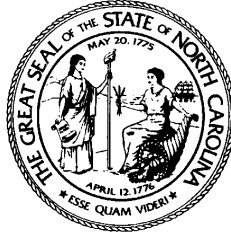

North Carolina Department of Revenue



DIRECTIVE

Subject: Prepared Food Sold to a College Student Attending an Institution of Higher Education
Tax: Sales and Use Tax
Law: N.C. Gen. Stat. § 105-164.4(a)(1)
N.C. Gen. Stat. § 105-164.13(27), *repealed eff. January 1, 2014*
Issued By: Sales and Use Tax Division
Date: December 9, 2013
Number: SD-13-1

Effective January 1, 2014, prepared food sold to a college student in a dining room, cafeteria, or similar establishment regularly operated by or on behalf of an institution of higher education in this State, including an institution of the University of North Carolina, a private institution of higher education, or by student organizations thereof, is subject to sales tax at the 4.75% general State and applicable local and transit rates of tax. Effective January 1, 2014, N.C. Gen. Stat. § 105-164.13(27), which provides an exemption from sales and use tax for the sale at retail and the use, storage, or consumption in this State of “[p]repared food and food served to students in dining rooms regularly operated by State or private educational institutions or student organizations thereof,” is repealed.

The repeal of the exemption, effective January 1, 2014, is not an imposition of tax on the “gross receipts derived from prepaid meal plans” billed or collected in advance for which a student is entitled to prepared food. The sales tax applies to the sales price of prepared food sold to or made available for consumption by a college student on or after January 1, 2014, notwithstanding that an institution of higher education receives funds from or on behalf of a college student for a prepaid meal plan prior to January 1, 2014. Sales of prepared food sold to guests, faculty, staff, and customers other than college students remain subject to the 4.75% general State and applicable local and transit rates of sales tax.

N.C. Gen. Stat. § 105-164.3(28) defines “[p]repared food” as “[f]ood that meets at least one of the conditions of this subdivision. Prepared food does not include food the retailer sliced, repackaged, or pasteurized but did not heat, mix, or sell with eating utensils.

- a. It is sold in a heated state or it is heated by the retailer.
- b. It consists of two or more foods mixed or combined by the retailer for sale as a single item. This sub-subdivision does not include foods containing raw eggs, fish, meat, or poultry that require cooking by the consumer as recommended by the Food and Drug Administration to prevent food borne illnesses.
- c. It is sold with eating utensils provided by the retailer, such as plates, knives, forks, spoons, glasses, cups, napkins, and straws.”

Sales and Use Tax Technical Bulletin 19-2 B.5 provides additional information regarding the meaning of the phrase “provided by the retailer” with respect to utensils.

Tax Imposed on the Retailer of Prepared Food

N.C. Gen. Stat. § 105-164.3(35) defines “[r]etailer,” in part, as “[a] person . . . making sales at retail, offering to make sales at retail, or soliciting sales at retail of tangible personal property . . . for storage, use, or consumption in this State.” N.C. Gen. Stat. § 105-164.3(34) defines “[r]etail sale or sale at retail” as “[t]he sale . . . for any purpose other than for resale. . . .” N.C. Gen. Stat. § 105-164.3(36) defines “[s]ale or selling,” in part, as “[t]he transfer for consideration of title . . . or possession of tangible personal property . . . or the performance for consideration of a service. The transfer or performance may be conditional or in any manner or by any means.”

In many cases, the institution of higher education is the retailer that makes retail sales of prepared food to college students in the State and is liable for the 4.75% general State and applicable local and transit rates of sales tax on the sales price of the prepared food, notwithstanding that the institution of higher education may have an agreement with a third party food service provider who is responsible for the preparation of prepared food for students. In other cases, the third party food service provider who is responsible for the preparation of prepared food is the retailer of the prepared food sold at retail to college students and is liable for the 4.75% general State and applicable local and transit rates of sales tax on the sales price of the prepared food. The specific language of the agreement between an institution of higher education and a third party food service provider should be instructive as to which party is the retailer that sells the prepared food at retail to college students and, therefore, is required to collect and remit the 4.75% general State and applicable local and transit rates of sales tax.

N.C. Gen. Stat. § 105-164.7 provides, in part, that the sales tax is “intended to be passed on to the purchaser of a taxable item and borne by the purchaser instead of by the retailer. . . . The [sales] tax must be stated and charged separately on the invoices or other documents of the retailer given to the purchaser at the time of the sale except for either of the following: (1) Vending

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machine sales [or] (2) Where a retailer displays a statement indicating the sales price includes the [sales] tax.”

If a person collects sales tax in error on prepared food transactions with college students, the erroneous collection must be remitted to the Department unless that person is entitled to a refund or credit of the tax paid per N.C. Gen. Stat. § 105-164.11.

Sales Price of Prepared Food

N.C. Gen. Stat. § 105-164.3(37) defines “[s]ales price,” in part, as “[t]he total amount or consideration for which tangible personal property . . . [is] sold. . . . The consideration may be in the form of cash, credit, property, or services. The sales price must be valued in money, regardless of whether it is received in money. . . .” The term “sales price” includes the retailer’s cost of property sold, the cost of materials used, labor or service costs, interest, losses, all costs of transportation to the retailer, all taxes imposed on the retailer, any other expense of the retailer, charges by the retailer for any services necessary to complete the sale, delivery charges, installation charges, credit for trade-in, and discounts that are reimbursable by a third party and can be determined at the time of sale and documented in the manner required by N.C. Gen. Stat. § 105-164.3(37).

Example: Institution of Higher Education is Retailer

A student attending an institution of higher education in the State remits funds in December 2013 to the institution for a prepaid meal plan for the semester that begins in January 2014. The gross receipts derived from and received by the institution for the prepaid meal plan are \$1,915.00 for the semester. The prepaid meal plan provides the student with access to 19 meals per week and a declining balance account of \$100.00 for the semester. There are 109 days in the semester. The institution has an agreement with a third party food service provider to manage, prepare, and sell the prepared food to the institution for resale to students. The institution is the retailer of the prepared food based on the language of the agreement between the institution and the third party food service provider and, therefore, is required to collect and remit the 4.75% general State and applicable local and transit rates of sales tax on the sale of prepared food to each student. The institution may determine the sales price of the prepared food it sells to the college student for each day in the semester to be \$16.65 (\$1,915.00 less \$100.00 declining balance equals \$1,815.00 which is then divided by 109 days in the semester to equal \$16.65 per day). The institution is required to remit the sales tax on the sales of prepared food on each of its sales and use tax returns for each period in which such sales occur. The sales price of prepared food, as determined by the institution, is subject to the 4.75% general State and applicable local and transit rates of sales tax. The applicable State and applicable local and transit rates of sales tax apply to the sales price of products purchased at the point of sale where any portion of the \$100.00 declining balance account funds are presented for payment.

Example: Third Party Food Service Provider is Retailer

A student attending an institution of higher education in the State remits funds in December 2013 to the institution for a prepaid meal plan for the semester that begins in January 2014. The gross receipts derived from and received by the institution for the prepaid meal plan are \$1,915.00 for the semester. The prepaid meal plan provides the student with access to 19 meals per week and a declining balance account of \$100.00 for the semester. There are 109 days in the semester. The institution has an agreement with a third party service provider wherein the third party food service provider is the retailer that sells the prepared food to students and bills the institution for payment. The contract specifically provides that the third party food service provider will sell meals to students and will also retain title to all food, food products, and other items purchased for resale until sold by the third party food service provider. The third party service provider bills the institution \$14.25 per day for each student that elects a prepaid meal plan. The sales price of the prepared food sold at retail by the third party food service provider to the college student per day and billed to the institution is \$14.25 and is the sales price of the prepared food subject to the 4.75% general State and applicable local and transit rates of sales tax. The amount paid to the institution for the prepaid meal plan on behalf of the student does not have a direct correlation to the sales price of the prepared food sold by the third party food service retailer to a student.

Use Tax on Food and Prepared Food

An institution of higher education, other than one that is an institution of the University of North Carolina, that provides food and meals to its students as part of the tuition fee and such students do not have an option to purchase a prepaid meal plan from the institution or purchase prepared food for consideration in a dining hall, cafeteria, or similar establishment, should remit the applicable State and local and transit rates of sales and use tax to its vendors on the purchase price of any food, prepared food, and other tangible personal property purchased on or after January 1, 2014. If such institution makes purchases of such items from vendors that do not charge the applicable State and local and transit rates of sales and use tax, the institution must remit the use tax on the purchase price of such items directly to the Department on its sales and use tax returns filed with the Department.

An institution of higher education that provides food and meals as a condition of enrollment to its students as discussed above and also makes retail sales of prepared food to faculty, staff, guests, or other persons, must collect the 4.75% general State and applicable local and transit rates of sales tax on retail sales of prepared food to such persons. Such institution may purchase all food and prepared food from its vendors without payment of sales and use tax at the time of purchase by issuing Form E-595E, Streamlined Sales and Use Tax Agreement Certificate of Exemption. However, the institution must report and pay the applicable use tax on the purchase price of food and food products

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provided without charge to such enrolled students on its sales and use tax returns filed with the Department.

Food and Prepared Food Purchased for Resale

A retailer who is engaged in the business of selling food and prepared food at retail or wholesale in the State and who purchases food, prepared food, services, and other items for the purpose of resale, shall furnish to its vendors as the vendor's authority for not collecting the sales and use tax Form E-595E, Streamlined Sales and Use Tax Agreement Certificate of Exemption, or other information or documentation as provided in N.C. Gen. Stat. § 105-164.28 as amended effective August 23, 2013.

Tax Rates and Sourcing of Local Taxes

The general State, local and transit sales and use tax rates applicable to the sales price of prepared food are 6.75% in seventy-four (74) counties; 7.00% in Alexander, Buncombe, Cabarrus, Catawba, Cumberland, Duplin, Edgecombe, Greene, Halifax, Haywood, Hertford, Lee, Martin, Montgomery, New Hanover, Onslow, Pitt, Randolph, Robeson, Rowan, Sampson, Surry, and Wilkes Counties; 7.25% in Mecklenburg County; and 7.50% in Durham and Orange Counties. A county or a municipality within a county may levy its own prepared food tax in addition to the 4.75% general State and applicable local and transit rates of sales tax due on a sale of prepared food. Additional information about the applicability of local prepared food taxes may be obtained by contacting the county or municipality directly.

The sourcing principles in N.C. Gen. Stat. § 105-164.4B apply to sales of prepared food. Generally, the sale of prepared food is sourced to the location of the dining hall, cafeteria, or similar establishment, notwithstanding that the college student may consume the prepared food in a different location.

Registration

A retailer required to collect the 4.75% general State and applicable local and transit rates of sales tax on the sales price of prepared food sold at retail in the State to college students who is not currently registered with the Department for sales and use tax purposes and has not received a Certificate of Registration, should complete Form NC-BR, Business Registration Application for Income Tax Withholding, Sales and Use Tax, and Machinery and Equipment Tax, to obtain a certificate of registration. Both an online business registration portal and a web-fill version of Form NC-BR are available at the Department's website, www.dorn.com. There is no fee required to register and obtain a Certificate of Registration.

Assistance

Questions regarding this notice should be directed to the Taxpayer Assistance and Collection Center at telephone number 1-877-252-3052 (toll-free).