

October 24, 2007

The Honorable John M. Knotts, Jr.
Member, South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Knotts:

We received your letter requesting an opinion of this Office concerning the South Carolina sales tax on unprepared food. We understand from a conversation with you that you desire clarification as to whether a food item purchased from a vending machine is subject to sales tax in South Carolina. Along with your letter, you included a letter from the South Carolina Department of Revenue (the "Department"), in which its Policy Manager, John McCormack, explained the Department's position with regard to vending machine sales. Along with his letter, Mr. McCormack included a copy of a proposed regulation pertaining to unprepared food, which you also attached to your letter.

Law/Analysis

Section 12-36-910 of the South Carolina Code (2000 & Supp. 2006) imposes a five percent sales tax on tangible personal property and other types of goods and services sold at retail. Pursuant to this provision, the Department imposes sales tax on unprepared food. In 2006, the Legislature amended section 12-36-910, adding the following provision limiting sales tax imposed on unprepared food to three percent:

(D)(1) Notwithstanding the rate of the tax imposed pursuant to subsection (A) of this section or the rate of any other sales tax imposed pursuant to this chapter and the rate of any use tax imposed pursuant to this chapter, the sales and use tax on the gross proceeds of sales or sales price of unprepared food which lawfully may be purchased with United States Department of Agriculture food coupons is three percent.

S.C. Code Ann. § 12-36-910(D)(1).

In June of this year, the Legislature again amended section 12-36-910. 2007 S.C. Acts 680. Act number 115 deletes subsection (D) of section 12-36-910 and adds a provision to section 12-36-2120 exempting “unprepared food that lawfully may be purchased with United States Department of Agriculture food coupons” from sales tax. Id. Neither section 12-36-910, nor any other provision in title 12, explain what is meant by “unprepared food that lawfully may be purchased with United States Department of Agriculture food coupons.” Thus, we first look to federal law in order to determine the types of food eligible to be purchased with United States Department of Agriculture food coupons.

Section 2019 of title 7 of the United States Code pertains to the redemption of food stamp coupons. This provision allows the Department of Agriculture to promulgate regulations governing the redemption of coupons. Accordingly, the Department of Agriculture adopted regulation 271.2, which defines “eligible food” as follows:

- (1) Any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption;
- (2) Seeds and plants to grow foods for the personal consumption of eligible households;
- (3) Meals prepared and delivered by an authorized meal delivery service to households eligible to use coupons to purchase delivered meals; or meals served by an authorized communal dining facility for the elderly, for SSI households or both, to households eligible to use coupons for communal dining;
- (4) Meals prepared and served by a drug addict or alcoholic treatment and rehabilitation center to narcotic addicts or alcoholics and their children who live with them;
- (5) Meals prepared and served by a group living arrangement facility to residents who are blind or disabled as defined in paragraphs (2) through (11) of the definition of “Elderly or disabled member” contained in this section;
- (6) Meals prepared by and served by a shelter for battered women and children to its eligible residents;
- (7) In the case of certain eligible households living in areas of Alaska where access to food stores is extremely difficult and the households rely on hunting and fishing for subsistence, equipment for the purpose of procuring food for eligible households, including nets,

lines, hooks, fishing rods, harpoons, knives, and other equipment necessary for subsistence hunting and fishing but not equipment for the purpose of transportation, clothing or shelter, nor firearms, ammunition or other explosives;

(8) In the case of homeless food stamp households, meals prepared for and served by an authorized public or private nonprofit establishment (e.g. soup kitchen, temporary shelter), approved by an appropriate State or local agency, that feeds homeless persons; and

(9) In the case of homeless food stamp households, meals prepared by a restaurant which contracts with an appropriate State agency to serve meals to homeless persons at concessional (low or reduced) prices.

7 C.F.R. § 271.2. This definition, especially considering subsection (1), appears to broadly define food eligible to be purchased with food coupons. The Legislature limits this definition with the specification that food be “unprepared food.” However, the Legislature does not provide any statutory guidance as to what is meant by the term “unprepared food.”

Pursuant to its authority to promulgate regulations, the Department of Revenue prepared a proposed regulation attempting to clarify what is meant by the term “unprepared food,” which you attached to your letter. This proposed regulation pertains to the use of this term as included in section 12-36-910(D). As we previously explained, the Legislature repealed this provision in 2007. Nevertheless, we believe the Department would similarly interpret “unprepared food” as used in section 12-36-2120 exempting unprepared food from sales tax. In the first section of this proposed regulation, the Department states there are three particular considerations in determining whether unprepared food is entitled to a reduced tax rate. S.C. Code Ann. Regs. 117-337 (proposed June 7, 2007). These considerations consist of “whether the food is of a type that is eligible to be purchased with USDA food stamps, the type of location selling the food, and whether the food is being sold for immediate consumption, business or institutional consumption, or home consumption.” The proposed regulation defines “eligible food” as:

- (1) Any food intended to be eaten at home by people, including snacks, beverages and seasonings;
- (2) Seeds and plants intended to grow food (not birdseed or seeds to grow flowers); and
- (3) Cold items, which may include salads or sandwiches, intended to be eaten at home by people and that are not considered “prepared meals or food” as discussed below.

S.C. Code Ann. Regs. 117-337.1 (proposed June 7, 2007). Moreover, the proposed regulation contains several general rules, one of which governs the sale of eligible foods to or by vending machine operators. S.C. Code Ann. Regs. 117-337.3(C). This provision states: “Sales of ‘eligible food’ to or by vending machine operators for sale through vending machines are for immediate consumption and subject to the sales tax at the full state rate.” *Id.* As Mr. McCormack conveyed in his letter, “the Department considers sales from vending machines to be sales for immediate consumption and not for home consumption.” Accordingly, the Department takes the position that food sold through vending machines is not eligible to the reduced sales tax rate under 12-36-910(D). Therefore, we would presume the Department would take the position that such sales are not exempt from sales tax under 12-36-2120.

“The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons.” Sloan v. South Carolina Bd. of Physical Therapy, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006). Moreover, a court will reject an agency’s interpretation only when the plain language of the regulation is contrary to the agency’s interpretation. Brown v. South Carolina Dep’t of Health and Env’tl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 415 (2002). Thus, this Office, just as a court, must give great weight to the Department’s interpretation of the term “unprepared foods.” However, in this instance, the regulation has not been adopted and is currently a proposed regulation. While the Department may adopt the proposed regulation as presented in the June 7, 2007 draft, it is difficult for us to rely on it at this point.

Nonetheless, as Mr. McCormack pointed out in his letter, section 12-36-110 of the South Carolina Code (2000) may clarify this issue further. Section 12-36-910, as we cited above, imposes sales tax only on sales at retail. Section 12-36-110 defines what is a sale at retail and includes “sales of tangible personal property, other than cigarettes and soft drinks in closed containers, to vendors who sell the property through vending machines. The vendors are deemed to be users or consumers of the property” S.C. Code Ann. § 12-36-110(1)(g). According to prior interpretations by the Department, pursuant to these provisions, sales tax is imposed on the vending machine vendor when that vendor purchases the goods to be sold in the vending machine. S.C. Rev. Rul. 92-5, S.C. Priv. Ltr. Op. 06-1 (February 8, 2006). However, a vending machine customer is not subject to tax on those items purchased through a vending machine except for cigarettes and soft drinks in closed containers. *Id.* According to Mr. McCormack’s letter, with the vendor as the ultimate consumer or user of the food, such food cannot be considered for home consumption and therefore, does not qualify as unprepared food pursuant to the regulation.

Although the status of the proposed regulation currently is in question, because food sold through a vending machine is taxable to the vendor, exempting such items from sales tax appears contrary to the Legislature’s intent with regard to 12-36-2120. In interpreting section 12-36-2120 to determine whether this provision exempts food sold through vending machines from sales tax, we must aim to ascertain and effectuate the intent of the Legislature. New York Times Co. v. Spartanburg County School Dist. No. 7, 374 S.C. 307, ___, 649 S.E.2d 28, 30 (2007) (“In interpreting a statute, [the court’s] primary purpose is to ascertain the intent of the legislature.”).

“A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.” Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005).

As explained above, the Legislature initially adopted a provision under section 12-36-910 allowing for a reduced sales tax rate on certain food items. This legislation was part of the 2006 Property Tax Reform Act, which added an additional property tax exemption for owner-occupied residential real property and added an additional one percent sales, use, and casual excise tax on taxable property traditionally subject to these types of taxes. 2006 S.C. Acts 3133. Thus, we presume the reduction in sales tax on certain food items was an effort by the Legislature to lessen the sales tax burden on South Carolinians for items of necessity. As we mentioned, in 2007, the Legislature eliminated the sales tax on these items further reducing the sales tax burden on consumers. 2007 S.C. Acts 680. However, in both instances, the Legislature placed specific restrictions on those items eligible for this tax benefit. As stated above, not only must food be “unprepared” in order to qualify for sales tax exemption, it must also be of the type that may be purchased with United States Department of Agriculture food coupons. S.C. Code Ann. § 12-36-2120. By placing these restriction on the food eligible for the reduced rate, now tax exemption, we gather the Legislature’s intent to only allow such a tax benefit on essential food items consumed by taxpayers.

Prior to the 2006 Property Tax Reform Bill and the recent amendments to the provisions governing sales tax mentioned above, the Legislature adopted section 12-36-110, in which the Legislature clarified that vending machine items are to be treated differently than other goods in that they are tax not when sold to the ultimate consumer, but when sold to the vendor. Our courts recognize the presumption that “the legislature has knowledge of previous legislation when later statutes are enacted concerning related subjects.” City of Camden v. Fairfield Elec. Co-op., Inc., 372 S.C. 543, 548, 643 S.E.2d 687, 690 (2007). Accordingly, we presume the Legislature had knowledge of section 12-36-110, when it amended the sales tax statutes first reducing the sales tax on certain food items and then exempting such items from tax.

While we acknowledge that the items sold through a vending machine often consist of items that would qualify a sales tax exemption if sold by a retailer, because these items are subject to tax before they reach their final consumer, we find it inapposite of intent of the Legislature to allow them to be exempt from taxation when they will not be consumed by the vending machine vendor, but rather be resold to the ultimate consumer. Accordingly, based on our understanding of the Legislature’s intent in allowing certain food items to be tax exempt and based on the Legislature’s intent as gathered from section 12-36-910 with regard to items sold through vending machines, we do not believe the Legislature intended for items sold through vending machines to be exempt from sales tax. However, certainly this is an area which is ripe for clarification by the Legislature.

Conclusion

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When the Legislature enacted section 12-36-910(D)(1), decreasing the tax rate on certain food items and then subsequently exempting such items from sales tax under section 12-36-2120, it provided little guidance as to what food items were eligible for such tax benefits other than that they include unprepared food that may be purchased with Department of Agriculture food coupons. From the proposed regulation attached to your request, we understand that the Department is in the process of providing guidance on this issue and when it does we will give great weight to the Department's interpretation. However, until then, we will employ the rules of statutory interpretation to guide us on whether the Legislature intended for this exemption to apply to food items sold through vending machines.

In our view of the Legislature's intent with regard to section 12-31-910(D) and subsequently, section 12-36-2120, we believe the Legislature sought to reduce the tax burden on consumers of essential food items. While these items, if purchased in a retail store by the ultimate consumers may be eligible the sales tax exemption under section 12-36-2120, because section 12-36-110 imposes the sales tax not on the ultimate consumer, but on vending machine vendors, we do not believe allowing a sales tax exemption in this type of transaction serves the Legislature's intent. Thus, we are of the opinion that the tax exemption on unprepared food found under section 12-36-2120 is not applicable to vending machine transactions.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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