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COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF REVENUE



February 29, 2000

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Mr. Robert E. Nyce  
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Independent Regulatory  
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Fourteenth Floor  
Harristown 2  
333 Market Street  
Harrisburg, PA 17101

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Dear Mr. Nyce:

Enclosed please find the Department of Revenue's draft final form regulation relating to vending machines.

We would appreciate it if you could convey your comments to this office by March 28, 2000. Comments received by this date will be considered in the drafting of the final form regulation.

Thank you for your anticipated input and assistance in promulgating this regulation.

Sincerely,

A handwritten signature in cursive script that reads 'Douglas A. Berguson'.

Douglas A. Berguson  
Senior Assistant Counsel

Enclosure

DAB:AMD:tlch

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FACE SHEET  
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Copy below is hereby approved as to form and legality. Attorney General

By: \_\_\_\_\_  
(DEPUTY ATTORNEY GENERAL)

\_\_\_\_\_  
DATE OF APPROVAL

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attached.

Copy below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:

PA Department of Revenue

\_\_\_\_\_  
(Agency)

Document/Fiscal Note No. \_\_\_\_\_

Date of Adoption: \_\_\_\_\_

By: \_\_\_\_\_

Robert A. Judge, Sr.  
Secretary of Revenue

Title: \_\_\_\_\_

(Executive Officer, Chairman or Secretary)

**DRAFT**

Copy below is hereby approved as to form and legality. Executive or Independent Agencies.

By: \_\_\_\_\_

\_\_\_\_\_  
Date of Approval

(Deputy General Counsel)  
(Chief Counsel, Independent Agency)  
(Strike inapplicable title)

Check if applicable. No Attorney  
General approval or objection  
within 30 days after submission

NOTICE OF FINAL RULEMAKING

DEPARTMENT OF REVENUE

61 Pa. Code § 31.28

Sales and Use Tax

Vending Machines

PREAMBLE

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The Department of Revenue (Department) under the authority contained in section 270 of the Tax Reform Code of 1971 (TRC) (72 P.S. § 7270), by this order amends 61 Pa. Code Chapter 31. Imposition, section 31.28 (relating to vending machines).

Purpose of Regulation

With the enactment of the act of April 23, 1998 (P.L. 239, No. 45) (Act 45), the sale of items that are considered taxable when sold from other noneating establishments are subject to tax when sold from vending machines. Vending machines were added to the list of establishments which are not considered to be establishments from which ready to eat food or beverages are sold. Since a vending machine does not qualify as an eating establishment, only the sale of selected food and beverage items as listed in section 204(29) of the TRC (72 P.S. § 7204(29)) are taxable when sold from a vending machine. Taxable tangible personal property, other than food and beverages, is also subject to tax when sold from a vending machine. The sale of candy and gum from a vending machine continues to be exempt.

Explanation of Regulatory Requirements

Subsection (a) defines "juice beverage," "meal," operator," "selected food and beverage items," "soft drink" and "vending machine" for purposes of this section. Subsection (b) relates to registration and provides that an operator who sells taxable tangible personal property or selected food and beverage items through a vending machine is required to obtain a sales, use and hotel occupancy tax license for the purpose of collecting and remitting tax to the Department.

Subsection (c) requires that a sign or sticker stating the name and address of the operator be conspicuously displayed on the vending machine. Subsection (d) explains the scope of taxation for the sale of tangible personal property and food or beverages from a vending machine.

Subsection (e) provides that the sale of selected food and beverage items dispensed by means of a vending machine located on the premises of a school or church is exempt from tax. The sale of tangible personal property other than food or beverages, dispensed by means of a vending machine located on the premises of a school or church, is subject to tax.

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Subsection (f) provides that sales tax collected by the operator upon taxable property, including selected food and beverage items, shall be reported and remitted to the Department. Subsection (g) explains the taxability of the purchase or lease of vending equipment and supplies.

Affected Parties

The regulation may affect vending machine operators.

Comment and Response Summary

Notice of proposed rulemaking was published at 29 Pa. B. 3738 (July 17, 1999). This proposal is being adopted with changes as set forth in Annex A.

The Department received no public comments. No comments were received from the House Finance Committee or the Senate Finance Committee. The Department received comments from the Independent Regulatory Review Commission (IRRC).

The amendments to the proposed rulemaking in response to the comments from IRRC are as follows:

(1) The Department's proposed definition of "soft drink" set forth in subsection (a) provided a simplistic definition; however, IRRC commented that the definition was not as complete as the definition set forth in section 201(a) of the TRC (72 P.S. §7201(a)). IRRC recommended that the Department include a citation to the statutory definition in the final form regulation.

The Department has amended the definition to incorporate the statutory definition; however, the wording of the statute was added because it was felt that the statutory citation would not provide sufficient guidance to the taxpayers utilizing the regulation. The Department intentionally did not reiterate all the items that the term "soft drink" does not include because the inclusion of these items could create confusion when read in conjunction with the definition of "selected food and beverage items." For example, coffee is excluded from the definition of "soft drink" yet is taxable as a hot beverage under "selected food and beverage items."

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(2) In reading the definition for "selected food and beverage items," IRRC indicated that the Department should clarify whether the microwavable items sold are taxable if an operator does not provide a microwave. The Department agrees with IRRC's comment and has amended subsection (d)(4)(ii)(N), which provides examples of exempt food and beverages, to include cold food for which heating facilities are not provided.

(3) IRRC raised two concerns regarding subsection (d)(2) relating to sales of taxable property other than food and beverages. The subsection provides that the operator of a vending machine can display a sign or sticker indicating the purchase price and amount of tax for each taxable item. IRRC indicated that the Department should clarify whether the posting of such information was optional or mandatory. IRRC also noted that paragraphs (2) and (3) address the requirements for taxing certain items but were not structured in a consistent manner.

To address these concerns, the Department reformatted paragraph (2) to parallel the structure of paragraph (3). In addition, the Department reworded the provision and added an example to clarify that the displaying of a sign or sticker with the purchase price and tax is optional.

(4) IRRC identified an error in the proposal in subsection (d)(4)(ii)(I), which lists juice drinks as an item that is not taxable when sold from a vending machine. The listing should have referenced juice beverages. The Department made the correction in the final form regulation.

(5) The listing of items that are not taxable when sold from a vending machine in subsection (d)(4)(ii) includes prepackaged from water-based products. For clarity, IRRC suggested the Department should provide examples of these products. The Department agrees with IRRC's suggestion and amended the clause accordingly.

(6) Proposed subsection (e)(1) provided that, "Sales of selected food and beverage items dispensed by means of a vending machine located on the premises of a school or church are exempt from tax, if the sales are made in the ordinary course of the activities of the school or church." IRRC questioned when sales would not be considered in the ordinary course of the church or school's activities. The Department reviewed this provision and

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concluded that the wording "if the sales are made in the ordinary course of the activities of the school or church" is not necessary and deleted it from the final form regulation.

During its internal review of the regulation, the Department made stylistic changes throughout the regulation for clarity and consistency.

#### Fiscal Impact

The Department determined that the amendments will have no fiscal impact on the Commonwealth. Rather, the amendments clarify the Department's policy on the taxation of items dispensed from a vending machine.

However, the change in policy required by the Commonwealth Court decision in CRH Catering Co., Inc. v. Commonwealth, 539 A.2d 38 (Pa. Cmwlth. 1988) has had a negative impact on revenue. The policy has been in effect since the 1988-89 fiscal year. The fiscal impact of the change in policy was estimated to be about \$0.4 million for fiscal year 1998-99.

This regulation also sets forth the Department's interpretation of Act 45 which amended section 209(29) of the TRC relating to sales tax on sales from vending machines. This amendment is estimated to reduce the fiscal year 1999-00 (the first full year of revenue loss) General Fund by \$15.4 million.

#### Paperwork

The amendments will not require additional paperwork for the public or the Commonwealth.

#### Effectiveness/Sunset Date

The amendments will become effective upon final publication in the Pennsylvania Bulletin. The regulation is scheduled for review within five years of final publication. No sunset date has been assigned.

#### Contact Person

The contact person for an explanation of the amendments is Anita M. Doucette, Office of Chief Counsel, PA Department of Revenue, Dept. 281061, Harrisburg, Pennsylvania 17128-1061.

Regulatory Review

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Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on June 30, 1999, the Department submitted a copy of the notice of proposed rulemaking, published at 29 Pa.B. 3738, to IRRC and the Chairpersons of the House Committee on Finance and the Senate Committee on Finance for review and comment. In compliance with section 5(c) of the Regulatory Review Act (71 P.S. § 745.5(c)), the Department also provided IRRC and the Committees with copies of all comments received, as well as other documentation.

In preparing these final-form regulations, the Department has considered the comments received from IRRC, the Committees and the public.

These final-form regulations were (deemed) approved by the Committees on \_\_\_\_\_ and were (deemed) approved by IRRC on \_\_\_\_\_, in accordance with section 5.1(e) of the Regulatory Review Act (71 P.S. § 745.5a(e)).

Findings

The Department finds that:

(1) Public notice of intention to amend the regulations has been duly given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The amendments are necessary and appropriate for the administration and enforcement of the authorizing statute.

Order

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 61 Pa. Code, are amended by amending Chapter 31. Imposition, section 31.28 to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

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(c) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the Pennsylvania Bulletin.

ROBERT A. JUDGE, SR.  
SECRETARY OF REVENUE

02/23/00



CONTINUATION SHEET  
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ANNEX A

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Title 61. Revenue, Part I. Department of Revenue, Subpart B.  
General Fund Revenues, Article II. Sales and Use Tax, Chapter  
31. Imposition.

§ 31.28. Vending machines [and automatic sales devices].

[(a) Vending or automatic sales. Tangible personal property otherwise taxable under the Sales and Use Tax Act (72 P.S. §§ 3403-1 - 3403-605) is taxable when dispensed by means of a vending machine or other automatic sale device.

(b) Identification requirement. Every machine used for the purpose of vending tangible personal property shall bear conspicuously thereon a sign or sticker setting forth the following information:

(1) The name and address of the owner of the merchandise contained within the machine and sold thereby.

(2) The charge made for the merchandise contained therein and sold thereby, indicating as separate items the charge made for the merchandise, the amount of tax imposed on the sale and the total amount of the sale including the tax.

(3) The Sales Tax License Number of the person liable for collection of the tax.

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(c) The sign or sticker required by this section may be reproduced by any method, but shall be clearly legible and prominently displayed.

(d) Where articles of more than one price are sold by the same machine, the sales price, tax and total amount charged shall be clearly shown for each article or group of articles having a different price.

Example: THE NAME AND ADDRESS OF THE OWNER OF THE MERCHANDISE CONTAINED IN AND SOLD BY THIS MACHINE IS:

Joseph J. Jones  
387 Parkside Drive  
Philadelphia 7, Pa.

SALES PRICE OF ARTICLE SOLD.....23 CENTS  
SALES TAX PAYABLE..... 2 CENTS  
TOTAL AMOUNT CHARGED.....25 CENTS  
SALES TAX LICENSE NUMBER.....

(e) Sales tax shall be paid by the vendor on the sale or use of food and beverages dispensed by means of a vending machine or other automatic sales device at the rate of 6% of the gross receipts collected from the machine under section 202(d) of the TRC (72 P.S. § 7202(d)). Thus, if the receipts from a machine total \$100, the amount of tax that is remitted to the Commonwealth by the vendor is \$6.]

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(a) Definitions. The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

Juice beverage - A liquid beverage containing at least 25% by volume natural fruit or vegetable juice.

Meal - A variety of foods prepared for immediate consumption and sold as a single item.

Operator - A person who makes sales of tangible personal property, including food or beverages, primarily through a vending machine.

Selected food and beverage items - Soft drinks; meals; hot or cold sandwiches, including cold meat sandwiches, cheese sandwiches, hoagies, hot dogs, hamburgers and similar sandwiches; brewed coffee; hot beverages such as hot chocolate, hot tea and similar items; food from salad bars; pizza, soup and other food items dispensed from the vending machine in a heated form or which are served in cold form and normally heated in an oven or microwave provided by the operator.

Soft drink -

(i) ~~A nonalcoholic beverage, in either powder or liquid form, whether or not carbonated, such as soda water, ginger ale, colas, root beer, flavored water, artificially carbonated water, orangeade, lemonade, juice drinks containing less than 25% by volume of natural fruit or vegetable juices, and similar drinks.~~

ALL NONALCOHOLIC BEVERAGES, WHETHER CARBONATED OR NOT, SUCH AS SODA

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WATER; GINGER ALE; COCA COLA; LIME COLA; PEPSI COLA; DR. PEPPER; FRUIT JUICE WHEN PLAIN OR CARBONATED WATER, FLAVORING OR SYRUP IS ADDED; CARBONATED WATER; ORANGEADE; LEMONADE; ROOT BEER OR ANY AND ALL PREPARATIONS, COMMONLY REFERRED TO AS "SOFT DRINKS" OF WHATSOEVER KIND, AND ARE FURTHER DESIGNATED AS INCLUDING ANY AND ALL BEVERAGES, COMMONLY REFERRED TO AS "SOFT DRINKS," WHICH ARE MADE WITH OR WITHOUT THE USE OF ANY SYRUP.

(ii) The term ~~does~~ SHALL not include a juice beverage.

Vending machine - A device which mechanically dispenses tangible personal property, including food and beverages, for a purchase price.

(b) Registration. An operator who sells taxable tangible personal property or selected food and beverage items through a vending machine is required to obtain a Sales, Use and Hotel Occupancy Tax License for the purpose of collecting and remitting tax to the Department. One license is sufficient for any number of machines operated by the same operator.

(c) Identification requirement. A sign or a sticker setting forth the name and address of the operator shall be conspicuously displayed on the vending machine.

(d) Scope.

(1) General. The sale of food or beverages FROM A VENDING MACHINE may be taxable or exempt depending upon the type of food or beverage or upon the basis of the location from which the food or beverage is sold. Since a vending machine does not qualify

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as an eating establishment, only the sale of selected food and beverage items as defined in subsection (a), is taxable when sold from a vending machine. Taxable tangible personal property, other than food and beverages, is also subject to tax when sold from a vending machine.

(2) Sales of taxable TANGIBLE PERSONAL property, other than SELECTED food and beverages BEVERAGE ITEMS.

(I) IMPOSITION. THE SALE OF TAXABLE TANGIBLE PERSONAL PROPERTY, SUCH AS CIGARETTES, COMBS, TOYS, PENCILS AND SIMILAR ITEMS IS SUBJECT TO TAX UPON THE PURCHASE PRICE OF EACH INDIVIDUAL ITEM.

(II) COLLECTION OF TAX. ~~As~~ THE VENDING MACHINE operator is required to collect and remit ~~Sales Tax~~ TAX upon the purchase price of each individual sale of taxable ITEM OF property, such as cigarettes, combs, toys and similar items. The amount required to be inserted in the machine is presumed to be the purchase price of each THE taxable item of property. THE OPERATOR MAY REBUT THIS PRESUMPTION, HOWEVER, BY DISPLAYING ~~unless the operator displays~~ a sign or sticker ON THE VENDING MACHINE WHICH SETS FORTH THAT PORTION OF THE AMOUNT REQUIRED TO BE INSERTED WHICH RELATES TO ~~indicating~~ the purchase price OF THE ITEM and ~~the amount of SALES tax for each taxable item.~~

EXAMPLE: "A" OPERATES A VENDING MACHINE FROM WHICH PENCILS MAY BE PURCHASED. TO OBTAIN A PENCIL, THE PURCHASER IS REQUIRED TO INSERT 35 CENTS INTO THE MACHINE. "A" MAY DISPLAY A

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SIGN OR STICKER ON THE VENDING MACHINE WHICH SETS FORTH THE FOLLOWING INFORMATION: PURCHASE PRICE - PENCIL = \$.33, TAX = \$.02. IF THE SIGN OR STICKER WERE NOT DISPLAYED ON THE VENDING MACHINE, THE PURCHASE PRICE OF THE PENCIL WOULD BE \$.35 AND SUBJECT TO A TAX IN THE AMOUNT OF \$.03.

(3) Sales of selected food and beverage items.

(i) Imposition. The sale of selected food and beverage items, as defined in subsection (a), from a vending machine is subject to tax UPON THE TOTAL RECEIPTS FROM THE SALE OF SUCH ITEMS.

(ii) Collection of tax. An operator of a vending machine from which selected food and beverage items are sold is required to collect and remit Sales Tax at the rate of 6% upon the sale of the selected food and beverage items. Sales Tax shall be computed by the following formula: (Total receipts from the sale of selected food and beverage items ÷ 1.06) x .06 = Sales Tax due.

Example:

"A" operates a vending machine from which milk, coffee and crackers are sold. "A" removes \$100 from the machine representing the following sales: milk-\$50, coffee-\$25 and crackers-\$25. Coffee is a selected food and beverage item. Milk and crackers are not. "A" remits tax in the amount of \$1.42 calculated as follows: (\$25 ÷ 1.06) x .06 = \$1.42.

(4) Sales of food and beverages other than selected food and beverage items.

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(i) The sale SALES of food and beverages of the type described in this paragraph are not subject to sales tax when sold from a vending machine.

(ii) Examples of exempt food and beverages include:

(A) Baked goods, such as cakes, pies, cookies.

(B) Potato chips.

(C) Corn chips.

(D) Cheese balls.

(E) Pretzels.

(F) Crackers.

(G) Milk products, such as plain milk, chocolate milk, malted milk.

(H) Ice tea and iced coffee.

(I) Juice ~~drinks~~ BEVERAGES.

(J) Unflavored water.

(K) Prepackaged ice cream products, such as ice cream cakes and pies, popsicles, sundaes and novelties.

(L) Prepackaged frozen water-based products, SUCH AS ICE POPS, FUDGE POPS, FRUIT ICE, BOMB POPS AND SIMILAR ITEMS.

(M) Candy and gum.

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(N) Other food and beverages not defined as a selected food and beverage item, INCLUDING COLD FOOD FOR WHICH HEATING FACILITIES ARE NOT PROVIDED.

(e) Vending machine sales on school or church property.

(1) Sales of selected food and beverage items dispensed by means of a vending machine located on the premises of a school or church are exempt from tax, if the sales are made in the ordinary course of the activities of the school or church.

(2) Sales of tangible personal property, other than food or beverages, which are dispensed by means of a vending machine located on the premises of a school or church, are subject to tax.

(f) Remitting tax to the Department. Sales tax collected by the operator upon THE SALE OF taxable TANGIBLE PERSONAL property, including selected food and beverage items, shall be reported and remitted to the Department.

[(f)](g) Purchase or lease of vending equipment and supplies.  
[Vending]

(1) The purchase or lease of vending equipment, including parts [and], accessories, [purchased for or used in connection therewith, shall be included within the scope of the definition of tangible personal property and the purchase thereof shall be] such as tables, chairs, microwaves, straw and napkin dispensers and other similar items, and supplies, such as straws,



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napkins, stirrers, eating utensils and similar items, is subject to tax.

(2) Wrapping supplies, such as plastic, paper and styrofoam cups, bowls or similar containers used to wrap property which is sold, are exempt from tax.

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