or pieces. "Candy" does not include any preparation that contains flour or requires refrigeration. (Section 2-10 of the Act) To meet the definition of candy, the item must be analyzed by using four factors, as explained in subsections (d)(7)(B) through (E).*
 - B) Flour: Products whose ingredient list contain the word "flour", regardless of the type of flour (e.g., wheat, rice) are not candy. A product does not contain flour unless the product label specifically lists flour as an ingredient. Ingredients such as soy or whey that may be used in place of, or as a substitute for, flour are not considered to be flour for purposes of determining if the item qualifies as candy unless they are specifically labeled as flour in the ingredient list.
 - i) Items that are not considered candy because they list flour as one of the ingredients on the label include, but are not limited to, certain licorice, certain candy bars, cookies and chocolate covered pretzels.
 - ii) Snack mixes that contain both candy and non-candy items, such as trail mix that contains products with flour or bags of individually wrapped candy bars in which some candy bars contain flour and

others do not, are not candy if the ingredient list on the bag lists flour as an ingredient of any of the items.

- C) Refrigeration: Items that require refrigeration are not considered to be candy. For example, popsicles and ice cream bars are not candy. Items that otherwise qualify as candy and do not require refrigeration are candy even if they are sold refrigerated or frozen, e.g., a candy bar that has been frozen. Merely suggesting that the product be refrigerated (e.g., to ensure product quality, please keep this package stored in a cool place, at or below 65°F) is insufficient to meet the refrigeration requirement.
- D) Sweeteners: Candy is limited to products that contain sugar, honey or other natural or artificial sweeteners. Examples of natural or artificial sweeteners include, but are not limited to, corn syrup, high fructose corn syrup, invert sugar, dextrose, sucrose, fructose, lactose, saccharose, fruit juice concentrates, molasses, evaporated cane juice, rice syrup, barley malt, honey, Rebaudioside A (Reb A), erythritol, xylitol, aspartame, saccharin, acesulfame K, sucralose, sorbitol.
- E) Bars, drops or pieces: Items must be in the form of bars, drops or pieces to be considered candy.
 - i) Examples of items that are not in the form of bars, drops or pieces and are not candy include, but are not limited to, jars of honey, syrups, peanut butter, preserves or jams, cans of fruit in syrup, cans or tubes of cake frosting and cereals.
 - ii) Examples of items that are in the form of bars, drops or pieces and are candy include, but are not limited to, sweetened cooking or baking bars or chips, sweetened coconut flakes, honey glazed peanuts, baking sprinkles, caramel-coated popcorn (does not include un-popped popcorn), artificially flavored candy mints, caramel or candied apples and almond bark.
- F) Examples of items that are considered candy (provided that they meet all the requirements of subsections (d)(7)(B) through (D)) include, but are not limited to:
 - i) chocolate bars, including sweet or semi-sweet bars or bits;
 - ii) chocolate molded items (e.g., bunny, snowman);
 - iii) chocolate covered or dipped strawberries, chocolate or carob covered raisins or nuts;
 - iv) chocolate covered potato chips;
 - v) chocolate covered bacon;
 - vi) caramel-coated popcorn (does not include un-popped popcorn), caramel apples, caramel corn or rice cakes;

- vii) almond bark, peanut brittle;
- viii) marshmallows;
- ix) breath mints;
- x) chewing gum;
- xi) fruit roll-ups;
- xii) glazed dried apricots;
- xiii) trail mixes that contain candy ingredients, e.g., sweetened nuts;
- xiv) granola bars;
- xv) any type of nut that is sweetened with any natural or artificial sweetener, e.g., if the ingredient list contains any natural or artificial sweetener.

G) Examples of items that are not considered candy because they do not meet the requirements of subsections (d)(7)(B) through (D) include, but are not limited to (note, if some of the items listed below, such as popcorn, are covered or dipped in chocolate, caramel or other candy coating, they may be considered candy):

- i) cakes, pies, cookies, pastry;
- ii) ice cream, ice cream bars, frozen yogurt, popsicles, hot fudge ice cream topping;
- iii) pretzels;
- iv) corn chips, potato chips, popcorn and beef jerky;
- v) chocolate milk, strawberry milk, fruit juice, soft drinks;
- vi) powdered hot chocolate cocoa mix and other drink mixes;
- vii) food coloring;
- viii) unsweetened chocolate;
- ix) cereals; and
- x) licorice and candy bars that contain flour as an ingredient.

8) Adult Use Cannabis. The reduced rate does not extend to adult use cannabis. All adult use cannabis (e.g., cannabis flower, concentrate, cannabis-infused products) is taxed at the State rate of 6.25%.

e) Reporting

- 1) The retailer must keep an actual record of all sales and must report tax at the applicable rates, based on sales as reflected in the retailer's records. Books and records must be maintained in sufficient detail so that all receipts reported with respect to food can be supported.
- 2) A retailer who finds it difficult to maintain detailed records of receipts from sales of food at the reduced rate, as well as detailed records of receipts from all other sales of tangible personal property at the full rate, may request the use of a formula. The request must be made to the Department in writing, must state the reasons that a formula method is necessary, and must outline the proposed formula in detail. Included in the request must be a description of how the method can be audited by the Department. Upon a finding that the formula can be audited and will produce results that will reasonably approximate the actual taxable receipts in each category, the Department may issue its approval for use of the formula. If approval is granted, the Department reserves the right to withdraw approval or require a change in procedure at any time.

(Source: Emergency amendment at 44 Ill. Reg 552, effective January 10, 2020, for a maximum of 180 days.